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How To Litigate Successfully: *Part III – How To Reduce Litigation Costs*

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Editor's Note: This article is the third in a series of five articles which will appear in The Metropolitan Corporate Counsel.

There are two very simple reasons why litigation costs have spiraled out of control. First, attorneys are motivated to do as much work as possible (much of it unnecessary) because it generates fees for their firm, in turn justifying their compensation. Second, corporate counsel often hire expensive, big name law firms for the political "cover" it provides them in the event the ultimate disposition of the litigation is unsatisfactory. The confluence of these factors is that cases are often "over-lawyered" (and over-billed).

Yet, it is easy to reduce litigation costs without sacrificing quality or compromising results. Most corporations could cut their litigation costs in half without adversely impacting the outcome of any of their litigation matters. This article will specifically identify and address those areas where billing excesses occur on a regular and ongoing basis.

Litigation Philosophy

Cost containment is a legitimate and essential aspect of a client's litigation philosophy. In short, the goal is to win as quickly and as inexpensively as possible. Unfortunately, too many large law firms have just the opposite

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philosophy. It is often their objective to keep the case (and the billing) going as long as possible and then to resolve it at the last possible moment so as not to risk an embarrassing loss in the courtroom.

Good and honest attorneys know what is truly necessary to their litigation strategy and what is not. Contingency attorneys routinely prove this as they fund their own litigations and do so successfully. Accordingly, while in-house counsel need to be respectful of their outside litigators, outside litigators must, in turn, be respectful of their client's financial considerations. It is a balance carefully

achieved by the experience, wisdom and integrity of those involved.

Litigation Budgets

Outside counsel should be required periodically to submit a proposed cost budget. While it may be difficult to predict with certainty, it is paramount that cost be considered at all times. It is the client's decision whether certain work proposed is worth the cost. A budget, as discussed here, is a reasonable prediction based on then current knowledge. It is not expected to be exact but it should be close to the ultimate number incurred, barring truly unforeseeable circumstances. It should not be

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viewed as a restraint, a limit or a hindrance but rather recognition of and respect for the client.

When setting forth an anticipated budget, outside counsel should include detailed estimates for all legal work including document discovery, court appearances, motions, depositions, experts and other disbursements. Each subsequent report should indicate if outside counsel is within budget or if budget modifications or changes need to be made, and if so, why. Such a requirement focuses outside attorneys on the issue of client cost while keeping in-house counsel informed along the way.

Billing Tips

Billing becomes problematic when the rules aren't clear from the start so we respectfully suggest consideration of the following guidelines:

1. Rarely is there a need for more than one attorney to be present at court conferences or depositions. It is usually an unnecessary expense for a law firm to send two, three and sometimes more attorneys to argue a motion or attend a conference. Why clients tolerate such excesses is inexplicable. Reduce the number of attorneys working on your files and ensure that after the first two or three attorneys are involved, there is no charge for additional attorneys to "get up to speed."

2. Motions should not be made without the permission of in-house counsel. Most motions are unnecessary and almost all are absurdly long and quite costly. Litigators should make every attempt to resolve issues by letter or phone call. If these far less costly options are unsuccessful and the issue is truly important, a telephone conference with the judge, magistrate or law secretary usually resolves the issue as they themselves do not want another motion. Only if the court advises the attorneys that a motion is necessary to resolve an issue should one be made. Outside attorneys should have to justify to the client why the motion is important to be made, the merits of their position, the chances for prevailing and the anticipated cost.

3. Depositions are another area rife with abuse. Far too many are done for no real reason and at great expense to the client. Deposition costs add up with preparation time, travel, the cost of the transcript and then its subsequent review. Instead of automatically depositing everyone under the sun, your attorneys should try to get a signed witness statement. It's easier, better, more effective and often achieved at a fraction of the cost. Only truly material witnesses should be deposed.

4. Limit the number of intra-office conferences your attorneys bill.

5. Legal research requiring more than 10 hours on any one issue should be approved in advance. Verify that your attorneys are not outsourcing their research or other legal work to India at \$12/hour and then billing you at \$600/hour.

6. Agree in advance on reasonable rates for partners, associates, paralegals, etc. There

is simply no need to pay more than \$500/hour to obtain top-notch legal talent and considerably less for quality associates. Rates should not be increased during the pendency of a case without your permission.

7. Decide up front how often you want to be billed and the format of the bill. Most clients prefer to be billed monthly. Requiring your outside firms to use your format allows you to more easily compare bills from case to case and from firm to firm.

8. Bills need to be periodically checked to see that you are paying reasonable rates for faxing, copying and computer charges.

Investigation And Experts

Outside litigators should recommend needed investigation providing general counsel with their reasons for the request and what they expect to be gained by it. Investigations should be conducted by well-respected professionals but not necessarily the biggest firm in the country or the world. There are many effective local investigators including former police officers and FBI agents who will gladly provide effective services at reasonable prices. As with all outside services suggested by your litigators, the request for your approval of such work should be accompanied by an estimated cost for the assignment. The same is true for experts. These estimates and the experts' curriculum vitae should accompany the litigator's request for your approval.

Reporting To The Client

Accurate and informative reporting is required if in-house counsel is respected by his/her outside attorneys. The goal of reporting should be to provide the client with facts, observations and opinions on how best to bring the litigation to a successful conclusion. Oftentimes, litigation reports say nothing at all about winning but merely regurgitate page after page of every nuance (no matter how immaterial) that has occurred since the last report. Most firms send overly long reports containing irrelevant information imparting very little helpful knowledge to general counsel. Once again, it depends on the objectives of the litigators and their respect for the client.

Reports should be short, to the point and address the client's goals. In general, reports should be provided within 20 days of being retained, after pleadings, after discovery, after depositions and before trial. The initial report should provide a simple statement of the facts and how the litigators view the case. This litigation report should indicate what information or investigation is needed. Further, it should set forth a proposed litigation plan for pleadings and discovery.

After pleadings, outside counsel should inform the client if there have been any changes in how they view the case. This report should contain a current opinion as to the strengths and weaknesses of the client's position, a discussion of liability and damages, a proposed plan for discovery and an outline of steps necessary to bring the litigation to a suc-

cessful conclusion. It should also contain a projected budget for discovery. Having to propose a budget forces outside counsel to consider the necessity and breadth of anticipated discovery and the cost/benefit of pursuing it.

The after-discovery report is important in advising the client whether the case is on course as previously predicted in earlier reports and, if not, why not. It is a time to realistically assess the case and re-evaluate the strategy. Depositions should not be taken without good reason. The report after depositions should be able to tell the client everything there is to know about the case, chances for success at trial and whether motions would serve a beneficial purpose. Finally, there is the pre-trial report which very specifically lays out the case for the client so that in-house counsel can knowingly assess the situation and determine the client's best interest. By this time, general counsel should have received at least five reports allowing for a reasoned judgment as to how the case has progressed and how accurately outside counsel has reported and positioned the case for a successful outcome.

To improve reporting, there should be periodic meetings in person if the client and law firm are within reasonable driving distance or telephonically to discuss status and case direction.

Conclusion

Corporate clients should look to themselves when confronted with runaway litigation costs. There are many successful litigators who would readily agree that the guidelines described in this article are fair and reasonable. In general, it is our experience that corporations are grossly overpaying on an hourly basis as well as paying far too many attorneys to work on their cases. Much of the work being paid for is unnecessary and unrelated to the ultimate result. This is easily verified by checking a file that has recently closed after many years of litigation. How many depositions actually made a difference? What did all the discovery reveal that changed the course of the case? How much money was spent on motions and to what end? Did you really need as many attorneys working the file? Could you not have found more efficient attorneys at significantly less cost?

With the suggestions proposed here, most responsible corporate counsel can quickly and easily reduce their litigation budget without compromising the quality of services or sacrificing results. General counsel should regularly monitor the "life cycle" of their files to know how long it took and how much it cost to reach settlement or verdict. Such monitoring should also provide an "average cost per file resolution" enabling in-house counsel to assess the effectiveness of their outside litigators. And outside litigators should readily and willingly participate in these analyses with corporate counsel. By doing so, value will be added to the attorney-client relationship, and effective measures can be implemented to significantly reduce litigation costs.