108 Managing Litigation from A to Z-From Avoiding Claims to Setting Reserves to Zapping Legal Fees

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FOCUSING ON LITIGATION RESULTS:

The Role of the Case Manager

Litigation grows ever more complex and costly. Gone are the days of small trials, when the lawyer would pick up a slender file on Monday morning, learn the names of the parties and the basic facts, and then pick a jury. Instead, trials are preceded by a mountain of discovery: often tens of thousands of exhibits, dozens of depositions, and a score of legal issues. Corporations routinely settle matters based as much on the litigation cost as on the merits. This complexity is multiplied when related, but different, issues are being fought by multiple parties in multiple venues. Sometimes the litigation is complicated by administrative actions by national, state, or local government agencies. Perhaps politicians are using the litigation as a chance to posture in public. As inside counsel, how do you manage this complex litigation so that it does not manage you?

The answer lies in organization, structure, and planning. Monitoring complex litigation isn't enough; someone has to manage it. In other words, what you need is a case manager.

In Brief

- **In complex litigation, company management often wants to be proactive, but that desire all too frequently translates into activity for activity's sake, with no real benefit.**
- **To really focus on results, consider using a case manager for large cases—not a lead trial lawyer, but one whose job is to manage the case's resources.**
- **Personality types, budget responsibilities, and other hiring tips are included.**

BY DONALD P. BUTLER AND ROGER D. TOWNSEND

Results Needed: The Game Is Not the Thing

The corporate culture has embraced the idea of proactivity. In the legal world, this means that a defendant or a potential defendant takes the initiative. This has resulted, however, more often in activity for activity's sake, rather than in strategic action directed toward a specific goal. Unfocused action does not necessarily advance your goals; in fact, it may backfire. It is also guaranteed to drive up costs.

By contrast, a model that focuses on results will limit actions to those that do advance the corporate goals. The major drawback to the results model is that it requires that most difficult (and therefore rarest) of all commodities—hard thinking. Specifically, it requires hard thinking at the outset, rather than later. Hard thinking at the outset will produce specific goals, an outline of the needed steps, and an estimate of the necessary resources. This kind of detailed planning permits accurate budgeting and allocation of resources.

The other drawback to the results model is that it requires a case manager: not simply inside counsel who monitors the case, but an actual manager who coordinates all the players and the strategy. Although a case manager may add expense, a good case manager will also add a results-based litigation strategy that should ultimately save you money by eliminating needless action.

Case Manager Wanted: Lone Ranger Need Not Apply

As inside counsel, your first step is usually to inform management that a complex case has been or is about to be filed. Your second step should be immediately to retain a case manager. But whom should you select?

Inside counsel can act as case manager, if he or she has the expertise, time, and personality. But most companies face complex litigation only occasionally, so that inside counsel usually has limited hands-on experience in actually managing (as opposed to overseeing) a complex case. Most inside counsel also lack the time required to manage a complex case; their time may be better spent in keeping management informed and mobilizing internal resources.

The lead trial lawyer is also rarely the best choice. Too many aspects of complex litigation are not directly related to a trial. And a lead trial lawyer's time is usually better spent preparing for trial than managing the efforts of others.

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Generally the best choice is someone with case-management experience. The ideal case manager must have:

- superb organizational skills, capable of tracking the filing, answer, and counterclaim deadlines for tens or hundreds of different plaintiffs in different jurisdictions;
- charm and charisma capable of managing high-profile trial lawyers (and reining them in where necessary) as well as corporate executives, in-house counsel, and support staff;
- the ability to see details as well as the big picture;
- a team-player focus (a complex case is no place for Lone Ranger egos); and finally,
- a sensitivity to controlling costs.

Therefore, the best case managers usually are either litigators or appellate lawyers. In general, these lawyers are familiar with a systems approach to handling cases, are adept at delegating matters, have a healthy respect for planning and deadlines, and do not resist reporting in writing.

Fee Arrangements: Costs Are an Object

Complex litigation is costly. Proper management can help, but many cost-control opportunities are available only early in a case. Again, what you need is a case manager who will do the hard thinking at the outset. But what about the costs of the case manager herself?

Legal fees are traditionally based on hours billed, with a self-evident incentive for inefficiency. On the other hand, a fixed-fee arrangement also presents another skewed incentive: to do as little as possible. A purely contingent (or for defendants, a reverse-contingent) fee is plausible, but may result in a huge payout at the end of the day, which management may later resent. And, understandably, a law firm acting as case manager may be reluctant to devote enormous resources if it faces a substantial risk of walking away with nothing several years later.

The optimal fee arrangement for a case manager might therefore be a fixed fee with incentive compensation attached. Under this arrangement, as client you can budget your costs by paying the fixed fee in monthly installments, with the incentive reserved over time. The case manager can also budget its own resources, without the risk of financial ruin if the case is ultimately lost. And the case manager's

Tips for Finding a Case Manager

- Probably the best place to begin looking is with corporate counsel who have been involved in complex litigation.
- Look for outside counsel with experience; you don't want a case manager who will have to learn on the job.
- Personal interviews are advisable; case management often demands intensive management of egos, often under time pressure. You need someone with charisma and the right personality, one compatible with your corporate culture as well as with your trial lawyers.
- Insist on a case manager who will handle the role personally, rather than delegating it to others.

only economic incentive will be to do as much as it takes to secure the incentive—no more and no less. Of course this arrangement has many possible variations, such as increasing the monthly installment in exchange for crediting some or all of it against any incentive compensation earned. If the case is truly in a crisis mode, you can agree to pay your case manager by the hour for one month, while a different fee arrangement is being negotiated. In fact, this typically may be the fairest way to treat the case manager, since it will usually take a few weeks to assess the case and to determine what an appropriate fixed fee and incentive would be.

Determining the Desired Results: What's the Goal?

Once hired, your case manager should assist you in determining the desired results. The initial step in this process is uncovering *all* the possible results under the given facts, both good and bad. This step will require legal research and fact-gathering teams. (See "Managing Legal Research," on p. 32.)

A legal research team must:

- consider issues of jurisdiction and venue;
- uncover all potential claims and defenses, along with potential damage models (whether they have been pleaded or not);
- determine the availability of counterclaims or third-party claims, insurance coverage, and the like; and
- coordinate with the fact-gathering team that is investigating the facts by reviewing documents and talking to employees or witnesses. Facts uncovered should be fed to the legal researchers as quickly as possible.

Once all potential results have been realistically assessed, your company can select and prioritize its desired results. Does the company want a quick settlement, regardless of the cost? Is the goal to try the case, win, and then settle on favorable terms? Should there be a protracted struggle to send a message and discourage future claims? Is there a rational reason to fight to the death for vindication? Is the goal to win on appeal, establishing a precedent that will eliminate future cases? Or is there some middle path? Once your company realizes what it is really after (and why), a different result may better fit what you really want at the end of the litigation.

Strategizing: Think Before You File

Without a coherent strategy, your tactics may work against your goals. With your case manager's assistance, you must develop a strategy as soon as you have determined your desired results—and continue to develop that strategy as the litigation unfolds. In fact, you will need multiple strategies: for law, facts, corporate finances, PR, and internal resources.

The law

A law strategy considers when to assert certain claims or defenses. In complex litigation, it is not uncommon for multiple claims to be filed, often in multiple jurisdictions. It is critical that the case manager create an easily understandable process for tracking when and where each claim was filed, what the appropriate response deadlines are, and whether the necessary responses to each claim have been made. (See "Tracking the Wild Claim," on p. 27.)

And of course, the case manager's management of your law strategy isn't just about deadlines. Different claims in different jurisdictions may demand different strategies. For example, in some jurisdictions you might begin with special exceptions or a Rule 12b(6) motion, followed later by a no-evidence motion for summary judgment, followed much later by a traditional motion for partial summary judgment. In other jurisdictions you might decide that no dispositive motion should be filed at all before trial; some courts routinely reject all motions for summary judgment, in which case the motion would simply run up costs and educate your opponent. On the other hand, if settlement were your goal, you might file the motion even if you were sure it would be denied.

Case management of the legal strategy must also take insurance coverage into account, which will probably be affected as the litigation develops amended claims and defenses. Again, the presence of different claims in different jurisdictions, possibly covered by different insurance policies with different notice requirements, calls for an extremely high level of organizational skill.

The facts

Without question, the biggest cost of complex litigation is discovery. Too many lawyers blindly follow a general tac-

tical plan: requests for disclosures, requests for admissions, interrogatories, and so forth. In ordinary litigation, the possible inefficiency of this routine may not be apparent. But in complex litigation, where having to re-ask a question or seek another round of discovery can involve multiple cases in multiple jurisdictions and the coordination of all the lawyers in all the different parties, small inefficiencies quickly add up to major costs. And of course, poor discovery tactics can have other costs as well. But it can be extremely difficult for any one person, no matter how experienced, to be sure that he has identified all the pertinent questions and requests for, say, one hundred different plaintiffs in four different factual categories spread out over five different jurisdictions. Thus the case manager must have a strategy and a system for coping with any or all of:

- multiple opponents with slightly different case facts, potentially requiring different approaches in discovery;
- multiple cases filed in different jurisdictions with different discovery rules and deadlines;
- huge numbers of documents, files, electronic material, or other evidence, all of which must be analyzed, incorporated into the strategy, and linked to the appropriate issue, case, or party.

(See "Tracking the Wild Claim," on this page.)

Complex litigation must therefore have a specific plan that structures and integrates discovery. A discovery plan is not simply an order fixing certain cut-off dates. Instead, it is a detailed, confidential plan of what discovery is to be pursued in what order, with alternatives based on what is discovered. The plan may also consider various potential discovery motions and the possibility of mandamus proceedings if the motions are denied. The plan must take into account the available resources, so that it can also be used as a detailed budget for financial planning. (For a simplified example, see "A Sample Discovery Plan," on p. 28.)

The discovery plan allows intelligent staffing. Before beginning discovery, the client and case manager can determine how many lawyers are needed to cover discovery on each issue. This avoids having to add lawyers unfamiliar to the case later in the process, and can lead to a discovery schedule that permits estimates of resource allocation.

Evolving the fact and law strategies

Your strategy of course should continue to develop as you develop the facts. The initial law and fact investigations should produce an outline for key facts to be discovered, with a comprehensive chronology that can be continually updated. As discovery uncovers new facts, the research team should look for helpful cases. The case manager should act as the coordinator, relaying new factual information to the research team and new legal information to the factual team.

Tracking the Wild Claim

A good case manager will have a good tracking system: one with multiple backups, preferably supplemented by at least one manual system monitored by a good paralegal, and one with the ability to calendar any grace-period deadlines in addition to the original deadlines. A good tracking system not only calendars events, but also ties them to the particular case at issue. Thus, the case manager can review what events are approaching on what days across the full spectrum of cases, or can access the upcoming events for a particular case. Good case-management software will also connect email and paper files with particular matters for easy retrieval.

Case management and tracking, of course, are also important for the critical ability to organize discovery in multiple ways, according to legal issue, factual topic, chronology, witness or document source, and forum. This multiple path organization allows the maximum flexibility not only in retrieval, but also in rearranging the discovery materials to support what will emerge as the themes for trial.

Corporate finances

A financial strategy must take into account more than just the money at stake in the litigation and the costs of litigation (and insurance or reserves coverage for those costs). It must also consider the potential effect on the company's financial life (see "The True Costs of Winning . . . and Losing," on p. 28). There may be repercussions in the financial markets or in the court of public opinion (and thus sales), shareholder complaints or suits, government regulators, legislative committees, and spin-off or copy-cat litigation. A settlement strategy is part of this analysis. For example, do you want to minimize costs and publicity, or to settle only for a rock-bottom price? If the former, start the settlement process earlier. If the latter, later or not at all.

PR strategy

Your company should quickly develop a consistent message—a theme—about the litigation. It then should consider who should deliver the message, when, where, and how. Usually one internal spokesperson is best, but the information should be coordinated with inside counsel and the case manager to keep the information accurate and consistent with the theme.

A good message and its transmission through the media can assuage financial concerns. It can also affect public

opinion, which might impact the litigation. While ethically public statements may not be intentionally used to affect the tribunal or jury itself, they can sometimes be used to soften up the other side for settlement. Furthermore, a public relations strategy can be used to reduce the risk of a large punitive damages award. Aside from affecting public opinion, the media's reporting of the event can permit continued sales, reduce punitive damages, and prevent financial panic by investors (see "The Big Picture," p. 30).

Internal strategy

The first requirement of an internal strategy is a firm commitment from management to assist the litigation with the required internal resources. This commitment should be communicated clearly throughout the company, as should a commitment to confidentiality, speaking with one voice, and protecting evidence.

The internal strategy should also address:

- who to keep informed within the company,
- how often and how detailed the information should be, and
- who provides the information and in what format (oral or written).

Keeping management informed is best left to inside counsel, who are familiar with the management's style and concerns. This also leaves outside counsel free to handle the case.

An internal strategy may also need to address other issues.

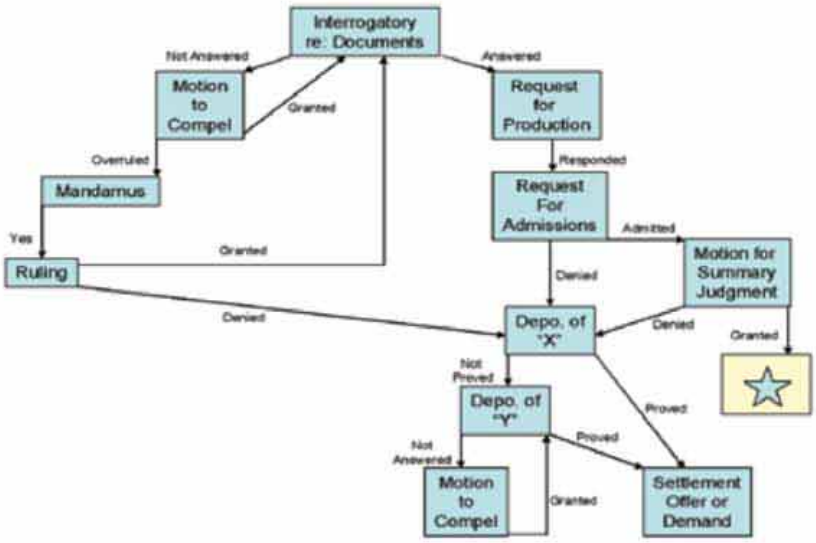
- Is management to blame for the problem? Are there board members maneuvering to replace the CEO or Chairman?

The True Costs of Winning . . . and Losing

What might happen if the case goes badly?

- How will the litigation affect the value of shares? Would a huge judgment increase the risk of a takeover? Should a poison pill be put in place now to prevent a takeover if the stock price later plummets?
- Would an adverse judgment cause lenders to accelerate debts, placing the company in a precarious position? Would judgment liens unduly encumber the company's property? Would deals to sell subsidiaries fall apart or be blocked? (We once had a client pay several hundred thousand dollars more than was warranted to settle a case on appeal in order to be able to sell a subsidiary for several million dollars.)
- Could the resulting judgment be stayed? Would bankruptcy loom? Recall that Texaco Inc. was forced into bankruptcy by Pennzoil's multibillion-dollar judgment against it.
- In the interim, would the litigation make suppliers and customers wary of renewing or entering into new contracts with the company? Would prospective joint venturers demand indemnity?
- Could the company's bank funds be garnished or attached? Or could there eventually be a turnover order, so that a receiver friendly to the opposition is appointed to run the company?

A Sample Discovery Plan



- Is someone else in the corporation likely to be a scapegoat? Is the general counsel in the line of fire—and in that case, could his continuing involvement in the litigation create tension?
- Are there disgruntled employees or whistleblowers who may testify adversely?
- Are trade secrets disappearing into the hands of the opposition or competitors?
- Is the time spent by employees in responding to discovery costing the company too much?

Organizing Resources at the Outset

As soon as the strategies are planned, decide how to implement them: identify, organize, and allocate resources. This requires inside counsel and the case manager to identify likely needs, to organize a schedule based on the probable timing of those needs, and to plan the timely allocation of resources. What legal skills will be needed? Which lawyers have them? When will those skills probably be required? The case manager should organize these staff resources into teams with communication structures, so that information can be effectively shared both upstream and downstream. The case manager should work to minimize the inevitable friction among the teams.

Support staff can also be crucial. For instance, in one particularly large case, we organized secretaries and legal assistants into shifts, so that we could generate documents around the clock. The case manager can foresee such likely needs for support staff and arrange for their deployment.

In a complex case, the client (usually with input from the case manager) will need to retain multiple counsel for settlement negotiations, discovery, and trial. The client also will need a legal research team (preferably headed by an appellate lawyer); a financial team (consisting of key members of the company's financial department, but augmented by corporate and perhaps bankruptcy counsel); and an internal-management team (usually headed by the general counsel). It may also find an insurance lawyer useful to keep pressure on carriers who are acting timidly about coverage. And finally, it will need a public relations team, consisting of an outside public relations consultant or the company's own public affairs officer. The various team leaders must have some administrative ability, and, because they are essential as information conduits, they must be reliable and prompt.

The teams will require not just leaders, but also members. But it is inefficient simply to throw bodies at a case. Thus, the case manager should consider: What kind of work needs to be done, and who is the best person to do it? For example, legal research by a partner may be more efficient than by a younger lawyer, if the partner's expertise will speed the research.

Thus the makeup of your legal team cannot be determined precisely until you have decided and scheduled your tactics. Law firms who skimp on these preliminary planning stages often underestimate the number of attorneys needed to staff a large case. When they later add attorneys to the case as it progresses, the client loses money and time while the new attorneys are brought up to speed.

Communicating

The case manager must coordinate the different teams while keeping the client fully informed, putting the case manager's communication skills at a premium. The case manager should persuade as well as inform: Keeping a large number of people pulling in the same direction requires that everyone understand (and ideally agree with) the reasons for the course of action. It's also worth remembering that complex litigation is a high-pressure situation—superb lawyers acting under tight deadlines are not always known for the modesty of their egos. A persuasive case manager can do much to keep everyone working together smoothly.

Thorough communications require periodic meetings or conference calls, though limited in the number of participants. Email groups, extranets, and videoconferencing all have their place in handling a complex case and should be used liberally. They also help save time and money by cutting down on travel.

Usually one conference per week is sufficient; a conference on Friday morning enables everyone to catch up with the week's developments, to decide on further steps, and to prepare for events scheduled for the next week. Of course,

The Big Picture

In the wake of the Tylenol deaths in the mid-1980s, Johnson & Johnson's executives essentially admitted the existence of a safer alternative design, which their outside lawyers probably cringed at. But management saw the big picture—not only would showing their immediate concern limit punitive damages, but keeping their product safe in the minds of consumers would continue sales that would likely far outstrip any future damage awards. They also quickly determined that the core issue in the case would be the intervening criminal conduct. They relegated all other issues to a secondary role and focused on the result they wanted: to get this quickly behind them. This was a classic case of managing complex litigation successfully.

the supervising inside counsel should be encouraged to participate in these meetings, and the supervising inside counsel and the case manager will probably converse almost daily, occasionally several times a day.

For the weekly conferences, an agenda should be prepared, circulated, and followed to the extent possible. Without some structure, conferences can ramble because lawyers tend to talk too much. A good case manager will lead the group back on track without stifling good ideas or hurting feelings. Usually, only the team leaders need participate in the conference. In one large case, we observed that every lawyer and legal assistant working on the matter was included on the weekly conference call—a total of about 45 professionals. It is not surprising that the calls dragged on for up to four hours on occasion, often with little substance.

Tactics, Schedules, and Budgets

As we outlined above, the case manager, team leaders, and client should brainstorm every possible action toward carrying out strategies that address law, facts, corporate finances, PR, and internal issues. The aim, of course, is to create an overarching plan that will achieve your desired results. The case manager and team should then consider alternatives based on anticipated countermoves by the opposition. After grouping the possible actions into chunks relevant to different parts of the case, they should prioritize them, decide what resources would be necessary, and schedule the chosen actions. This, in turn, permits much more accurate budgeting.

Anticipating surprises

Many lawyers resent budgets, while more and more clients demand them. One problem with budgets has been their inherent unpredictability. Usually, however, surprises result from a failure to have thought through the case at the outset. Many of litigation's inevitable surprises can be anticipated, at least as possibilities, and taken into account in the budgeting process.

Furthermore, budgets can also offer a constructive structure for handling the case. The more a budget forces counsel to think of all the things that must be done, might need to be done, and could be done, the more the client can be confident that counsel has considered everything necessary to the efficient handling of the case. For example, focusing on the budget might force the realization that a deposition of a minor witness in Detroit can be handled by written questions or orally by a junior associate instead of by a videotaped deposition by a partner. Similarly, a budget might reveal that an esoteric point will become relevant only if a certain fact is elicited during discovery. Instead of putting a pack of associates on a scorched-earth research mission early in the case, the company can perhaps reserve the issue for a later date—by which time the case may have settled without the client ever incurring that research expense. (See "Managing Legal Research," on p. 32.)

Monitoring interim results

The case manager must constantly monitor the outcomes of the selected tactics in order to adjust them and the budget as necessary. In the rare instance of a major factual, legal, or financial surprise, the company's strategy may need to be completely rethought. But proper initial

ACC Resources on . . .

Case Management

InfoPAKs:

- Outside Counsel Management (2004), at *www.acca.com/resource/v247.*

Annual Meeting Course Materials:

Program material from ACC's 2005 Annual Meeting is available at *www.acca.com/am/05/material.php*, including:

- Thomas D. Gaillard, Richard A. Parr II, Robert H. Peahl, "Benchmarking Outside Counsel Performance—A Roadmap," course 305.

Webcasts:

The following webcast is available at *www.acca.com/networks/webcast/:*

- Managing Outside Counsel: Getting Off on the Right Foot—And Staying in Step (January 18, 2006).

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- Bridgeway brings best practices to corporate legal departments for matter management, corporate governance, electronic invoicing/cost management, mass tort and contracts management. *www.bridge-way.com.*

For more ACC extras about case management and outside counsel relations, see the *HandsOn* in this issue, and visit *www.acca.com/docket/mar06/value.php.*

It's also worth remembering that **complex litigation** is a high-pressure situation—**superb lawyers** acting under **tight deadlines** are **not always known** for the modesty of their **egos.** A persuasive case manager can do much to keep everyone working together **smoothly.**

planning should minimize this possibility by taking the potential for change into account when developing the initial strategy.

Trial preparation tactics

Trial preparation tactics largely rest on the lead trial lawyer, with the case manager helping to coordinate the trial lawyer with the teams usually involved in preparing witnesses and legal memoranda. Most clients require daily reporting of developments, and press inquiries are not unusual in a high-profile case. The case manager can be invaluable in taking on many of these nontrial tasks, so that the trial team can focus on the trial itself.

Losing the trial

Case management doesn't end with the trial—particularly if the trial is lost. A loss at trial requires management on multiple levels. First, the losing party must worry about financial repercussions and public relations. It may need to:

- employ the public relations team to reassure creditors, shareholders, customers, and suppliers;
- activate the financial and legal teams to seek a supersedeas bond or a reduction in the bond, to prevent implementation of the judgment;
- have the internal management team communicate effectively with management and employees, to answer the inevitable questions and avoid profitless panic and scapegoating.

And of course, preparation of an appeal will require case management.

Learning from the Experience

When it is all over, the case manager can be invaluable in helping the client review the experience, as the case manager will observed the various teams in action and will have probably have the clearest idea of what led to the litigation. At the same time, of course, the client will want to review the performance of the case manager. Were there too many surprises? Were there too many tantrums and turf battles? Was the case manager cost effective? Did she communicate effectively and promptly?

The Rewards of Good Case Management

A good case manager can ensure that effectiveness and efficiency are not at war with each other, but actually complement each other. This should improve the quality of the legal services being provided to the company, while controlling the costs. Imagine telling your management that you have figured out a way not only to get better results, but also to reduce costs. That usually leads to a promotion, or at least a good bonus. A good case manager can become a valuable friend.

Have a comment on this article? Email editorinchief@acca.com.

Donald P. Butler and Roger D. Townsend, "Focusing on Litigation Results: The Role of the Case Manager," *ACC Docket* 24, no. 3 (March 2006): 22–32.

Managing Legal Research

Unnecessary legal research is one of the most costly aspects of complex litigation. Because complex litigation often involves multiple claims raising multiple issues in multiple jurisdictions, the need to understand and track which law applies to which claim can quickly overwhelm unprepared counsel.

But even when legal research can be concentrated in one jurisdiction or issue, the high stakes of complex litigation can create a pressure to leave no stone unturned. This is rarely productive; few precedents are ever directly on point. Too many lawyers perform legal research backwards, by collecting holdings and then trying to match them to the case. Instead, once a lawyer has some familiarity with the law at issue, he should stop research and begin to think: What rule is fair to the parties? What rule is workable in the real world? Then he should resume research. Almost always, he will then find a case supporting that rule. In the rare instance where there is no authority, a court is likely to adopt the rule anyway, as the best rule, even in the face of some adverse (but no doubt distinguishable) authority.

" MANAGING LITIGATION FROM A-Z – AVOIDING CLAIMS TO SETTING RESERVES TO ZAPPING LEGAL FEES"

ASSOCIATION OF CORPORATE COUNSEL MEETING
TORONTO, ONTARIO

JUNE 27, 2006

(Keith Perrett and Neil St. John)

- **We'd like to welcome you all to this session, which is called "Managing Litigation from A-Z – Avoiding Claims to Setting Reserves to Zapping Legal Fees".**

- **I'm Neil St. John, the Corporate Secretary & General Counsel of PricewaterhouseCoopers LLP, Canada. My co-presenter is Keith Perrett, the Assistant General Counsel of the Bank of Montreal.**

- **I've been in my present position for 18 years, and Keith has been in his for just about as long.**

- **We have a lot of experience in managing litigation – and we look forward to sharing some of that experience with you. Mind you, asking us how to manage litigation is like asking Henry VIII how to manage marriage.**

- **I start with two comments:**

- **First, seeing as you are now in Canada – we'll have to change the name of the session from "Managing Litigation from A to Zee' to "Managing Litigation from A to Zed"**

- **Second, we obviously can't tell you everything about managing litigation in an hour and a half. As a first year undergrad, I took a course called "An Overview of History". We referred to it as "From Plato to Nato." This is somewhat the same.**

- **We're simply going to hit some basics – tell some war stories – and respond to your questions.**

- **Keith and I aren't very formal – in fact, we'll both be glad to depart from our written text and wing it – so please jump in if you are so inclined.**

- **Here you are in Canada – and more specifically Toronto – home of SARs, the mighty Blue Jays, and the not so mighty terrorist conspirators.**

- **We thought we'd open by giving you some insight into the litigation environment in Canada – as compared primarily to the United States.**

- **We think that you'll find yourself fairly comfortable operating in Canada – just as we are fairly comfortable operating in the United States.**

- **There are differences, however. We point out that Canada has 10 Provinces – all with their own business and securities laws, and there is a significant Federal sector as well, with its own legislation.**

- **Nine of our Provinces are common law based – Quebec's laws are based on the French Civil Code.**

- **We do not have a Federal Security regulator like the SEC – each Province has its own Securities Commission.**

- **Generally speaking, we are a somewhat litigious society – but we can't remotely compare with the United States.**

- **We are not as extensively involved in class action litigation – laws have only fairly recently been passed in the various provinces to allow such litigation, and we don't have a great deal of experience in the area.**

- **Give us a few years and we'll have more!**

- **There are some serious disincentives to plaintiffs and plaintiff's counsel compared with the United States.**

    1. **We have very few jury trials in civil cases.**

    2. **Punitive damages awards are rare – and the amounts awarded are relatively small – the largest amount I'm aware of is $450,000, and that is likely to be appealed.**

    3. **We have the so-called "English" rule on costs – if you lose you wind up paying your costs, and a proportion of mine! This even applies to the representative plaintiff in class actions.**

    Overall, it's a somewhat more friendly environment to defendants than the United States.

- **If you are going to operate in Canada, we certainly recommend that you retain Canadian external legal counsel to assist you.**

- **PwC and BMO operate everywhere across Canada, and Keith and I retain counsel in every province.**

- **Keith will describe how his group handles their litigation, and it's essentially the same way we do. We manage it, but we retain local counsel to run it.**

- **PwC has national litigation counsel, together with regional and local counsel. We split our major litigation amongst three national firms.**

- **Depending on the nature of the case, we may have local counsel handle it – or we may "tagteam" local counsel with our senior national counsel.**

- **We in the Law Department are involved in the supervision and management of all of our cases.**

- **I think of our litigation counsel as a "virtual " law firm – they have acted for us before – understand our culture, and are compatible with one another – that is, local counsel are prepared to work with national counsel and vice versa – and most important – with us.**

- **That leads me to the final point I'd like to make at this juncture. Keith and I met to discuss our remarks, and we quickly found we were in agreement on a fundamental point.**

- **If you are the Legal Officer in charge of managing litigation – then manage it!**

- **Neither Keith nor I are interested in being "gatekeepers" – just processing the work and passing it along to outside counsel.**

- **We, and our lawyers, manage every significant piece of litigation that crosses our desks. We stress significant, because we appreciate that certain matters may be largely mechanical, and not require your attention.**

- **Litigation management covers a myriad of things, including getting the best result for your client – controlling legal costs – avoiding damaging precedents, avoiding reputational damage – keeping your management up to date, managing the expectations of regulators, auditors, shareholders and investors.**

- **External counsel can't do all of these things.**

- **I'm now going to turn things over to Keith- who will expand on these topics – and I'll be back to give you my thoughts on how to shut down litigation, should you be so unfortunate as to become involved in same.**

- **Keith, over to you.**

Litigation Management: "Tools and Techniques"
Introduction

The Litigation Portfolio of a large Schedule I Canadian Bank includes hundreds of lawsuits with total claims at times running into billions of dollars. These lawsuits exist in dozens of jurisdictions, and deal with issues such as class actions, securities, letters of credit, swaps, loans, negotiable instruments, employment, and more recently patents and intellectual property. The number, size and complexity of these cases make effective management a continuous challenge.

First and foremost, I should state we do no litigation "in-house". While we will often handle a case at preliminary stages including dealing directly with opposing counsel, once the lawsuit is commenced, we retain external counsel to run the file. I am not convinced that substantial savings can be realized by running litigation in-house, given the number of jurisdictions in which we litigate, the expense of top level

litigators, and the cost of litigation support such, as research capability and document management.

The goals of the Bank's Litigation Management Team can be described in relatively simple terms:

1. **To maximize the benefits and minimize the exposure of litigation on a case-by-case basis, including awards or settlements, publicity resulting from litigation, and business exposure or lost opportunity costs resulting from precedent setting litigation;**
2. **To reasonably contain litigation expenses; and**
3. **To collect and evaluate the case information necessary to satisfy financial reporting requirements and ever expanding governance demands. This necessitates generating reports for management, internal auditors, shareholders' auditors and, in some cases, regulators.**

Realization of these goals is dependent upon (1) well defined policies and procedures; (2) the careful selection and management of outside counsel; (3) the use of cost/benefit analysis; (4) utilization of computerized litigation databases and, finally, (5) client education programs. I intend to take the next 10 to 15 minutes to address each of these points.

Policies and Procedures

Well articulated policies and procedures will enhance your organization's ability to achieve the objectives I have outlined. These procedures can be simple, such as "upon being sued, or before instituting a suit, contact the Law Department", or much more detailed; outlining for management which cases are to be reported to the Law Department, when these cases are to be reported, and what the role of the Law Department will be in the litigation process. For the Bank, we require the reporting of all potential or commenced litigation against the Bank with claims above $50,000; claims which could materially

impact our manner of doing business (precedent cases); and claims which could be embarrassing or gain public notoriety such as cases with other banks, government agencies, public figures, or cases which call into question the ethics of the organization. We are also require notice of all cases commenced by the Bank where the amount claimed exceeds $1 million.

The appropriate policy and procedure for a particular corporation will depend upon its internal organization, the sophistication of its management, and the structure and resources of its Law Department. Despite its size, the Bank of Montreal did not have the required policies until the mid-1980s. The first year following introduction of the policy was revealing. Every type of claim imaginable came out of the woodwork. Regardless of the nature of the policy implemented, the first rule should be to encourage early and complete disclosure of any potential suit to the Law

Department. To guarantee effectiveness, I suggest you have your internal auditors annually audit compliance with your policy. This will provide teeth to your policy, and give added comfort to your Shareholders' Auditors.

Choice of Litigation Counsel

The choice of counsel, as we all know, plays a significant role in determining the eventual outcome of any case. When commencing or defending litigation, the issue is rarely simply winning, but often "can we settle?", and "can we settle early?" Who you choose as counsel can have a significant impact on the answer to these questions.

Once counsel has been selected, the die is usually cast. It is difficult, and certainly expensive, to change counsel prior to trial. It is therefore crucial that the right choice be made at the beginning of the litigation. No doubt we all have had to change

counsel in the middle of a lawsuit; it is a painful process and one to be avoided.

Always select a particular lawyer for a particular case. Do not rely on traditional relationships with law firms, no matter how prominent the firm. Each suit has a personality of its own, and demands a particular expertise and litigation type if you intend to maximize results. For example, you may wish to retain a particularly hard nosed litigator for a file where settlement is an unlikely or an unpalatable prospect. This same selection, on the other hand, would be unwise for a case where the publicity associated with a trial would be unwelcome.

At the Bank, we also try to match the files with certain firms in order to save costs. For smaller, less complicated matters, we often select experienced litigators with smaller firms. This tends to reduce the expense associated with the conduct of the file as these firms tend to have lower hourly rates and to

allocate fewer resources to the file. The emergence of litigation boutiques in recent years has been welcomed by the Bank. Often by using these boutiques you can obtain the litigation expertise of a larger firm while paying smaller firm rates.

Litigating in many jurisdictions can also provide challenges when selecting external counsel. In those jurisdictions where the Bank has a sufficient number of cases, we try to maintain a list of at least 2 or 3 litigators in order to deal with conflicts or performance issues.

Picking counsel in jurisdictions where you have never litigated before is always a problem. Usually I seek the recommendations or litigators I know and trust, who have dealt with counsel in those jurisdictions. Sometimes, however, no recommendations are available, and recourse to the usual lists is the only option. In these situations careful and constant

monitoring is crucial until you develop confidence in the selected counsel.

Cost/Benefit Analysis

Once counsel has been selected, we very quickly establish an understanding of our respective roles and what our expectations of litigation counsel are in each instance. This is an important first step. To quote Michael D. Bergeisen from his article on "How to Manage Litigation and Evaluate Outside Counsel",

> **"Lawyers should treat lawsuits not as a contest to be won at all costs, but as business problems to be resolved according to practical cost/benefit principles."**

Along with the internal client, we initiate the cost/benefit analysis process shortly after the lawsuit begins. This process

is one which takes time and has to be redone repeatedly during the pre- trial period. In order to perform this analysis, it is necessary that at the earliest opportunity accurate and detailed information be given to, and opinions and budgets be obtained from, outside counsel regarding the Bank's case.

Our Law Department utilizes a standard form request for an opinion and budget in our management of individual cases. I have brought some copies of same with me should you want one

I cannot emphasize strongly enough the importance of early document analysis and early internal witness interviews, I might add long before initial discovery. There is nothing more debilitating and expensive than the "surprise" or the "I know I should have told you before" syndrome! I believe these interviews, particularly of major witnesses, require the presence of your litigation counsel. It is cost-effective to get to

the whole "truth" early. Secondly, you have a first-hand opportunity to assess counsel's early pre-trial preparation and reaction to your case. Thirdly, you get an early opportunity to possibly avoid the pyrrhic victory -- the case you win in court and lose in the public forum because of adverse publicity surrounding your company's conduct or a case in which a precedent is established which materially impacts the way you conduct your business.

If performed regularly, starting at the earliest possible point in the dispute, ongoing cost/benefit analysis can:

1. **Lead to a significant number of early settlements and resulting legal expense savings. The cost/benefit analysis provides the basis for the offer or counter offer.**
2. **It will provide a method for objectively evaluating the performance of outside counsel.**

3. **Also, because mistakes are often repeated, the corporation may face similar claims. Proper analysis is useful in the preparation and evaluation of other cases in which the corporation is involved.**

We store all the analysis, research and opinions provided by outside counsel on a computer database. This information provides the necessary report generation on the litigation portfolio for the corporation's management and auditors.

The cost/benefit analysis process is not a scientific one, but is very much one of judgment. The key numbers in the analysis, the evaluation of the applicable law, and the projected litigation expense are only as valid as the judgment and knowledge of internal counsel who provide them.

Computerized Database

At the Bank, we manage hundreds of lawsuits. In order to do this effectively, we need to manage daily the activities and decisions relating to each individual case, while at the same time we need to be able to describe and quantify the financial impact of the portfolio on the Bank. We use a computer database to help with both of these functions. Currently, we are using Microsoft Access for our software choice.

We use the database to store our "bring forward" dates for each file and create daily "To Do" lists to manage the communications and activities associated with the task of managing a case from commencement to conclusion. Information is stored on each case, including that relating to clients, external counsel, issues, witnesses, budgets and opinions. All of the computer fields are full text searchable which helps in locating the information.

The database can also be pre-programmed to generate reports on the portfolio as a whole with very little effort. For example, we generate automatically a monthly report which shows opening and closing balances for the portfolio, and provides details of the significant cases opened and closed during that month. This report is provided to senior management, the finance department and to the Bank's external auditors. In this way, new cases can be addressed in a timely fashion, and surprises, for the most part, are avoided. Another report lists all cases over $5 million, ranked according to claim size. This report is used on a quarterly basis to review the cases with the finance department, in order to assess litigation reservations, and any changes to the Bank's financial reporting resulting from litigation matters.

Reports can also be generated on a custom basis, for example, to list all cases defended by a certain law firm, or to list all

cases within a certain line of business such as "mortgages", or to list all class actions in Quebec.

Client Education

Solicitor-client privilege is one example of an issue requiring client education. I would like to take the last few minutes to speak on this topic. The availability of solicitor-client privilege for corporate counsel plays a significant role in the management of litigation. In my view, all Law Departments should educate management about the existence and operation of this privilege. Obviously it is paramount that we encourage management to advise the Law Department at the very first opportunity of potentially litigious matters. Counsel can and should participate with management in developing a plan to reduce the risk of our clients becoming their "own worst enemies".

I have brought with me, should you wish a copy, two memoranda relating to solicitor-client privilege. We send the shorter memorandum to internal clients to educate them on the subject of privilege. This memo describes some of the pitfalls to be aware of, such as involuntarily waiving the privilege through unduly wide communications, and goes on to list some practical steps management can take to ensure that appropriate communications are Privileged.

The second memorandum is intended for use within the Law Department and goes into considerably more depth on these issues, as well as dealing with the more esoteric aspects of this issue, such as: "Who is the client?", "whether privilege applies to advice given by a lawyer not qualified to practice in the jurisdiction where the communication is received", and "the circumstances in which communications with third parties would be Privileged". Audit reports and human resources reports receive specific treatment in this memo.

Finally, I should mention that communications which may qualify for solicitor-client privilege in Canada may not enjoy that protection if production of them is sought in the context of U.S. litigation. The distribution of communications into U.S.-based affiliates or branches should therefore be considered separately, and if necessary, the advice of U.S. Counsel should be obtained.

Over to you again, Neil

I said I'd give you some thoughts on how to shut down litigation.

- **This is the situation where you have a claim and, for these purposes let's describe it as fairly significant and not "run of the mill" – you've spent the money to assess it – you've advised your senior management – you've reported it to your insurer (if applicable) and you seem to be settling in for the long grind of litigation.**

- **I like that line in Kenny Rogers' song – "You've got to know when to hold 'em, when to fold 'em, when to walk away and when to run"!**

First, make sure your external counsel is told everything

- **Communicate fully with your counsel**
- **Give counsel your assessment of the situation, and the personnel involved**
- **Raise any special issues, i.e. is this "just about money" or are health or reputational issues involved?**
- **Consider whether the case, if it went the wrong way, would establish a dangerous precedent for your client, or its insurers**
- **Review your insurance considerations, i.e. your amount of cover, your deductible**
- **Make sure you, and your counsel, fully understand all of the considerations, and your ultimate objectives.**

Second, spend the money up front

- **We have spoken of getting an early opinion or view of the situation, because you must get to the bottom of things as quickly as possible. Spend your money up front to fully understand your situation and potential exposure(s). Don't engage in false economy.**
- **You may conclude that the right answer is to seek an early exit**

- **If so, be prepared to pay the money and move on – it's not the principle of the thing – it's the money!**
- **Litigation has several costs**
- **Its dollar cost**
- **Its psychological cost**
- **Our partners are stunned when they are sued – typically the allegation is that they acted negligently in providing their services.**
- **Their reaction is hardly surprising when their entire career focus is client service.**
- **"It's the worst thing that ever happened to me"**
- **We handle such matters all the time – so we can be objective – that's our job**
- **But never lose track of how your client feels**
- **Litigation is negative**
- **It looks backward**
- **It eats up the productive time of your people – you can't recover that**
- **We want them out there billing – being positive, upbeat and working on new projects**

Third, all our good advice may not help you if you have an incompetent counsel or a zealous plaintiff on the other side.

- **Understand your opponent.**
- **What are his motivations?**
- **What are his resources?**
- **What's his end game?**
- **Does he have competent counsel?**
- **You might think it counter intuitive to hope your opponent has competent counsel – but that is not the case. You want someone on the other side who fully understands the risks of litigation.**
- **This includes class action lawyers – whose game is to get out as quickly as possible, with as big a score as possible, while spending as little of their own time and money as they can.**

Fourth, get business / strategic minds involved on both sides

- **If the lawyers run the file – it can run away – and I include internal and external counsel.**
- **Someone needs to be involved, on both sides, to keep you focused on what's important, and to keep you focused on your ultimate goal.**

So, what's your role?

- **To do everything I've mentioned.**

- **But also to stay, to some extent, above the fray.**

- **To keep your external counsel on target – to focus on the big picture.**

- **To say, what does this mean, where are we going, what's our objective, what's our strategy, what are our chances?**

- **I've intervened recently in several cases, which have gone on for years, because the legal wrangling was pointless.**

- **It was "just about the money", and we had spent enough – I didn't care about the points in question.**

<u>Fifth, consider Alternative Dispute Resolution</u>

- **George Adams is a very well known Canadian mediator. I've used him as a mediator on two of our matters – and this is what he typically says in his opening remarks to the parties.**

  "This dispute started as the result of a business arrangement between the two of you – no one understands the situation better than you do. This is your chance to resolve this matter. Do you honestly think you'll be better off leaving it to some judge you don't know, who knows nothing about it?"

  – George Adams

- **Be creative – explore ADR, most likely mediation.**

- **Look for an early exit at a reasonable cost.**

- **The parties have to want to mediate – mediation implies a settlement – it isn't all or nothing.**

- **You need a business/strategic mind on the other side.**

- **You need the same thing on your side – and that isn't necessarily you.**

- **You need an activist mediator – a real head banger.**

- **But watch out – mediators have their own agendas – in terms of their reputations, batting averages, and their desire to drive a deal.**

<u>Sixth, never let a player get away</u>

- **This is a rule I learned from my previous Chief Operating Partner – an old poker player.**

- **If you have someone on the other side who knows the game – and is taking tough, but logical, positions that cause you to think long and hard about your potential exposure, costs, etc. – don't let them get away!**

- **Be realistic – even if it's unpleasant – your best play may be to stop the bleeding.**

<u>So – To Sum Up</u>:

1. **"You da man", or should we say, "You da person" – assume responsibility for managing the situation.**

2. **Understand the situation and its implications.**

3. **Get management and your insurers in the loop and keep them there – don't surprise them.**

4. **Select top external counsel and brief them fully.**

5. **Be prepared to spend a lot up front to understand your situation.**

6. **Continue to work with your counsel – focus on strategy and the big picture. Keep asking questions. Don't let them get caught in minutiae, or being penny wise and pound foolish. Ensure you are kept up-to-date.**

7. **Seek to understand the motivations of the other side.**

8. **Look for an early exit – consider ADR.**

9. **Your first loss may be your best loss – if you have a player on the other side, don't let them get away. Try to find their player – their guiding mind – and ensure they are involved.**

10. **Have a player on your side. You need one for tactical and self-protective purposes.**

11. **Absent a catastrophic case like Loewen – or a reputation buster like Enron/Arthur Anderson, litigation is a cost of doing business – and all such cases ultimately go away – try to make it happen sooner, rather than later.**

12. **And finally, what did you learn from the case so as to avoid future problems of a similar nature, or how to handle such matters more efficiently?**

Thank you.

Keith and I would now like to throw it open to you – so please feel free to ask us whatever you'd like.

JOSEPH J. CATALANO is a senior vice president and chief litigation counsel at Union Bank of California, where he manages its litigation group. He is also chair of ACC's Litigation Committee, and immediate past president of ACC's San Francisco Bay Area Chapter. He is a member of the Financial Institutions Committee of the California State Bar. Prior to joining Union Bank in 2005, Catalano was the general counsel of Bay View Capital Corporation, where the legal division varied in size from one to five attorneys.

Union Bank of California is a super-regional bank based in California with $55 billion in assets and 11,000 employees, including 30 attorneys. With a number of multi-state activities including commercial finance, customer trust, and insurance subsidiaries, Union Bank offers a broad array of financial services in both the commercial and retail realms.

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Tips & Insights on:

Litigation Management for Small Law with Joe Catalano

The Importance of Litigation Management for Small Law

The landscape of legal services delivery is currently changing more dramatically than it ever has. The changes are apparent to all, and guiding our law departments through it is an increasing challenge. Directors and CFOs know about massive consequences for electronic discovery failures, and look to us to manage innovation without loss of quality. Each of us must justify our choices of counsel and vendors through the economic delivery of the best possible results. A small law department can deliver best-of-class services if it effectively chooses which services to perform itself and which services to have performed by others it manages.

The Litigation Management Formula

The smaller you are, the more you probably rely on trusted outside counsel in litigation issues. In Union Bank of California's four-lawyer and two-paralegal litigation group, we handle some matters ourselves, such as routine check cases, eminent domain, or condemnation cases where the bank is a secured real estate lender and there are only a few pleadings filed. But if a case is going to require any material court appearance work or deposition practice, we will engage counsel at the outset. Small law departments typically don't have the resources to stand by calendar calls or take protracted depositions. In any significant case, measured by exposure, disruptive effect, regulatory consequence, or ptrecedental opportunity, small law departments should engage counsel from the very beginning.

A small law department can also deliver value to its company by identifying the origins of litigation. In-house counsel can become familiar with the architecture of the relationships that give rise to disputes and learn the context of contentions even before they rise to litigation. Learning the company's risk appetite and investment in any particular outcome is critical in guiding the strategy and tactics of litigation avoidance and success.

Small companies are more nimble and can design processes to resolve matters more easily than large ones. In contract negotiations, for example, a small company might be quite comfortable offering CFO to CFO negotiation of any dispute before commencement of action, whereas larger companies would be understandably unable to offer such a senior executive's participation as a matter of course.

Down to the Specifics …

- **Getting Started.** Do a pre-assignment, early-case assessment of all cases so that you have a good, thorough sense of them before you

Litigation Roles and Responsibilities

- Selection, engagement, and management of outside counsel
- Tracking plans and budgets
- Managing strategy
- Coordinating the law firm's relationship with company personnel
- Litigation holds, including identification of personnel and custodians
- Managing any electronic discovery issues
- Participating in mediation and other opportunities for resolution
- Managing law firms
- Reviewing invoices
- Testing the staffing
- Validating tactics and strategies, in light of response from the other side
- Looking for early settlement opportunities
- Early assessment once the litigation is joined or before the case is at issue

engage counsel. It's critical both in your selection of counsel and also in the early guidance of counsel to have a strong overview of what the case is about. Preliminarily, it's critical to know whether it is a single plaintiff or representative plaintiff case, whether it concerns a pattern of your company's conduct or an isolated incident, and whether the matter arises out of a systemic condition or is an aberrant employee issue.

- **Establishing Relationships with Firms.** If a matter arises for which you do not have appropriate counsel available, look to your peer group for counsel suggestions. When Union Bank doesn't have outside counsel with appropriate experience in the subject matter of a dispute, or in the location where the matter has been brought, we look to ACC or various bank lawyers' groups, as well as to other commercial parties whose experience might be relevant for counsel suggestions. In small cases, we don't go through any particular formalistic process. A strong endorsement from someone similarly situated can be enough to consider engaging a particular lawyer. In-house practitioners currently have much more bargaining power than we did during the internet boom days when it was sometimes difficult to get return phone calls when seeking

In My World . . .

Initiating Litigation v. Early Resolution

We balance possible precedent with the defense cost and the settlement value to decide whether or not to resolve matters at an early stage at Union Bank. We do litigate cases and appeal trial court results that are inconsistent with our understanding of the law. We've had our name on a number of published opinions, with almost every one upholding our view. We are willing to fight and our counter-parties know that.

Fair Relationships with Firms

Like many other companies, we are exploring alternative fee arrangements for legal services. One opportunity for such arrangements is the appointment of rents and profits receivers that are fairly routine, and a flat fee can be arranged for each of them. The same fee is paid whether the matter is uncontested, or contested in a two- or three-day hearing. The fee is set, and reviewed every six months. Initially it can be based on what the fair hourly rate would be for an average case, as a benchmark. But again, it has to be subject to review, and it has to be fair to be sustainable on both sides of the equation. Companies like Cisco, Tyco, and Unocal have all recently negotiated flat fee arrangements with their outside litigators, and the early results are positive.

Peer-to-Peer Communication

I have been active on the Litigation Committee for the past seven years, and truly, ACC's committee system is where many forward-thinking users of legal services meet to share insight and experience. It's amazing how valuable the peer-to-peer communication is, and the responsiveness on the listservs is also very high. It's the willingness and the availability of that peer-to-peer information transfer that's invaluable. We're all so barraged by vendors that even modest vetting by a colleague has tremendous value. If someone I know recommends a company or firm, that's tremendously valuable to me. It's a peer-to-peer data point, it isn't a sales data point.

Peer experience with new approaches is extremely useful to the small law department, as well. The number of innovative approaches to the process of legal services delivery can be overwhelming to any single department. Whether it's a systematic approach to electronic discovery, case management systems, electronic billing, or use of extranets, learning what worked and what didn't from our peers can eliminate a significant number of false starts and miscues. The practice of law is so vast an arena that if you can find the particular focus that the committee structure offers and find people in your particular practice area sharing ideas and current practices, it's a tremendous advantage. In the sea of the law, you don't easily find people with your exact area of interest and current concern, but ACC's committee system does provide a reliable and strong structure to do just that.

Tricks of the Trade

Remember, even if a law firm isn't willing to negotiate their hourly rates with you, you should insist on their best rate with their vendors. If you don't get movement there at least, you're probably dealing with a law firm that doesn't understand that small law departments in active peer groups talk to each other, and we all buy legal services.

counsel for an individual matter. The legal services pendulum has swung toward the buy side after years of law firm control of limited resources. Now, after many law firm mergers, old relationships are being tested. The resulting legal services landscape is populated by larger firms whose growth requires new business. Even if you're not a traditional, blue-line client, law firms need new clientele who are going to introduce them to new practice areas, where their associates can build relationships and acquire practice area expertise.

- **Engaging Outside Counsel.** The engagement of counsel is a process that depends on the nature of the case, your prior experience with cases of the matter and type, and the relevant experience of the attorneys on your current outside counsel list who have done these cases for you in the past.
- **Staying Actively Involved.** Union Bank's in-house counsel stay actively involved in the strategy of cases that are referred to outside counsel. We also require adherence to the litigation plan and budget process, although those can be similar to opinion letters if they contain many exceptions and caveats. Outside counsel must provide a litigation baseline. You understand that things may change, but you still need a baseline, and it's critical you push for that. Your business units are frequently responsible both for any ultimate settlement and the litigation costs. The challenge when you have limited resources is to be more nimble and current, and know what kind of outcome to anticipate in a particular forum or subject matter. To be an effective litigation manager, you need to be an effective risk assessor; staying abreast of what the current trends are can

ACC Resources on . . .
Staff Retention

TITLE	LINK	DESCRIPTION
Memo to Instruct Employees to Preserve Documents	*www.acca.com/resource/v6539*	Sample memo to employees instructing them to preserve and retain all documents related to an administrative law suit.
Response to Due Diligence Request	*www.acca.com/resource/v6498*	A sample of a company's response to due diligence requests submitted by counsel for Purchaser. The focus is on conducting a due diligence in preparation for a sale.
Outside Counsel Evaluation Form	*www.acca.com/resource/v5977*	This evaluation form helps the small in-house law department ask the right questions to ensure the competence of outside counsel.
Small Law Department InfoPAK	*www.acca.com/resource/v4858*	An ACC resource, this InfoPAK contains links to articles and sample forms and policies pertaining to the life of a small law department attorney.
Auditing Outside Counsel Invoices	*www.acca.com/resource/v3645*	This quick reference will help the busy in-house attorney check for the accuracy and efficiency of outside counsel as well as track their billed costs and expenses.
Effectively Leveraging Outside Resources	*www.acca.com/resource/v3354*	This reference discusses how companies can leverage outside counsel to support internal business objectives.

help you avoid being blind-sided. You have to know which business practices carry disproportionate risks and help your client know what practices need to be adjusted to avoid them.

- **Routinely Looking into New Firms.** Although the process of reviewing new firms is not very structured, it does have a natural selective system built into it. This is an incredibly competitive market for law firms, and they are hungry for new clients—large and small. A successful small client will become a successful large client, and law firms know that. Legal work is very portable; firms know they have to be on the cutting edge of the law. They know they have to get consistently good results at reasonably priced rates or the client will go elsewhere—their competitors are just a phone call or email away. Thus, relationships with firms can practically be self-monitoring on the sell side. They know they have to deliver the service and they have to please the client.

Cost Containment Measures

No business can survive for long if it's buying services at unreasonable prices, and the service provider, with any type of vision, understands that. Legal services, like almost everything else, are negotiable. The important point is to open the dialogue, because the vendor is not likely to offer any discounts or favored pricing unless you ask. Here are some tips to keep in mind.

- In the end, all you want is a fairly priced service. Even while recognizing that, litigation managers may be able to negotiate discounted fee arrangements, flat fees, or volume-based billing.
- Even if you are stonewalled on some or all of the attorneys' hourly rates, insist that you receive the firm's best rate from vendors whose services will be billed to you.
- Find out who and where the decision maker within the firm is. The firm may be willing to substantially compromise on the hourly rate for first- or second-year associates, whom you might otherwise not be willing to accept on your matters.
- If you don't bring a significant enough book of business yourself to move the firm to material discounts, see if a trade group or other unifying element can provide that clout.
- Firms understand the law of large numbers. Tell them their good and economical work will be reported to your peers. If you can introduce the firm to a number of small clients with similar issues, such as real estate brokerage or small financial services companies, the firm will benefit from volume, and each of the clients can benefit from sharing the firm's learning curve.
- Even in the smallest start-up, there are fee structures that can make sense—law firms can take equity in them in lieu of fees on a current basis. Small clients grow from success, and good legal services usher in that success.
- Possibilities include hybrid fee arrangements with contingency fee kickers or hourly rates discounted against percentage of recoveries and premiums for expeditious and economical outcomes.

Two Cents

The billable-hour model of law firm billing creates a tension between the firm and the client. If the focus is on the matter only, reliance on the essential trust between client and lawyer is less warranted. The relationship must instead be based on the firm's relationship to the client, not the matter, or it will bounce with great discomfort from matter to matter. Unless there is trust, fee discounts are illusory. If a firm is engaged for a discrete matter, the effect of discounts can only be measured at the end of the matter, and if the client and the firm are looking at services on a matter-by-matter basis, the relationship will almost inevitably be subject to distrust. You must test the fairness of any type of hybrid relationship. Services priced too lean offer a disincentive to pursue "possible" but viable theories, and relationships with inherent imbalance are not sustainable. Every arrangement must be subject to review and reconsideration.

But whatever arrangement you create, pay invoices quickly. It goes a long way to comfort a firm that has stretched to get your business.

Success in litigation management for the small law department, like success in litigation, comes through preparation. But the law department must prepare for litigation long before process is served. Learn your company and its risk profile. See where it's going, not just where it is and where it's been. Learn where your peer group is being challenged in the courts, and who is successfully defending these matters. Build relationships with other in-house practitioners, and test your theories with each other. Collectively, we are our best resource.