

Partnering with Outside Counsel: Effective Techniques

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HEADLINE: Managing Litigation Effectively Through Partnering And Teamwork

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HIGHLIGHT:

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BODY:

Due to cost constraints, most corporate counsel must reduce the costs of legal services. Substantial savings can often be achieved in litigation costs. A recent survey reported that the process costs of litigation (as distinguished from the outcomes -- e.g., judgments, settlements, etc.) averaged 30% of the 1995 budget of the law departments of the 1,000 largest companies in the United States. Savings can be achieved through teamwork and "partnering" with outside counsel, inside counsel and a key business executive joining together in candid communication to seek a favorable result in the most cost-efficient manner possible. Through partnering, the litigation team, among other things, can develop clear litigation objectives and a strategy to achieve them; they can decide to forego litigation activities that may cost more than their incremental value; and they can agree upon alternative billing arrangements, as where outside law firms share the risk of losing and are rewarded if they achieve outstanding results. When inside and outside counsel and business executives "partner", clients receive the maximum representation at the most reasonable cost, and law firms can operate profitably.

Litigation Management Generally

Cost-effective litigation management requires: clear objectives and a strategy to achieve them at the outset of the case; the confidence to forego activities (such as discovery or motion practice) that are not cost-justified; and regular communication between the members of the litigation team.

First, clear business and litigation objectives and a strategy to achieve them must be established at the outset of each case. A well-designed strategy -- i.e., the plan to achieve those goals -- must be narrowly tailored so that each filing, each discovery tactic and each motion advances the cause. Careful analysis at the outset is critical. Activities not directed to clearly articulated goals and strategies result in aimless, excessive litigation.

Second, litigation must be managed tightly at all stages to insure that each activity advances the cause and does not cost more than its incremental value. This requires hard decisions. Whether as part of a total quality management program or otherwise, companies now look constantly for ways to increase their return on every dollar they spend. Even dollars spent on litigation are scrutinized. Counsel must craft an effective strategy based upon a budget, even at the cost of foregoing supplemental discovery or secondary legal research. While

the "bet your business" case may justify leaving no stone unturned, most commercial litigation does not. Certain discovery or motion practice may be only marginally helpful and not worth the incremental cost. Outside counsel must have sufficient confidence in their case and themselves to proceed based on the key evidence or key litigation tactics rather than to insist on a marginally better case at substantially increased costs. Counsel must approach a case with the recognition that even if it involves millions of documents and thousands of potential exhibits, often no more than 10 documents will be critical to its outcome and no more than 100 generally will even be important. Too often, litigators make decisions based upon what is legally achievable or defensible without sufficient regard to whether the achievable result is cost-efficient and makes good business sense overall. Outside counsel must learn to spend a client's money as if it were their own. They must understand clients' concerns about avoiding unnecessary, excessive or frivolous costs.

Third, cost effective litigation requires regular, frequent communication among the team members -- the underpinning of a successful partnering relationship. The goals must be articulated by the client, and the strategies formulated collaboratively by the litigation team. Outside counsel must understand the lines of communication and the standards and procedures for tasks they perform. Inside counsel and the business executive need to be aware of all significant developments in the case and all major activities including discovery pursued, discovery resisted, research undertaken, and motions made. Such communication avoids situations in which the company is billed for work its in-house counsel believes unnecessary. It also insures that outside counsel knows of changes in the long- or short-term objectives of the client and can structure the litigation to achieve those objectives.

The Team Concept

Unfortunately, many companies have not dealt with litigation effectively. Inside counsel often delegate the entire case to outside counsel. In fact, they often abdicate their role, asking outside counsel only for infrequent status reports and occasionally contesting invoices.

Proper management of litigation requires a team effort. There should be at least three team members: the inside attorney, the outside attorney and the business executive. No one person has all the insights and perspectives necessary fully to represent a company's interests. Each different perspective provides something the others lack. This is the basic concept of "strategic strengths." Determining who is in the best position to handle each chore may be difficult in some cases, but it is simplified by approaching the analysis with a view to each person's strategic strengths.

Just like a football team that blends the talents of tackles, guards, tight ends and running backs, the litigation team must have various players to defend its own end zone and to advance toward the opponent's goal line. Also like a football team, the players cannot make independent decisions as to what needs to be done. The more clearly those roles are delineated in advance, the less likely redundant or unnecessary activity by the team members will occur. They need to understand each other's roles.

Two principal tasks of in-house counsel are to determine the legal talents necessary to represent the company in the case in question and risk counseling. Both responsibilities require an understanding of: (1) the basic processes of the dispute-resolution system; (2) the corporate client and its business and other goals; and, (3) the corporate culture and how risk averse the company is. Inside counsel must seek an outside counsel who will be sensitive to that culture and who will understand those goals.

Business executives can assist in reviewing documents and files because they may be more familiar with those documents than the attorneys; use their expertise in the company's business to locate fact or expert witnesses; and provide the business sense necessary to effective litigation management. Further, the business executive must recognize that every case has its genesis in underlying business conduct. He or she must insure that the company learns the lessons that past litigation can provide. If the executives think litigation is "the lawyers' business," rather than the company's business, the company may repeat mistakes that led to litigation because it will be unable to heed those lessons. We have all seen examples of memoranda and letters resulting

in bad verdicts. Each one represented a failed opportunity by its author either to refrain from writing the damaging document or to state the same information in a less-harmful way.

Outside counsel must develop a litigation plan, in consultation with inside counsel and the business executive, and implement that plan. The basic steps of the plan follow: (1) summarize the facts; (2) identify the legal issues underlying the parties' claims; (3) identify the client's legal and business goals; (4) describe the central theme(s) on which the client's legal position will be based as well as the supportive assumptions; (5) develop alternative strategies for presenting that position; and (6) describe the stages through which the case might proceed, as well as a timeline.

Closely related to the litigation plan is the case budget. Litigation costs are difficult to predict, but no more difficult than certain other business activities. The degree of control that either party has is circumscribed, but some understanding of the cost-related implications of how the case might proceed is important.

The budget must represent counsel's best, informed judgment as to how much it may cost to pursue the agreed-upon litigation strategy. It should include an estimate of the litigation-related costs that will not be included in counsel's bills -- e.g., expert witnesses and consultants. Obviously, the initial budget will represent only an educated guess, but counsel must evaluate the costs and value of each included activity. There should be periodic (or frequent) reviews and, as appropriate, revisions of the budget.

Other Cost-Savings Considerations

* Task-based billing can be a valuable tool in controlling litigation costs. Task-based bills summarize the hours and cost of the work performed for each phase of the case. They permit inside counsel to determine the amount of fees attributable to a particular task rather than having those fees presented chronologically; and they permit inside counsel to compare actual costs to projected costs for each category or task.

* Incentive billing can be used to reward efficient and successful counsel. Variations of incentive billing may compensate the lawyer based on the percentage of the amount saved or won or it can take the form of a contingency or a multiple of hourly rates for a "win". This form of billing may also include bonuses for achieving results at various stages. For example, counsel for a defendant corporation might receive a bonus for obtaining summary judgment or for settling within a pre-established period of time.

* Electronic imaging, based upon CD ROM technology, holds the potential to reduce costs substantially because a small team can effectively handle voluminous documents otherwise requiring an army of attorneys and paralegals. Over a million pages of documents can be searched in seconds.

* Outside counsel should send research memoranda to clients in draft form. Court filings require "polish" that may be unnecessary in connection with research memoranda. Of course, all research must be narrowly focused and supervised.

* Continually explore whether a resolution is possible through settlement discussions, mediation or other alternative dispute resolution techniques.

* Use temporary personnel and otherwise "unbundle" services, as appropriate.

Conclusion

Through development of clear litigation objectives, a cost-conscious strategy and candid communication between the members of the litigation team, litigation costs can be controlled and substantially reduced. Commitment to the concept of "partnering" and the willingness to implement cost-saving techniques are enabling inside and outside counsel to work together, in a cost-effective way, to their mutual benefit, but, most importantly, to the benefit of the client.

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