

Litigation Management

Optimizing Your Litigation Results

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Introduction

Executives are correct to cringe when they think about litigation. There are many unpleasurable aspects to litigation, from the expansive freedom typically taken by outside litigators, to the often prohibitive cost, to the uncertain cost. Litigation is distracting and painful – especially if you are on the defense.

However, there are several strategies that companies and their in-house counsel can employ to make litigation manageable and successful. Taking the simple steps in this article can reduce the cost of litigation, improve results, control outside counsel, and achieve success in litigation. These steps can help you manage litigation like a business project.

Conduct a 90-Day Evaluation

The first step to successfully managing

litigation is having a reasonably in-depth understanding of the facts and law of the lawsuit shortly after you receive the lawsuit. I recommend conducting a 90-day issues and theories evaluation of the case. Investigate and review the facts and identify all the significant potential issues within 90 days. Decide which arguments and strategies you think will be successful or damaging. This evaluation allows you to better plan the direction of the case, create

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a litigation budget, find outside counsel with the proper qualifications, better communicate with outside counsel, and address settlement.

It is common to feel wronged and defensive when you have just been sued. When this happens, companies often rush to hire the best lawyer regardless of price, go on the offense, spare no expense so that they show they are highly confident, and wait for updates from their lawyer. By doing this, a year or more can go by before you seriously review whether to settle the case. By this time, you can have spent thirty, fifty, or even one hundred thousand dollars. For all these reasons, a 90-day suit evaluation is critical to a good start.

A 90-day evaluation will give you a bird's-eye view of the case. It forces you to assess the case before you begin blindly defending the case. One of the biggest litigation mistakes is to just



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start defending the case before taking an overall look at the case.

Decide Your Litigation Goals

Deciding your litigation goals is a critical initial step in the planning process. There are a number of factors to consider in setting your goals. Have you been sued by the government? Or, are you in litigation with a competitor? Or a customer? What is at stake for you? Could you lose your IP? Could you lose the ability to sell using a particular method or could you be forced to alter your sales practices? Is it just money that is at stake (as contrasted to a possible injunction)? Are you in state of federal court? Is that docket fast or slow?

Each of these options will lead to different alternatives and goals. Properly developing your goals will lead to a well-considered, thorough strategy instead of a knee-jerk, “we’re going to show them” response.

Use a Litigation Plan

After you have conducted your early evaluation and decided your litigation goals – and if the case cannot be settled (see below in this article) – the next step is to create a Litigation Plan. The plan should contain the case legal issues and how you will attack the issues, investigative requirements, discovery needs, required research, and specific steps to achieve your case goals, the desired outcome of each step, timeline, and budgets. You should include details such as settlement discussions, depositions, and dispositive motions. The Litigation Plan should show how you will move step-by-step to achieve your litigation goals.

Litigation is unpredictable, so your Litigation Plan will need to be revised due to setbacks and shifting tactics of your opponent. It will also inevitably not contemplate an important future event, so with the passage of time you should plan to regularly revisit and revise your Litigation Plan.

Play an Active Role

It is a challenge to manage outside counsel. Some big law firms seem to think they should make decisions for you or think that you do not have enough experience to ask the right questions. For these reasons, big companies use inside counsel to manage outside counsel. If you do not have a Law Department, it can be hard to effectively supervise litigation. Who should do this for you? If someone at your company has prior experience managing outside counsel, they may be well-suited to this difficult task. This person should take an active role in every litigation phase.

In general, how can you manage the litigation? You must demand the right to make all decisions. To do this, create an understanding with outside counsel as to how you will work together. You must manage the outside service provider, not vice versa. Ask them questions constantly, ask to be updated, and

Your Litigation Plan and a budget are two of the best ways to control costs.

ask them “why” a lot. Be upfront with outside counsel as to what you expect from the representation and what results you desire. Communicate your guiding principles to outside counsel.

Have outside counsel routinely give you progress reports and give you copies of motions, briefs and documents. You own this work product because you have paid for it; outside counsel should freely share this with you. If your company has inside counsel, have them review pleadings and motions in advance. Inside counsel will also need to review deposition transcripts and discovery to be properly involved in the case.

Stay on top of case developments. Use a Project Management System to track filing deadlines, investigations, and research. Microsoft Project is useful Project Management software for this task. MS

Outlook is a good calendaring system to keep track of key dates, important deadlines, completion of accomplishments and other time-sensitive information. Or, ask outside counsel to make litigation details available from their matter management system.

Hire the Best Outside Counsel

Choosing counsel is a very important decision. As with all service providers, different lawyers have different abilities and communication styles. Choose counsel who meets your needs. Use a systematic approach when hiring outside counsel. Conduct due diligence on each potential attorney before hiring him or her.

You should assess several outside counsel in order to find the best attorney. Verify their litigation experience –the number of first chair trials, types of trials, success rate, methods and number of federal versus state trials. Do they have state agency tribunal or international experience? Ask the candidates for their proposed preliminary strategy for your case. Some attorneys may protest that they cannot give you free advice. However, you need to test their thinking. In my experience, this is a “must” and you should find another attorney if the prospective attorney will not provide this analysis. Also be sure you have the right chemistry with your prospective attorney.

Finding a great attorney should not be a problem if you look in the correct places. Some helpful resources can be referrals from colleagues or other attorneys, competitors, trade associations, friends, your current attorney, local bar associations, attorneys who have authored articles related to your legal issues, internet resources such as Martindale and the attorney’s website.

Paying Outside Counsel

Think about how you will pay outside counsel. Hourly billing is the predominant method and it works well in many litigation situations – contrary to

popular misconceptions. The reason the hourly rate works is that the attorney is only paid for work completed (ethics rules prevent the attorney from billing you for services not provided if they are using hourly billing). Nevertheless, the hourly billing method is successful only if outside counsel spends time on activities which optimally support the Litigation Plan, and if outside counsel does not engage in unnecessary activities.

One of the best methods to manage legal costs is to use task-based billing. It keeps track of how much

There are many good alternatives to the hourly rate.

time is being spent on particular litigation tasks. You start by dividing the litigation into discrete tasks, such as dispositive motions, written discovery, depositions, pre-trial preparation, trial and appeal. Then, counsel gives you a budget for each task within these categories. Each month, counsel’s invoices show actual monthly and total-case expenditures against each task. Now you can successfully compare actual expenditures to the budget, just like any other business project.

Task-based billing is more than simply tracking an attorney’s hours; it is a system to find out how much time an attorney spends on specific tasks. With this method, you should be able to pinpoint exactly where your money is being spent and you can spot inefficient work. If an attorney is billing too much time on a task, redirect his or her work per the Litigation Plan. Doing this will make litigation more cost-effective and more useful for your company. Your Litigation Plan and a budget are two of the best ways to control costs.

Billing Alternatives

However, there are alternatives to the hourly rate. One alternative is the flat fee. A flat or fixed fee is difficult to obtain because most attorneys do not want to take a loss if they underestimate the time required for the case or if the opposing party

engages in unpredicted, excessive, or irrational tactics. So, attorneys will often add a significant premium (10-40%) to the estimated time due to this risk. Or, they may not invest the proper time in the case if later they determine they underbid it. Of course, there will be variations from the budget due to unexpected actions by your opponent. It may be fair to then pay this deviation from budget.

Usually, flat fee pricing is used for recurring, similar claims (e.g., product liability cases for the same product). If you have prior case experience for similar matters, you can use this fee data to more accurately forecast a fixed fee. Setting a flat fee for an individual task is an alternative to the all-case flat fee. However, you usually need to have negotiating power and information to persuade outside counsel to agree to a flat fee.

An additional alternative is a discount from published hourly rates. This usually takes the form of a percentage. Five to ten percent is often available just for the asking if you are a good customer.

Another alternative to the hourly rate is a success fee. With a success fee, the attorney gets an agreed bonus for pre-defined success. It is important to properly define success. Success could be merely obtaining a certain dollar verdict or settlement, or, if you are defending the case, it could be achieving settlement below a certain dollar figure or avoiding an injunction. Many times, a success fee is combined with a lower hourly rate.

There are several success-based fees structures to save you money, such as the ACES® method. In this method, the client pays 80% of the ordinary hourly rate and reserves the other 20% until the conclusion of the case. Using this method, the law firm will receive anywhere from zero to three times the withheld 20% based on pre-defined success. When you use this method, your law firm has some stake in the game and has greater incentive to achieve your stated goals.

Some in-house counsel consider a success bonus useful because the bonus gives outside counsel an incentive to achieve a desired result and minimize costs. However, some other in-house counsel are leery of success or merit bonuses. These in-house counsel believe that forcing law firms to accept limits on their fee arrangements will result in diminished outcomes because the attorney might not do something because the attorney would not have been paid for it. When considering a success bonus scheme, weigh these important considerations. One other often-used method is blended rates (having one rate for all lawyers at the firm).

There are non-billing methods to reduce fees. You may choose counsel from smaller firms so that you get greater attention from the firm. Or, find firms in smaller metropolitan areas where the cost of living and cost of legal services is lower. The quality of legal work is consistently high across the U.S., but rates are lower in smaller towns and smaller firms. Do not overlook this cost-saving opportunity.

Many companies successfully reduce fees by implementing billing guidelines. Properly drafted billing guidelines will disallow, for example, first-class plane tickets, charging for travel time, intra-office conferences (i.e., two or more lawyers charging you for time in conferring with each other), third-party research costs, secretarial overtime, and other items. You should also require lawyers to prepare their time sheets daily, not weekly or monthly in retrospect.

Alternative Dispute Resolution (ADR)

Many companies have successfully used mediation and arbitration to settle cases. You can save time and money with these methods, while achieving a comparable result to a trial. It is a clear consensus in the legal community now that it is wise to consider ADR in the right circumstances¹. Twenty years ago this was not true. This is especially true if liability is not significantly in question and the case is mostly just a question of the assessment of damages.

¹ ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution", Stipanovich (2004)

There are a number of ADR alternatives – mediation, arbitration, mini-trials, summary jury trials, and non-binding evaluation or assessment. The two primary alternatives I will discuss are mediation and arbitration.

There is no consensus on which of arbitration or mediation is preferable. In our opinion, the choice between the two must be made on a case-by-case basis. It will depend on the issues, risks, costs, and the personalities of the corporations and decision-makers.

Mediation

Mediation is non-binding and amounts to supervised negotiation. Mediation is conducted pursuant to a Court Order, a contractual clause requiring mediation of disputes, or a negotiated, written Agreement between the two sides. The Agreement or Court Rules will lay out all the operating rules of the mediation.

Both parties choose a mutually agreeable mediator. This person should be knowledgeable of the industry and legal issues involved in the dispute. Like arbi-

A good mediator can use multiple useful methods to reach consensus between the parties.

trators, mediators often are retired judges. The parties will usually each present introductory arguments with everybody in the same room. Then, the parties will retire to separate rooms and the mediator will shuttle between the two rooms trying to understand the case and each party's needs. He or she will try to persuade both parties of the weaknesses of their cases and the reasons to settle. Different mediators use different methods to reach agreement between the two parties. A mediator will never reveal your confidences. I have found that this new perspective of the mediator gives the parties a better appraisal of their case than the previous subjective (perhaps even too rosy) assessment of the litigating party.

Arbitration

Arbitration is the equivalent of a low-cost, mini-trial. The parties present evidence, including witnesses and documents – just like at a regular trial. The arbitrator is the decision-maker. Arbitrations have a limited scope, thus it is usually much cheaper to conduct arbitration than a trial. As with mediation, the arbitration could be associated with a Court Order, a contractual clause requiring arbitration of disputes, or an Agreement negotiated between the two parties.

Arbitration can be binding or non-binding. If the parties agree in advance to make it binding, then the parties are bound by the award. If it's non-binding, either party can decide not to accept the award and continue with the litigation.

The decision-maker can be one arbitrator or a panel of three arbitrators. As with mediation, the arbitrators should to be trained in the legal issues and the industry at issue. Arbitrators will usually be retired, ex-Judges or highly experienced trial attorneys.

The downside of ADR is the time and money expended if the case is not successfully resolved. The other risk is telegraphing your case during ADR. However, ADR often succeeds so these downsides can be worth it. If ADR is unsuccessful, the parties can continue with the litigation. For all these reasons, be sure to give thorough consideration to using an ADR alternative.

Early Settlement is Often the Best Settlement

When should you approach settlement? The answer is as early as feasible. Companies should rigorously assess settlement during the 90-day Evaluation and periodically thereafter. When you address settlement early, both parties have usually by then spent little money and therefore the case can be settled for less. Ordinarily, you will need to obtain some minimal information (discovery) before you settle the suit. Since by settling early you may not obtain as much information as when a case goes through full discovery, you may have to be willing to accept

more risk. However, you should be comforted by knowing that in most cases the most damaging information is found early, before exhaustive, full discovery.

Many attorneys believe that being the first party to suggest settlement shows weakness. Yes, the other side can interpret it that way, but with most commercial business litigation it is almost always in every party's interest to determine the other side's settlement framework as early as possible. Anywhere from just one percent to four percent of cases go to trial, depending on the court system.² So if you address settlement early you may settle for the same amount as later in the case, but by settling early you will save litigation fees, time, and energy. Therefore, it is wise to settle early while you have little invested in the case. Of course, sometimes you cannot settle if the other side wants too much or if an important policy or practice is at stake.

Many attorneys do not spend enough time vigorously exploring settlement options early. Many times, if you open the door to settlement and work hard at it you will obtain good results. With this rigorous exploration of settlement, you may also be able to agree to non-monetary settlement alternatives such as a license or different damage assumptions. It is painful even talking to the other side, but you probably both want to save money. Therefore, even if you think you can win, you should strongly consider settling your cases as early as possible. If early settlement is not achievable, then you can carry on with the case and you have lost little.

Maximizing Your Settlement

Advanced, quantitative settlement/risk analysis methods have been developed which could be useful for you. The foremost method is Decision Tree analysis. In addition, other methods such as Probability Distributions and Sensitivity Analyses have been successfully used. These quantitative methods isolate individual, dependent and independ-

ent events in the suit, assess probabilities, integrate information, and perform analyses to determine the value of alternative pretrial and trial strategies. These methods go beyond the ordinary intuitive analytical processes and can be very useful. Companies offer training in these analytical methods. We recommend that companies with repetitive litigation train their litigation managers in these methods. You should then study the results achieved by these methods, modify the methods to suit your practices and implement these processes to optimize future settlement decision-making.

Getting Help

Some lawyers specialize in assisting other lawyers in Litigation Management. These specialists can assist on a one-time, consultative basis with one lawsuit, or an on-going basis with multiple suits, or can review your litigation system. They can help double-check your decided strategy, your overall practices, your assumptions about the Judge presiding over your case or give you a second opinion on an individual issue. When functioning in this capacity, this type of lawyer can be the most effective money you spend in the litigation.

Executives and in-house counsel can achieve significantly improved litigation results.

What qualifications should you look for? The attorney should have experience managing large litigation nationwide and worldwide. She should be familiar with the best practices of litigation management such as 90-day evaluations and Litigation Plans. If they also have legal audit experience, this is a plus. In my experience, the best candidates for this work have been ex-in-house attorneys. Litigation management is one of the key functional jobs for some in-house counsel and in this environment, an in-house counsel learns invaluable skills.

² See both Manner of Disposition for General Civil Filings in General Jurisdiction Courts, National Center for St. Courts (1999) and Judicial Business of the United States Courts (2004)

Conclusion

Using these methods and a new mindset as a framework, executives and in-house counsel can achieve significantly improved litigation results. Improved litigation management begins with establishing written goals early, knowing what needs to be accomplished, and tracking progress and fees. These issues should be addressed in your 90-day Evaluation and then in your Litigation Plan. Implement your Litigation Plan by hiring an effective attorney, arranging the best legal-cost structure, and keeping close tabs on your attorney. Be actively involved. Do not forget to ask questions of your attorneys and to stay on top of the litigation. With these straightforward steps the daunting task of litigating or settling a matter can become more successful, easier and less expensive.

This article does not constitute the giving of legal advice. Please seek legal counsel who can assess your individual legal situation in compliance with the law.

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