DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

"Reebok Rules" for Litigation Management

by Barry Nagler

The spring 1992 issue of the ACCA Docket marked the first publication of the "Reebok Rules," a set of practical guidelines employed by Reebok's legal department to successfully counsel clients in an entrepreneurial environment. These rules apparently struck a chord with the in-house bar; for a period of time, the piece was the subject of more reprint requests than any other article published by the ACCA Docket. I have been told that the reason for the article's popularity was that its point of view was valid for many legal departments.

Life at Reebok - like life at many companies - is fast-moving. Its culture encourages unconventional solutions, demands risk-taking, and rewards quick, practical answers. Successful counseling in such an environment requires a conscious effort to tailor counseling style to the corporate culture. Reebok is hardly unique in this respect. Certainly the trend in legal departments is away from the ivory tower mentality. Far more appreciated are in-house counsel who see the big picture and deliver practical advice; who are integrated with the business; and who are willing to forego the safer tried and true methods in favor of sharing risk with their clients.

This same entrepreneurial, results-oriented approach has inspired a second set of Reebok Rules - one designed to meet the challenges of litigation. In these days of shrinking budgets, in-house counsel face ever-increasing pressure to achieve successful outcomes at reduced cost. This is no easy task. Like the original Reebok Rules, the following principles may be useful to other legal departments facing this challenge.

Rule 1: Bigger isn't Necessarily Better

One of the original Reebok Rules for in-house legal work was "Not Every Job Requires an 'A' Effort." The same concept applies to outsid litigation. With no disrespect intended, very few situations justify paying a premiu to retain large, name brand litigation counsel. The big firm premium ca inflict a double whammy on the client's pocketbook, combining a high hourly rate with an inefficient approach to case management (excessiv conferences, marginal legal research, and dubious discovery) made possible by the firm's seemingly inexhaustible supply of eager associates and support staff.

In addition, it has been our experience that it is usually possible to find firm lawyers with expertise as good as or better than their large-firm competitors. Furthermore, as a big client of the smaller firm, Reebok enjoys better service and preferred billing rates.

Having said this, there are at least two instances in which a large firm is not only desirable, but probably essential. The first is the bet-the-company-case, for which you must employ all the resources necessary to prevail. The second is when the in terrorem effect of the name brand firm is likely to produce a quick and favorable result. In these situations, proceed with caution and follow Rule 2.

Rule 2: Hire Lawyers, Not Law Firms

Finding the proper size firm for a matter is only the first step in the process. The choice of lawyer within that firm is equally important. The ideal is to find the right lawyer (with the right mix of expertise, client service, and cost consciousness) in the right-sized firm. I have been fortunate enough on occasion to find a large-firm lawyer who can effectively override the firm's institutional inertia toward multiple attendance at hearings and depositions, inter-office team meetings, and other excesses. If you are similarly fortunate, then - depending on the type of case - this staffing approach may offer you the best of both worlds. Finding a name partner in a name brand firm, however, is no guarantee of a successful or cost-effective outcome. We have found that there is no substitute for using contacts and personal referrals to find the right individual.

Rule 3: Don't Hire "Litigators" for Litigation

This is a corollary of Rule 2. A number of law firms claim to specialize I litigation," and a number of practitioners characterize themselves a litigators," without any meaningful trial experience. To ensure the best result, you want a trial lawyer, not a litigator.

Since well over 90 percent of commercial cases settle before going to trial, the simple truth is that there is not enough trial work to go around. Today it is all too common for a large firm litigation associate to come up for partnership without having had a single major jury trial. Although they may be able to write eloquent summary judgment briefs, these "litigators" are at a serious disadvantage when faced with an adversary intimately familiar with the trial process.

Lack of trial experience can have hidden costs. Uncertainty about the risks of a jury trial can lead to overcautiousness, "discovery-itis" (leaving no interrogatory unserved and no deposition untaken), and over-preparation. Moreover, I have a pet theory that many defense counsel become more pessimistic about a case and more willing to recommend settlement late in the litigation process because of a subconscious fear of the unknown — the jury trial. The net result is too many settlements on the courthouse steps after too much money has been wasted on discovery and trial preparation.

These costs can be avoided by retaining an experienced trial lawyer. For this reason, we routinely probe below the surface and inquire about the details of a prospective counsel's trial experience. (We are sometimes even so presumptuous as to ask for their win-lose record.) It is truly amazing to me that in the six years I spent as a litigator before joining Reebok, only one client ever asked me about my trial experience. I vowed not to make the same mistake.

Rule 4: Less is More

In reviewing the 1996 Price Waterhouse LLP Law Department Spending Survey, I was surprised to learn that only 31 percent of large corporations reduced the number of law firms doing significant work for them in 1995, while 43 percent observed an increase in the number of firms they used.

At Reebok, we have a very different philosophy. I am a great believer in the benefits of consolidation. The efficiencies to be realized through ongoing representation by a core group of high quality firms are impressive. The continuity ensures an enhanced understanding of your business and industry, giving your counsel a competitive edge over their opponents. It also increases trust from clients, making them more willing to cooperate in the litigation process.

We have discovered that an ongoing relationship makes the billing process far smoother as the rules of the game on staffing, disbursements, and other issues have been definitively resolved. Time spent in bill review decreases as trust increases. Outside counsel are also more likely to reduce questionable bills, since they have an expectation of a continuing business relationship. Finally, with a better understanding of your business and

a comfort level with you as a client, your legal providers will be far more willing to undertake the sort of creative, incentive-based billing arrangements that generate better and more cost-effective results for your company. (See Rule 10.)

In following this strategy, we are foregoing the savings that could be achieved through the negotiation of "one-off" arrangements with multiple firms hungry for our business. This is one area, however, where we have learned it does not pay to be penny wise and pound foolish.

Rule 5: Discovery is Overrated

In-house counsel live with constant risk. Given the continual pressure to do more with less, it simply cannot be avoided.

Outside counsel (particularly those in larger firms) face a very different dynamic. They generally have no internal resource limitations. From a financial standpoint, the more time they invest in a case, the better off they are. They also have legitimate concerns about maintaining their firms' reputations and standards of professional responsibility.

Given these incentives, it is not surprising that firms tend to take a no-stone-unturned approach to discovery. But the truth is that marginal inquiries rarely carry the day. (In my experience, discovery disputes are more often the product of turf battles between opposing counsel than a search for truly pivotal information.)

It is not enough, however, to criticize "wasteful" excesses and refuse to pay "inflated" bills. Our solution lies in making outside counsel our partner in the cost-benefit assessment of discovery options. By removing blame from the equation, we eliminate the incentive for our outside advisers to be overly cautious. Together, we recognize that leaving some stones unturned may increase risk, but will also save money. The result is a mutually agreed upon discovery plan that strikes an optimal balance between reducing costs and maximizing success.

Rule 6: You Snooze, You Lose

How many times has each of us seen outside counsel fall into the trap of "litigation by autopilot" - adopting a rote pattern of motion to dismiss, answer, discovery, summary judgment motion, settlement negotiations, and so on, without so much as an ounce of forethought? All too often, this approach leads to in-house counsel's worst nightmare - a settlement on the courthouse steps after years of expensive discovery, because of an eleventh-hour revelation of a harmful document or a hostile witness.

At Reebok, we make a detailed assessment of the merits at the outset of each case. We collect all the key documents and interview all the known witnesses. Our approach involves a lot of work, but the investment is worthwhile.

If we are the defendant and our case is weak, we make an early effort to settle before the other side has an opportunity to learn our bad facts. (There are exceptions to this rule, typically in cases where an early settlement would encourage similarly situated plaintiffs to sue or where a significant principle is at stake. It is amazing, however, how some clients become willing to compromise after enduring the pain and cost of extended litigation, which suggests that even matters of sacred principle should be evaluated seriously for early settlement.)

By resolving disputes early, we avoid wasting money on unproductive motions or discovery. Our publicly stated commitment to alternative dispute resolution makes it easy to broach settlement without communicating concern about the merits. This strategy is not without risk; by settling quickly, we may miss finding a smoking gun document in our opponents' files. It is more likely, however, that no smoking gun exists and that the hostility engendered by prolonged discovery will ultimately make settlement more difficult.

If we think we have a winning case, being ready early allows us to take an aggressive posture, such as deposing plaintiffs before their stories have been finalized. In this way we also avoid the trap of having to stall for time and ask for continuances, which invariably adds to cost and projects weakness. (If a case is delayed, we want it to be because it serves a strategic purpose, not because we are unprepared.) For the same reasons, we make every effort to be totally buttoned-up before filing litigation as a plaintiff, thereby truly putting the defendant on the defensive. To use a sports analogy, we don't play for time, we play to win.

Rule 7: Location, Location, Location

It is shocking how many attorneys take the choice of forum for granted. In my experience, the court, the judge, and your counsel's home city are among the most important determinants of a litigation outcome and price tag.

As plaintiff, we usually have a choice of multiple jurisdictions and either state or federal court. We are sure to take into account not only the applicable precedent, the quality of the judges, the possibility of hometown bias, and the likely speed of resolution, but also cost and logistical considerations, such as the inconvenience to our witnesses and local counsel's billing rates. Recently we had a choice of litigating a case in Boston or Nebraska. By choosing Nebraska we paid an average billing rate that was roughly a third of Boston's.

As defendant, this is another area in which early action can pay big dividends. We have found the declaratory judgment action an effective tool for turning the tables on a prospective plaintiff and assuring a favorable forum. It is surprising to me how many plaintiffs' counsel allow themselves to be "DJed."

Finally, we never forget the opportunity to influence the choice of forum at the inception of a relationship. Wherever possible, we use boilerplate agreements to our advantage. In addition, we think long and hard before agreeing to forego our standard choice-of-forum clause in any contract negotiation.

Rule 8: All ADR was Not Created Equal

As alternative dispute resolution has become more fashionable, there has been a tendency to lump all ADR methods together and praise them equally as low-cost alternatives to litigation. Although we are great believers in ADR, our experience has shown us that there is a decided difference between the usefulness of arbitration and mediation.

In many ways, binding arbitration combines the worst characteristics of ADR and litigation. Many arbitrators allow partial or even complete reliance on discovery tools, sacrificing much of the cost-savings potential. Furthermore, because arbitrations typically involve full evidentiary presentations and are often scheduled in blocks of two or three days at a time, the process can take longer than a trial. The inefficiencies created by the stoppings and restartings of the proceedings can actually make it more costly than litigation. And, perhaps most importantly, the split-the-difference mentality adopted by many arbitrators makes binding arbitration perilous if you are defending against a weak or frivolous case.

Mediation, on the other hand, is an indispensable tool for any in-house lawyer committed to expense reduction. Our department upholds a stated commitment to mediate at least half of all new defensive litigation matters. We have enjoyed great success with the process and its ability to break through the posturing of outside counsel (and the recalcitrance of clients) to bring cases to a quick resolution. Like other strategies mentioned here, there is a chance of overpaying for an early settlement, but our experience has shown this to be largely a theoretical concern. Since the process is nonbinding and relatively inexpensive compared with other ADR tools such as arbitration and minitrials, the risks are limited. Indeed, even when a mediation does not immediately result in settlement, it has real benefit. No other process provides such direct access to the client on the other side, without the filtering effect of outside counsel. As such, it presents a unique opportunity to reduce your opponent's expectations, paving the way for later resolution.

Rule 9: Litigation Costs Cause Amnesia

The "amnesia effect" is a clinical phenomenon well known to in-house counsel. How many of us have had conversations with our CEOs during which we have been ordered to "win at all costs," only to face a very different point of view at budget time or when a deposition notice arrives? For this reason, responding to a CEO's declaration of war with a meek "Yes, boss" is usually a mistake, since the urgency of the situation is often forgotten when the bills arrive. On the other hand, a constant doom-and- gloom approach to litigation is hardly conducive to long-term job security.

At Reebok, we deal with this challenge through a delicate balance of enthusiasm and practicality. We begin by communicating that we are up to the task and willing to take on the risks and uncertainties of litigation. Only after that "can do" message is delivered do we then make sure that a quality conversation occurs to identify all the drawbacks of the litigation process.

I take the same approach to projecting legal and expert witness costs that I use with my plumber - I take the estimate and multiply it by two. I also identify all the executives whose attendance will be required at depositions and at trial, compute the time commitment, and double it as well. (If we have learned anything as in-house counsel, it is that litigation invariably takes twice as long and is twice as expensive as your worst case estimate.) I make certain that public relations concerns are vetted and business-oriented alternatives to litigation are fully considered.

We also take advantage of chances to educate senior executives about litigation costs on an ongoing basis. The annual budget process is a good opportunity to reinforce the message that it is virtually impossible to try a case from start to finish for less than six figures. From time to time, I share press accounts of various litigation horror stories with senior management. Litigation expense is a recurrent theme in our department's educational programs in areas such as intellectual property, antitrust, and employment law. These efforts have helped to increase our clients' sophistication on this issue and make it easier for a dispassionate conversation to occur before war is declared.

Rule 10: Hour is a Four-letter Word

The Price Waterhouse survey held other surprising news. Despite widespread rumors about the death of the hourly fee arrangement, less than 25 percent of respondents reported using alternatives to that tried and true method of law firm compensation.

My point of view on this issue, which stems from the results-oriented philosophy that has long prevailed at Reebok, is that more than anything, the hourly fee creates an incentive to bill more hours, which is directly contrary to the client's objective of a quick, cost-effective resolution. Discounts to hourly fees are just quick fixes, which - although preferable to paying full freight - do not represent true solutions.

A lawsuit involves many choices - whether to assign a junior or senior associate to a case; whether to take or skip certain depositions; whether a reply brief is necessary; and so on. These choices frequently have little or no impact on the ultimate result, but they almost always affect the bill amount. The ideal fee arrangement is one that changes the incentive structure so that a portion of outside counsel's compensation depends on the quality of the resolution (with "quality" read broadly to include the cost incurred to achieve that resolution). Only then will the interests of in-house and outside counsel truly be aligned. By changing the paradigm from one that values effort (or hours) to one that values results, the chances of realizing the best outcome greatly increase.

Several creative billing alternatives can achieve this shift in paradigms: fixed or capped fees, plaintiff and

defense contingencies, and discounts combined with bonuses for achieving specific outcomes or cost targets (to name just a few). These strategies are not without risk - you may, for example, end up "overpaying" when your outside counsel obtains a large and early settlement under a plaintiff's contingent fee arrangement. In another very important sense, however, you have not overpaid; your outside firm has achieved an excellent result quickly and deserves to be compensated handsomely for that success.

The keys to an effective creative billing arrangement are simple: a trusting relationship with your outside counsel; a commitment to making the up-front investment of time necessary to arrive at the right fee structure; and a willingness to experiment (and occasionally get burned). It also helps to have the same freedom to innovate that we enjoy at Reebok.

Conclusion

As with the original "Reebok Rules," the Reebok approach to litigation management is not for everyone. But it has worked for us.

To illustrate: two years ago, Reebok and a codefendant were sued in another state by one of Reebok's competitors in connection with a real estate dispute. Our competitor was represented jointly by its usual outside litigation counsel and a large local firm. Our codefendant was represented by its regular corporate counsel and another large local firm. We retained a single firm - a local litigation boutique, with billing rates averaging 25 percent below those of comparable area firms. Our fee arrangement involved a highly discounted hourly rate combined with significant bonuses for achieving certain outcomes and cost savings. After consultation with the lead trial lawyer of our firm, we decided on a minimalist strategy - foregoing most written discovery, skipping certain depositions and participating in others by phone, and "free-riding" on the papers of our codefendant whenever possible.

Reebok and its codefendant prevailed at the summary judgment stage. In connection with subsequent motions for costs, we learned that our competitor had spent more than $250,000 in legal fees, and our codefendant close to $300,000. We spent less than $60,000, even after paying our attorneys a 20 percent premium above their normal hourly rate - a win-win, to say the least.

Not all of our litigation has been so successful. But more often than not, our risk taking has paid off. It is fitting that the same can be said for Reebok, the company. I believe the same can also be said for other legal departments willing to be entrepreneurial in their approach to litigation management. May/June 1997.