

providing clear, established guidelines that include setting out criteria that plaintiffs must meet before a class can be certi-

fied. Litigation managers should advocate that Rule 23 procedures and the reforms that have been proposed to those procedures be

viewed as a starting point to devise amendments to existing aggregate class-action legislation abroad—before it's too late.

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Core Competencies

Issues Management Versus Litigation Management

Effective issues management can eliminate unwarranted litigation entirely, improve the landscape in which cases are tried, and build support for a company's positions and messages—both inside and outside the courtroom.

By Steven B. Hantler



DONNA TEREK

Hantler: More companies need to participate in legal reform and to embrace a fully integrated approach to winning the battle with the trial bar.

As my first column in this four-part series noted, litigation managers must develop three new, nontraditional core competencies—litigation communications (see “Trial by Newswire,” *Litigation Management*, Summer 2003, p. 16), issues management, and relationship management—to succeed in today's legal environment. This column explains issues management in the context of a critical issue facing litigation managers: the risks associated with operating in the always unpredictable, often hostile, U.S. civil justice system. The next, and last, article in the series will discuss relationship management and its link to litigation communications and issues management.

How does issues management differ from litigation management? Litigation management

involves ensuring that the legal risks and costs associated with a company's litigation portfolio are reduced to acceptable levels. This is accomplished through risk analysis, outside counsel selection, and general case management and cost-reduction techniques. For the most part, litigation management is reactive in the sense that the management of one lawsuit typically does not affect other pending or future lawsuits, while issues management is proactive.

Issues management involves the identification, analysis, and shaping of the trajectory of all of the factors that affect a company's litigation portfolio. Effective issues management can help to avoid litigation entirely, improve the landscape in which lawsuits are tried, and create a positive predisposition to a company's

positions and messages, both in and out of the courtroom.

These three outcomes can positively affect a company's litigation portfolio, including future litigation. For example, legal reforms obtained in Michigan since 1995—the election and appointment of judges who adhere to the “rule of law,” the enactment of product and medical liability legislation, and a better-informed public—have dramatically reduced unwarranted litigation and improved the landscape in which lawsuits are tried.

Issue Identification

The U.S. civil justice system presents financial, share value, and reputational risks for all defendants, especially large companies. The financial risks are clear and calculable. While the share value and reputational risks are not as calculable, they are as serious—if not more serious. Since

IN BRIEF

Litigation management is reactive; managing one lawsuit does not affect pending or future lawsuits.

Issues management is proactive and involves the identification, analysis, and shaping of the trajectory of all the factors that affect a litigation portfolio. It can:

- Help companies avoid litigation entirely
- Create a positive predisposition to a company's positions and messages

lawsuits are no longer tried exclusively in the courtroom, but also in the court of public opinion, customers and shareholders now sit in judgment along with juries.

Three of the key factors, or issues, that affect a company's litigation portfolio risks and its financial, share value, and reputational risks are:

- Judges
- Applicable laws
- The attitudes and behaviors of the public, including juries

Key stakeholders, in addition to judges and the public, are the trial bar, shareholders, the media, interest groups, and other government officials. Both issues management and litigation communications strategies must take into account these factors and stakeholders. The three factors listed above—judges, the law, and public attitudes and behaviors—are the pillars of an effective legal reform campaign.

Issue Analysis

One of the reasons that the trial bar has largely been successful in defeating legal reform efforts is that those within the legal reform community analyze and respond to these factors differently. Some believe that judges are the key, while others believe that legislation or driving public opinion will pave the way to legal reform.

But the reality is that the combination of these three factors, not any one of them, is the key. Consider preemptive federal legislation on any topic. Assuming the many obstacles to passing a *meaningful* bill, partic-

ularly the 60-vote requirement for cloture in the U.S. Senate, can be overcome and a bill is signed into law by the president, it is doubtful that this alone will eliminate lawsuit abuse. For example, there has been a significant increase in federal court securities litigation since the passage of the Private Securities Litigation Reform Act of 1995.

Judges and juries ultimately decide whether to follow a law and if a law applies to the facts of a particular lawsuit. Having a strong legal position does not guarantee success in the courtroom. State and federal judges who disagree strongly with a law have not shown reluctance to

determine its inapplicability to lawsuits before them. And trial lawyers will limit the claims pled and the parties joined in their lawsuits to preserve the intrastate, or nonfederal, character of lawsuits.

With juries, a great deal of deliberation revolves around what seems intuitively right and fair. Jurors are sure to ask, "Why should I follow the law to the letter when it helps a big, rich corporation?" After all, the public, and an important subset, jurors, are predisposed to distrust business. Trial lawyers latch onto this distrust, portraying their clients as unwitting victims of corporate greed who

deserve sympathy and help. Implicitly, the trial lawyers' message to jurors is that helping the little guy will cost no one but the big, rich corporation. This is as much a cultural war with the trial bar as it is a legislative or election battle.

In short, the enactment and effectiveness of any legislation, state or federal, will depend on changing the attitudes and behaviors of policy makers, especially judges, and the public on the consequences of lawsuit abuse. In other words, reforming state and federal civil justice systems requires a multifaceted approach to legal reform—the integration of strategies to

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address the legislative branch, the judicial branch, and public opinion. No single strategy alone will succeed.

Shaping Trajectory

The trajectory of the issues identified above should be shaped by:

- Appointing or electing judges, starting with appellate judges, who will follow the law and legislative will—instead of legislating from the bench
- Enacting laws that substantially reduce, if not eliminate, current incentives and opportunities for both lawyers and claimants to engage in lawsuit abuse

- Driving public support for—or, in the short term, putting constituent pressure on legislators to support—legal reform legislation, getting judges to uphold that legislation, and ending lawsuit abuse in the courts

Issues management in the litigation context—legal reform—works. Legal reform efforts that integrate the three issues have succeeded, and gains have not been eroded by the trial bar's judicial nullification campaigns in Alabama, Michigan, and Texas (although Alabama and Texas still have a few of what the American Tort Reform Association calls "judicial hellholes"). What's more, new gains have recently been obtained in Louisiana, Mississippi, Ohio, and Pennsylvania, and integrating the three issues in these states should protect the gains against inevitable trial bar assaults.

Still, more needs to be done. More companies need to participate in legal reform efforts and to embrace an integrated approach to winning the battle with the trial bar. In addition, the corporate resources devoted to legal reform should be devoted to tactics and activities that serve our overall strategic goal: an effort that integrates the three key factors—judges, laws, and public opinion.

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