DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

OUTSIDE COUNSEL RELATIONS:

STRATEGIES FOR THE EFFICIENT MANAGEMENT OF LITIGATED CLAIMS

ASSIGNED TO OUTSIDE COUNSEL

BY WALT METZ

CHAIR OF ACCA LITIGATION COMMITTEE

Werner Enterprises, Inc.

Senior Counsel

P.O. Box 45308

Omaha, NE 68145-0308

Phone: (402) 894-3002

E-Mail: metz@werner.com

One of the most important roles for a general counsel in a smaller company, or a senior in-house litigation attorney in a larger company, is the management of litigated claims which have been assigned to outside counsel. Pro-active in-house litigators seek control over such litigation by first defining clear-cut goals or objectives, and then by closely managing outside counsel in order to efficiently achieve these goals. This article will present techniques which can be followed by in-house counsel who seek to take and maintain control over the direction of litigated claims; and in the process reduce the company's litigation costs, while achieving superior results.

GOAL SETTING

An ancient philosopher once said:

"In every enterprise, consider where you would come out."

This is a point that should be well taken by in-house litigators. When first staring down the barrel of a litigated claim aimed at your company, you must first determine where you "would come out" upon resolution of the claim. This will help you set the goals to be achieved in defending the litigated claim, and enable you to manage the claim with a results-oriented outlook. Too often corporations either cede the initiative to plaintiff's attorneys while in a reactive mode, or let outside counsel determine the course of litigation. Such approaches do not well serve your corporate employer. Such passive approaches can only lead to high defense costs and increased exposure. As an in-house manager of litigation, you must first set the goals or objectives to be achieved in defending litigated claims, communicate them to outside defense counsel, and then monitor compliance. This will focus the defense counsel's energies, and provide for a better return on the company's investment in his or her billable time.

The nature of the goals to be attained will of course vary with the individual claim. Factors unique to individual claims such as potential exposure, complexity, jurisdiction, particular subject matter, potential adverse publicity, and other intangible factors will, of course, influence the objectives to be set. However, ninety percent of the goals that should usually be sought in the defense of litigated claims can be summarized by the following list:

- Limit Attorney Fees
- Limit Other Litigation Costs
- Early Resolution
- Settlement/Verdict at the Minimum Equitable Level
- Limitation of Publicity or the Encouragement of Similar Suits.

Once the goals to be achieved in the particular litigated claim are set, then the next step is to formulate a plan for achieving these goals.

A good in-house litigation-managing attorney needs to apply some basic time- and battle-tested methods to achieve the types of goals discussed above. These goals can be achieved by consistent application of these methods. A generalized list of these methods is as follows:

- Careful selection of a trial attorney, not a "litigator";
- Negotiation of discounted hourly billing rates, and careful review of future billings;
- Communication of detailed instructions for claim handling, and careful monitoring for compliance;
- Focusing discovery on relevant issues.
- Use of alternative dispute resolution proceedings.
- Taking pro-active steps to limit adverse publicity.

Let us now consider the use of each of these methods in the management of litigated claims.

OUTSIDE COUNSEL SELECTION PROCESS

The key to selecting a defense attorney capable of assisting you in achieving your goals is to hire an attorney, not a law firm and to make sure that that individual is an experienced trial attorney who is willing and able to take the matter to trial if necessary. You want to avoid a "litigator" who is capable of taking the case only through the discovery stages, but who is unable to effectively support a decision to try a case. Most litigated claims never go to trial. However, the best settlements arise from a Plaintiff's attorney's perception of a defense counsel's ability and willingness to try a case. The assignment of a good trial attorney also gives comfort to a corporate defendant making a decision to try a case, unless acceptable settlement terms can be achieved.

In interviewing a proposed defense attorney for a particular case, you should elicit information from that attorney from which to decide whether that attorney is a "litigator" or a "trial attorney". Such information would include:

- Years of trial experience;
- Jury trials in the last two years;
- Jury trials involving similar claims & similar companies;
- Does the attorney subscribe to a proactive or to a reactive approach?
- Does the attorney have time to handle this case?

If an attorney with acceptable credentials is found, then negotiation needs to be made with that attorney as to the billing rate, firm staffing, communication with the company, and other "practices and procedures". Once these matters are negotiated, they should be set forth clearly in writing.

BILLING RATES AND STAFFING

Most law firms and most attorneys have several different hourly billing rates that they follow, depending on the client and the nature of the work. Most attorneys have a standard rate they will quote when asked, but a company which promises to provide a significant volume of future business should be able to negotiate an hourly rate significantly below the standard rate. This is an obvious cost saving measure.

Although negotiated discounted hourly billing rates are important, one should not "lose the forest for the trees". If that attorney then assigns most of the work to other firm attorneys or paralegals, or is inefficient on how he or she handles the claim, the savings from the discounted rate will quickly disappear. Significant savings may result from firm personnel with lower hourly rates handling particular tasks, but if those persons are inefficient, it could end up being more costly in the long run to have lower level firm personnel handle certain matters. The hired partner is generally more efficient in the time he or she spends on a given task. What good is an associate's 25% lower hourly rate if that associate spends 2-3 times as many hours as the partner on the same task? By the same token, even if minimal delegation takes place, the efficiency of the hired partner must also be considered in reviewing future billings.

The careful review of bills submitted by defense attorneys is also an important aspect of controlling defense costs. Not only does reducing excessive individual billings save money, but future billings are also limited because of the defense attorney's awareness of your active billing review process. For substantial exposure claims, it is difficult to effectively utilize billing auditing services, and you risk antagonizing your outside defense firm. These services utilize a computer driven billing review process which fails to take into account the particular factual, legal and procedural issues present in a given case. What is really needed is the application of professional judgment on whether the time spent on a particular billable task is reasonable. However, some generalized rules are helpful in the billing review process. These rules include:

- Actual hours should be reflected on bills, not minimum billing increments;
- No two professionals should bill for the same service ("double billing") unless there is some justification for using two attorneys or other professionals in the same firm for that task;
- Large amounts of time spent on "research" should be pre-authorized and be backed up by file copies of the actual research from which its reasonableness can be judged;
- Administrative or overhead items should not be billed as professional services (i.e.---word processing, filing, staff overtime, etc.);
- Overall billings should not be out of line with probable exposure.

The negotiation of flat fees for the defense of the entire case has been proposed as a solution to the problem of containing excessive defense costs. While this may be a viable alternative for

The negotiation of flat fees for the defense of the entire case has been proposed as a solution to the problem of containing excessive defense costs. While this may be a viable alternative for repetitive "cookie cutter", small exposure cases, it is not really a viable alternative for large claim litigation. A limited flat fee agreement in larger exposure claims has some utility if the defense assignment is limited to the filing of responsive pleadings, preliminary discovery and an initial case evaluation. If, as a matter of course, the corporate client then reviews the case and seeks an early resolution, or at that point authorizes a specific plan for preparation of the case for trial, then the limited flat fee arrangement is a valuable cost containment tool. Future case billings would then be on an hourly basis. If possible, early resolution of the case through mediation, arbitration or effective negotiation will drastically reduce defense costs by avoiding a full-blown defense preparation.

Early Resolution Through

Alternate Dispute Resolution

It goes without saying that an acceptable settlement achieved in the early stages of litigation is far better than incurring the costs and risks associated with a full blown defense preparation and a trial. Some court systems require mediation at early stages of the case, which is useful in only a limited number of cases. If the parties are willing and able, a voluntary agreement to mediate a litigated dispute at the appropriate time can be a "win-win" situation for both sides.

Once sufficient discovery has been performed to enable an accurate assessment of liability and damages exposure, then the in-house litigator should explore the feasibility of approaching Plaintiff on conducting a mediation. You must rely on the local defense attorney's assessment of the feasibility of a successful mediation because the local defense attorney has a better feel for the personalities of the Plaintiff and the Plaintiff's attorney. The defense attorney must also give guidance on the selection of a mediator. Whether of not a skilled mediator is involved is a major factor in a mediation's success.

IN-HOUSE CONTROL OF LITIGATION

A "hands on" approach by in-house counsel to the management of litigation is an indispensable component of litigation cost control, and a vital element of a quality control plan to achieve superior results. The results achieved are ultimately judged on how closely the resolution of the case meets the goals set at the outset of the litigation. Aside from defense cost reduction factors, superior results may be reflected in achieving a settlement or verdict at the lowest equitable level. Superior results may also be achieved through the minimization of adverse publicity and the reduction of exposure for similar claims in the future.

Good communication between the in-house counsel managing the defense of the claim, and the outside defense counsel of record is vital to achieving effective in-house control of litigation. The process of communication should be initiated by providing the defense attorney written guidelines, commonly referred to as "practices and procedures" guidelines. Each company should have its own pre-printed guidelines to be forwarded to defense counsel along with the initial engagement letter.

A corporation's defense counsel "practices and procedures" guidelines should be tailored for the type of litigation involved (i.e. --- personal injury, employment practices, commercial litigation, etc.) They should provide clear guidance to defense counsel on how the corporation wants its defense assignments handled. At a minimum, the following subjects should be covered:

- How the case will be staffed by the firm (allocation of work between hired partner, associates and paralegals).
- Initial case assignment considerations, such as:
- Possible removal from state court to federal;
- Consideration of motions to transfer to different venues within the same court system;
- How authorization for jury trial demands is made.
- Billing procedures:
- Hourly rates;
- Frequency of billings;

- Frequency of billings;
- Detail to be provided on hourly fees and expenses;
- Pre-authorization procedures for extensive research.
- Communications to the Company:
- Information or documents to be regularly forwarded to company;
- Company contact or contacts to be kept informed;
- Contacts for particular types of case decisions;
- Requirement of and components of defense costs budget;
- Communication of critical case progression dates or deadlines;
- Timetable for initial and follow-up case evaluations;
- Components of required case evaluations, including:
    - Liability analysis;
    - Possible defenses;
    - Claimed compensatory damages;
    - Punitive damages claimed;
    - Testimony of critical fact witnesses;
    - Expert witness summaries;
    - Summary of settlement negotiations to date;
    - Feasibility of ADR;
    - Potential verdict range;
    - Probable verdict range.

Management of The Discovery Process

Discovery may be responsible for the lion's share of defense costs for a corporation. These costs arise not only from billable attorney time, but also from the time spent by employees hunting down and compiling manual and electronic documents responsive to Plaintiff's document production requests, and then producing company witnesses to answer questions regarding the information disclosed in these documents. These costs are largely unaccounted for, but their significance can not be ignored. The costs can be effectively contained by seeking to enforce the definition of allowable discovery provided by the law.

Defense counsel should be instructed on the company's position on discovery generally. Discovery questions which go beyond the proper scope of discovery should be met by timely objections. If necessary, defense counsel should seek protective orders from the Court to restrict Plaintiff's discovery. To an outside defense counsel being used for the first time, this approach may seem novel

Defense counsel should be instructed on the company's position on discovery generally. Discovery questions which go beyond the proper scope of discovery should be met by timely objections. If necessary, defense counsel should seek protective orders from the Court to restrict Plaintiff's discovery. To an outside defense counsel being used for the first time, this approach may seem novel in the modern era of liberal discovery rules. But it is a very basic approach which seeks only to enforce the scope of discovery parameters that were originally intended by the drafters of the rules.

In some cases, Plaintiffs submit discovery requests which are gauged to discover facts relevant to legitimate issues. In such situations, the internal and external costs of responding to such discovery requests are simply a cost of doing business. However, in a large percentage of these cases, the discovery requests, including document production requests, are nothing more than unmerited fishing expeditions, which exceed the bounds of the properly defined scope of discovery. It is therefore important to make a concentrated effort to try to restrict discovery responses to discovery questions or requests which are relevant to legitimate issues in the case.

In determining the proper scope of discovery in a given case, one must consider the Plaintiff's Complaint, as well as Federal Rules 11 and 26, and similar state code rules. Rule 26(b)(1) provides in pertinent part:

> *The parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .*

The relevance "to the subject matter" is largely defined by the pleadings. So, Plaintiff plays a large role in determining what is relevant to the subject matter through his or her Complaint. Rule 11 restricts the Plaintiff to good faith pleading assertions. Rule 11 provides in pertinent part:

> *. . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . .*

The 1983 Committee Comments to Rule 26(g) say that rules 11 and 26 are to be read together. Read together, these rules provide that except for such tangential matters as discovery of impeachment or credibility evidence, the scope of discovery is determined by the Plaintiff's good faith Complaint allegations. For the good faith pleading requirement to be satisfied, the Plaintiff must have a pre-filing basis for making an allegation. An unfounded allegation should not expand the scope of discovery. Otherwise Plaintiff would be permitted to take a fishing trip at the company's expense.

In holding Plaintiff to a limited scope of discovery, certain techniques should be utilized:

- As soon as the lawsuit is filed, Plaintiff should be served with "contention interrogatories" asking for the factual basis for pleading allegations.
- Motions for a more definite statement should be used in cases where detailed pleading requirements apply, such as claims for fraud, SEC violations, breach of fiduciary duties, etc.
- Future Plaintiff discovery should be restricted to those items that are relevant to allegations made in Plaintiff's Complaint for which Plaintiff had a pre-filing good faith basis to plead.
- Discovery outside of these parameters should be resisted by use of objections and motions for protective orders.

It also goes without saying that good claims management practice dictates that discovery responses also be restricted to "non-privileged" information or documents. The in-house litigator should always take into account the possible application of the attorney/client privilege, the work-product doctrine and the self-investigative privilege.

Limiting Adverse Publicity

As lawyers we receive minimal training on the public relations aspects of claims management. Unfortunately, public relations have become a factor needing the increasing attention of lawyers managing a corporation's litigated claims. Big lawsuits make big news. If not handled properly, a company might lose the public relations battle, even if the claims litigation is resolved satisfactorily. Also, one can not ignore the fact that Plaintiff's attorneys may be attempting to "poison" the jury pool long before voir dire and opening statements.

When Plaintiff's bar takes a litigated claim filing to the press, the in-house litigator needs to be prepared to act. This does not mean that the in-house litigator should handle the situation by himself or herself. A litigator is a professional in the field of litigation, but not in the field of public relations. The matter should be forwarded to the corporation's public relations contact or communications department, followed by close work with that department to bring about a proper response.

When Plaintiff's bar takes a litigated claim filing to the press, the in-house litigator needs to be prepared to act. This does not mean that the in-house litigator should handle the situation by himself or herself. A litigator is a professional in the field of litigation, but not in the field of public relations. The matter should be forwarded to the corporation's public relations contact or communications department, followed by close work with that department to bring about a proper response.

The in-house litigator's role in limiting adverse publicity and discouraging the making of similar claims becomes more direct when a case is settled. At this stage, the in-house litigator needs to insist on the inclusion of strict confidentiality clauses in settlement agreements. One of the most important reasons for the use of such clauses is to prevent a Plaintiff's attorney from using his or her settlement of the present claim as a marketing tool to dredge up future claims.

CONCLUSION

An in-house counsel's pro-active role in managing litigated claims assigned to outside counsel is absolutely vital for a corporation to efficiently achieve superior results. The bottom line is that the in-house litigator must have clearly defined goals or objectives to be attained in the defense of a particular litigated claim, a plan to achieve these goals, and then a diligent follow through with outside defense counsel to make sure the plan is carried out. There are some well-recognized techniques for carrying out these duties. This article has hopefully conveyed these to you.