



# Litigation Readiness: *Mastering the Inevitable*

By Tim Stevens, with Dan Cook

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## *Foreword*

# The Litigation Balancing Act: No Pressure to Measure?

As a career performance management aficionado (and self-proclaimed expert), I am bewildered. The principles of “you get what you measure” and “you cannot manage what you cannot measure” seem self-evident. In most large commercial and public-sector entities, integrated performance management systems have evolved into foundational elements of how these organizations are run.

However, it seems odd that one of the most high-risk, high-exposure and politically/economically sensitive business processes has escaped proper measurement: litigation response. Perhaps the reason for this is that litigation response is not really looked at as an organized business process in most organizations. Despite the fact that most large organizational entities accept being sued as a part of doing business, litigation response is still an aggregation of a set of discrete actions, without an organized framework, and without a proper performance measurement/management system. I can only assume that it will not be long before a tangible measurement system will be imposed upon

in-house counsel. Chances are good that the measurement system will not be limited to the general counsel's ability to manage operating expenses of the department.

### **Measure Down to Measure Up**

As with anything, there is more than one way to approach filling a void. The most obvious mechanisms are “top down” or “bottom up.” The bottom-up approach is fairly straightforward. Assess an organization's current litigation response “process,” identify the gaps relative to some “proven practice” model, then put a proactive litigation response process in place that fills the gaps. The process should have detailed, sequential steps, roles, responsibilities, tasks, tools and technologies outlined. Pretty simple, conceptually, though probably not as simple to execute. The top-down approach is where performance management comes into place.

In all my years honing my performance management radar and techniques, one thing has stood out from the rest as a “lesson learned.” Start with the measures you want to use to determine progress toward an objective, then work backward/downward to establish the system that allows you to “get what you measure.” The benefit of this approach is that you create and utilize the management dashboard you want as the mechanism to regulate what you do, and equally as important, what you don't do. So what measurement mechanism is an appropriate starting point? Why not one of the most socialized measurement systems in use today—the balanced scorecard?

### **The 4-dimensional Scales of Justice**

The balanced scorecard is a conceptually simple, yet operationally complex measurement methodology. The operational complexity is often a result of the over-engineering of the core tenets of the methodology. Software companies have made a bundle on applications to facilitate a balanced scorecard measurement system. Consultants

have made at least five to 10 times what the software companies have generated in revenue implementing these systems. There is certainly value in these services and these technologies, but in the domain of litigation response, it is more valuable to “crawl before walking.” An oft-neglected organizational domain (at least when it comes to professional business management/process techniques) is the in-house legal department, which needs a simple framework as a starting point.

The balanced scorecard, in its most primitive (and original) instantiation, has four (hence the balance) key measurement dimensions: financial; customer; learning and growth; and internal business process. In the context of litigation response, these dimensions can be very valuable. Finally, in the face of an ever expanding universe of electronic data, measuring litigation is tantamount to managing litigation.

### **Financial Dimension**

Litigation response is plagued with perceptions of large, yet untracked cost. The cost of outside counsel is pretty simple to acquire. The cost of time spent by in-house counsel litigating a matter is also easy to get. Any outside services used (e.g. electronic discovery services) are also easy to track and aggregate. However, the soft costs of litigation response are where the greatest gaps exist. How much time (and therefore soft cost + opportunity cost) is incurred by the information technology (IT) organization helping lawyers respond to discovery requests? What is the cost of line managers combing through their hard drives for documents that are potentially relevant to a lawsuit? What is the fully loaded cost of litigation response? What is the ratio between exposure on a matter and the total cost of litigation response for the matter? Any or all of these can become tangible, quantitative measures that fulfill the financial dimension of the balanced scorecard.

### **Customer Dimension**

Who are the customers of the litigation response process? The primary customer is the organizational entity being sued. How does one measure progress on this dimension? The most obvious one is the ability of the legal department to fend off litigation. However, other measures could be the ratio of lawsuits settled vs. litigated. The ratio of favorable outcomes as a percent of total lawsuits. The mix of lawsuits and the trend over time (relative to what is most desirable). The total exposure on a year over year basis.

Quick tangent here—isn't it odd that initiatives such as proactive archival of e-mail are being positioned as being correlated with litigation avoidance? In actuality, the only thing that is correlated with avoiding litigation is *winning* more lawsuits. In any case, putting measures in place similar to the ones outlined here will provide good perspective on how to architect a litigation response system to achieve the measures.

### **Learning and Growth**

How does the litigation response process contribute to an organization's ability to respond to litigation on an ongoing basis? Can the tools used to respond to one lawsuit be used to respond to the next lawsuit? Is there an organized evidence collection system in place that can improve every time evidence is collected? Are the technologies needed to gather data being improved so that data/evidence can be filtered and collected more quickly? How about the criteria being used to select outside counsel to help litigate a matter? Are the criteria being augmented to include the nuances of handling new aspects of 21st century litigation—i.e., the ability to properly host, handle and review the large volume of electronic data that is part of litigation today? Does the litigation response system allow an organization to properly optimize the activities of outside counsel? Is response to the next matter more efficient than it was to the last one?

## **Internal Business Process**

This dimension is in most need of a measurement system. As a support function for the rest of the organization, it is crucial that the in-house legal department does not cause undue stress on the company in the process of litigation response. Perhaps a tool as simple as a satisfaction survey could be a useful measure of success in this category. Perhaps a measure that is tied in with the financial dimension could be valuable: Does the ratio of soft costs to hard costs of litigation response improve over time?

## **Immeasurable or Priceless?**

There is no elixir in the arena of litigation response. There is no substitute for a data-driven, fact-based, process-oriented approach to managing the inevitable. However, if an organization thinks about how it would track and measure (and therefore manage) progress in litigation response, it will be a lot easier to put an organized process in place for actually responding to a lawsuit. The balanced scorecard approach is a fairly straightforward mechanism any legal department can put in place, even manually, to start the journey toward a production-level litigation response system. Ultimately, however, the actual system chosen for measurement is less important than the act of measuring.

This book, authored by a battle-tested lawyer and his team of contributing authors, is a great vehicle for any organization to start gaining control of its litigation response process, especially as it relates to complex matters containing large volumes of electronic evidence. It provides the framework for setting up a litigation response process that can be properly measured.

—*Prashant Dubey*