

New Core Competencies for the Litigation Manager

News flash: What they didn't teach you in law school about public relations may come back to haunt you in today's litigation environment.

By Steven B. Hantler

For in-house counsel, trial lawyers' use of public opinion campaigns may be the most problematic of the three strategies they employ to promote lawsuit abuse and prevent legal reforms. Lawsuits are no longer tried exclusively in the courtroom; today they're also tried in the court of public opinion, where the messages are that business puts profits ahead of safety and fair dealing, and large damage awards are the only way to get business to act responsibly.

Through massive, coordinated public opinion campaigns and other strategies, the trial bar has fundamentally changed the litigation landscape in ways that threaten American companies. This new litigation environment

requires corporate litigation managers to develop a new set of core competencies—skills and strategies that will allow companies to level the playing field with the trial bar.

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matically affect share value and company and product reputation, so alignment between company goals and the goals of the litigation manager is more important than ever. Obtaining this alignment requires litigation



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IN BRIEF

It's not enough for today's in-house counsel to manage litigation well. Three additional core competencies are necessary to fight the efforts of the trial bar:

- Litigation communications
- Issues management
- Relationship management

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managers to view their function more broadly. Their role must also include reputation management or litigation communications, issues or public affairs management, and relationship management.

New Litigation Environment

Over the past 20 years, trial lawyers have taken a page from corporate America's process reengineering playbook and radically redesigned the U.S. civil justice system at both the state and federal levels. Twenty years ago, corporate litigation managers feared a \$1 million verdict. Today, litigation managers all too

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often hope to escape a jury trial with a \$1 million settlement. What happened in these two decades? The answer is not inflation.

Ask most litigation managers or their general counsel to create a process map for litigation and they will place "service of summons and complaint" in the first box on the first line. Most litigation managers and general counsel believe this is where the litigation process begins. But trial lawyers believe that the litigation process begins far earlier. For them, it begins in the court of public opinion and in federal and state legislatures

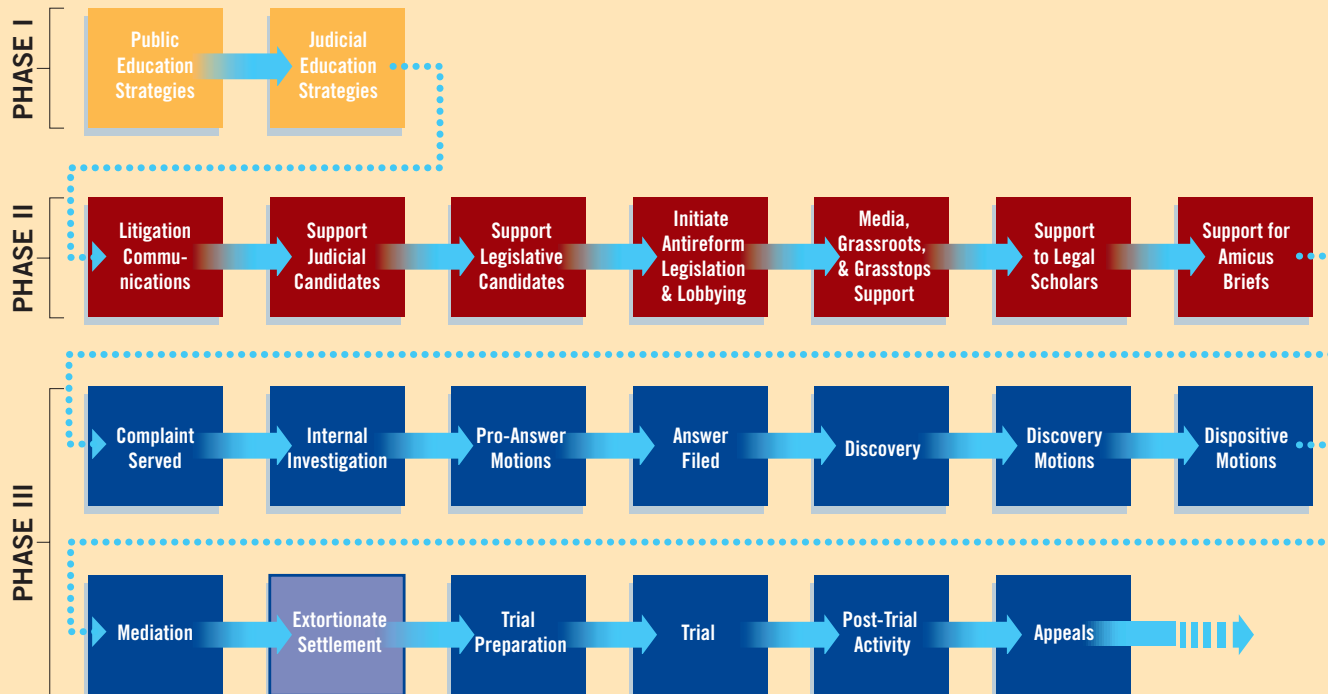
and courts, where laws are made and interpreted.

In an interview in May 1999, one lawyer talked to *The New Yorker* about the strategy meetings of the Castano Group, a band of trial lawyers who led the assaults against the gun and tobacco industries. He said, "A lot of what we discussed was how to talk about the [issue] to the general public."

It is no accident that polls show the American public has a high level of distrust for corporations—a phenomenon that predates recent corporate scandals. It is not by happenstance that people believe that companies place profits ahead

THE THREE PHASES OF LITIGATION MANAGEMENT

This process map shows that most corporate law departments take a narrow view of the litigation process, thinking it starts when the complaint is served—Phase III. But the trial bar and the organizations that support it have a more expansive strategy to win in court, starting much earlier, as shown in Phases I and II.



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of safety and honesty. And it is no mere coincidence that, primed with this misinformation, juries are all too willing to vote for eye-popping damage awards. Make no mistake: This is a well-orchestrated public relations campaign by the trial bar and its surrogates—self-anointed consumer and safety advocates—to undermine public confidence in corporations and distort our legal system.

At the same time the trial bar works to twist the civil justice system to its benefit, it also operates an equally effective campaign to block common sense legal reforms in legislatures across the country. And even where reforms are enacted, the trial bar works to undermine them through a judicial nullification strategy. It accomplishes this by investing millions to lobby and elect legislators and judges who will protect the status quo. The result of this is a civil justice system that fails to accomplish its twin functions of compensation and deterrence.

Formulating a Response

For years, most corporations have been reluctant to join the legal reform fray. Even today many companies seem content to let the trial bar dictate the terms of the public debate by failing to respond to direct attacks and refusing to aggressively advance their own messages. But ceding control to the trial lawyers has its consequences. Litigation managers therefore must develop three new core competencies.

Litigation Communications. A 1998 public opinion survey reveals that 62 percent of

Americans believe that when they hear “no comment” about a lawsuit, it means a company is covering up wrongdoing. And 48 percent of Americans are less likely to buy a company’s products when it is accused of wrongdoing in a lawsuit.

Faced with these consequences, an increasing number of corporate defendants are developing litigation communications strategies. There is nothing mystical about litigation communications. It is simply the application of media relations strategies to the litigation context, both outside and inside the courtroom. The goal is to shape the terms of the public debate so that the trial bar responds to us, not the other way around.

Issues Management. Trial lawyers are a very innovative and entrepreneurial group. Suits involving breast implants, lead paint, financial services, and no-injury class actions are only a few examples of their ingenuity. The litigation manager must anticipate and shape the trajectory of emerging issues or face being overwhelmed by a perfect storm of key stakeholders—trial lawyers, media, regulators, and customers. This, among other things, requires the litigation manager to understand and exert influence within the complex legal and regulatory environment in which his or her company operates.

Relationship Management. It has been said that relationships can move mountains. Litigation managers who understand and leverage the power of relationships can achieve extra-

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ordinary outcomes. In the litigation management and communications contexts, this means avoiding litigation or other confrontations entirely and, for those that cannot be avoided, allowing for resolutions that are both feasible and desirable to diverse stakeholders. In addition, this means that litigation managers must create a positive predisposition to a company’s message and actions both outside and inside the courtroom.

The new litigation environment requires litigation managers to master at least three new core competencies in addition to managing lawsuits. The next three articles in this column will discuss these competencies in greater detail, along with the partnership between the litigation manager and the communications and government affairs operations of a company.

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FOR YOUR CONSIDERATION

Once upon a time, a solid legal defense and exculpatory facts could be used to minimize settlement values. That is no longer the case because the trial bar invests millions of dollars annually to:

- Drive public opinion against business and legal reform
- Create choke holds to stop legal reform in state and federal legislative and judicial branches
- Elect or select judges who perpetuate lawsuit abuse