Practice Area
briefings

sponsored content graciously presented by Sullivan & Worchester LLP

Using Benchmarks to Manage Litigation

By Andrew T. Solomon

You are on the verge of trial, your litigation budget has been blown and outside counsel is telling you to settle for a figure far above what you told the CEO the case was worth at the beginning. How did this get out of hand? Where did it go wrong?

If this sounds familiar to you, you are not alone. According to the 2014 "AlixPartners Litigation and Corporate Compliance Survey," companies continue to face sizeable threats from legal disputes and compliance risk. Those threats, and their related costs – have resulted in active efforts by in-house counsel to seek new approaches to dealing with litigation.

How do you prevent this scenario from happening again? An in-house counsel charged with supervising the initiation and management of litigation can introduce a few easily implemented benchmarks to create a system for evaluating, tracking and controlling the costs of litigation.

1. Setting Benchmarks for Measurement

A common adage goes like this, "You cannot improve or you cannot manage what you cannot measure." There are limits to this, of course. As Donald Rumsfeld once put it, "If you try to measure everything, then nothing happens really." Simply put, measurement requires benchmarks. The benchmarks should be specific and quantifiable, but simple enough that implementation and monitoring are not arduous or time consuming.

I suggest committing an outside litigator to three predictions from early on or before the start of the case:

- Expected legal fees and costs of litigation;
- Expected length until final resolution;
- Expected outcome: worst case, best case, and predicted outcome.

Most outside litigators will resist doing this. They might protest, *litigation is uncertain, every case is different, it depends a lot on what the other side or the judge does.* However, you can reassure them that these are not caps being placed on their work, but merely benchmarks for you to measure and understand. Whether you choose to reassure them or not, you should insist that the benchmarks be put in place. While no lawyer can guarantee litigation results, an experienced lawyer should be able to predict the range of outcomes,

The sheer number of lawyers in a firm is no guarantee of that firm's effectiveness—only of its size. At Sullivan & Worcester, we don't have thousands of lawyers. We don't cover every practice area either. Rather we focus on key areas where we really excel. So if quality means more to you than quantity, talk to us.

We don't have the most lawyers, but there's a good chance we have the right one.

SULLIVAN & WORCESTER

BOSTON LONDON NEW YORK WASHINGTON, D.C. sandw.com

provide reasonable estimates of cost and timing of a case.

2. Tracking The Benchmarks

How often have you looked at a bill from a law firm and wanted more information about what you are paying for? Cover letters to a bill often introduce the attached bills with no other detail. Cover letter should have at least three short statements that read like this:

- *We predicted that this case would cost $X, thus far you have been billed $Y and have paid $Z.*
- *We predicted that this case would be resolved, either by trial or settlement, within X months; we are currently in month Y.*
- *We predicted the following outcomes, best case [ ]; worst case [ ]; and expected case [ ], as of today we consider these predictions valid [or not valid and here is why].*

This report does not have to be monthly. It could be quarterly or on some other schedule agreed to between you and outside counsel. The point is only that a mechanism is in place to ensure regular communication between you and outside counsel about the benchmarks.

3. Benchmarks Keep Eyes on the Outcome

Litigation management is a dynamic process that requires constant monitoring and a willingness to make important strategic and tactical adjustments as the case develops. Benchmarking can help.

Once a case begins, a litigant is constantly faced with the strategic decision about whether to settle or to continue the case, and tactical questions about resource allocation (e.g., three depositions or twenty; fight discovery or produce everything; how much to spend vetting for privilege).

The cost and time estimates are not particularly useful for making future strategic decisions in this particular case because the costs are "sunk." But they can be useful in building a knowledge base about litigation management, so that future estimates can become more realistic.

But the best case, worst case, and predicted case figures are critical. If outside counsel is informing you that the worst case just got worse or the best case better, you may want to try to settle or abandon the case. By requiring outside counsel to give these predictions some thought every month, it is a reminder to both of you to at least think about the overall strategic goal on a periodic basis.

4. Every attorney-client relationship should have an incentive component; benchmarking is one way to help

Winston Churchill is often quoted as saying: Democracy is the worst form of government, except for all the others." The same could be said for hourly billing. It creates bad incentives (i.e., to overbill) but it could be the least bad basis for compensating lawyers. Hours could be like the cost of a good sold, and a litigation that requires a lot of hours justifiably commands a higher price. In this sense, p aying a lawyer based on the hours performed is like a cost-plus or time-and-materials contract.

Client dissatisfaction with hourly billing has resulted in fixed fee or fee cap arrangements. Those might work well when a case is of the cookie-cutter variety or otherwise predictable in terms of cost and range of outcome. But more complex cases may not lend themselves to these kinds of arrangements. Again, the benchmarks can help.

A fee arrangement can contain fee reductions in exchange for success fees based on the outcome relative to the worst or best case. Similarly, the fee agreement can provide for significant reductions in hourly rates if the total cost exceeds the expected legal fee estimate or a certain percentage of that fee estimate.

A fee arrangement can contain fee reductions in exchange for success fees based on the outcome relative to the worst or best case. Similarly, the fee agreement can provide for significant reductions in hourly rates if the total cost exceeds the expected legal fee estimate or a certain percentage of that fee estimate. A hybrid arrangement might create the best mix of incentives. In other words, hourly rates could be reduced as fees exceed a percentage of the fee estimate, but the lawyer can recapture some or all of the discount depending on the outcome. Both features serve your overall objective and align outside counsel's objectives with your own.

In the 2015 "*ACC Chief Legal Officers Survey,*" one of the top three most commonly cited strategies deployed by chief legal officers for reducing a company's legal spending on outside counsel was to negotiate/set alternative fee arrangements. While, as mentioned above, it can be difficult to do this in complex litigations, you should propose the benchmarking approach for each phase of the litigation instead. While it would require more work on the part of your outside counsel, it will continue to keep you both actively engaged at every phase of the litigation and approach the matter as a team effort.

5. The Benchmarks can help in the selection of counsel

It is not uncommon for in-house counsel to have several law firms that compete for their litigation work. One mechanism you can use to select counsel is to receive predictions of the three benchmarks from the contending law firms, and then use them as a basis of comparison in the selection process. You might consider predictions of costs and outcomes in making the choice. This is even more significant if the bidding process includes some of the incentive structures suggested above. Moreover, the accuracy of the predictions can be taken into account in making future selections. For example, you may disfavor a firm that has a bad history of being overly optimistic.

6. Fewer Surprises

It is impossible to eliminate all uncertainty of litigation. Indeed, cases that go to trial are, by nature, highly uncertain. The point of benchmarks is twofold: 1) to provide an easy system to measure performance versus expectations; and 2) to ensure regular communications between you and outside counsel about the validity of those expectations. The updated process provides discipline to not only the process of communication but also the overall thinking about the case, and whether the calculus of settlement versus continued litigation has shifted.

If a benchmark system is implemented and followed, if nothing else, in-house counsel and their outside counsel should never find themselves deep in the mire of a lawsuit asking, "How did we get here?" **PAB**

One mechanism you can use to select counsel is to receive predictions of the three benchmarks from the contending law firms, and then use them as a basis of comparison in the selection process.

Andrew Solomon is a litigation partner in Sullivan & Worcester's New York office. He can be reached at solomon@sandw.com

SULLIVAN & WORCESTER