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## How To Litigate Successfully: *Part IV* – *How To Monitor Ongoing Litigation*

David J. Meiselman  
and Jeffrey I. Carton

MEISELMAN, DENLEA, PACKMAN,  
CARTON & EBERZ P.C.

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

Prior articles in this five-part series have discussed when to litigate, how to litigate and how to reduce litigation costs. While the common theme underlying each of these previous articles has been open, candid and straightforward communication between in-house counsel and his or her outside litigation team, this article concerns effective and practical tips as to how to monitor ongoing litigation. The fifth and final article in this series will candidly explore how to choose outside litigation counsel. This article assumes, therefore, that outside counsel was wisely chosen and that in-house counsel desires effectively and smartly to monitor their outside litigation team.

*David J. Meiselman and Jeffrey I. Carton are Senior Litigation Partners in the White Plains firm of Meiselman, Denlea, Packman, Carton & Eberz. The firm represents plaintiffs and defendants in State and Federal Courts throughout the country. Messrs. Meiselman and Carton have been selected by their peers for inclusion in "Best Lawyers" and "Super Lawyers" and to the top 25 New York Super Lawyers™ list for Westchester County.*



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### Periodic And Meaningful Reporting

At the outset of any litigation, in-house counsel and their outside litigators should plainly and simply articulate for one another the yardsticks by which developments in the case will be measured and reported to in-house counsel. Whether these yardsticks are a function of time such as monthly or quarterly reporting, or substantive developments in the case, e.g., pleadings, paper discovery, depositions, dispositive motions, etc.,

having a clear understanding from the outset as to what triggering events will result in reporting requirements is paramount.

In-house counsel should require their outside litigators to report developments in the evolution of the case in the context of how those developments impact upon the ultimate disposition of the matter. General counsel should not rely merely on a regurgitation of the facts and circumstances elicited through paper and deposi-

*Please email the authors at [dmeiselman@mdpcelaw.com](mailto:dmeiselman@mdpcelaw.com) or [jcarton@mdpcelaw.com](mailto:jcarton@mdpcelaw.com) with questions about this article.*

tion discovery but, rather, should require outside trial counsel to report those developments as they impact upon the strategic course of the litigation. For instance, it should not be sufficient for outside counsel defending a charge of employment discrimination merely to parrot back for in-house counsel the allegations of discrimination that the former employee remarked upon at her deposition. Rather, outside trial counsel should comment upon the remarks and whether they provide a basis on which the plaintiff will be able to sustain her burden of making a factual proffer from which to sustain her claim of employment discrimination. Likewise, outside counsel prosecuting a plaintiff's breach of contract action should not merely serve as a messenger in reporting the facts established at the defendant's deposition, but should remark upon how those facts are likely to be perceived by the ultimate trier of fact and how to combat the inferences that a jury will be asked to draw by the defendant.

#### **Set Meaningful, But Realistic Budgets**

An equally important tool by which to monitor ongoing litigation is a constant cost-benefit analysis concerning the actions taken by trial counsel and how the ultimate objectives of the litigation are being furthered. At the outset of the litigation, trial counsel should have provided you with a projected budget to coincide with the various phases of the litigation. In-house counsel should not be reticent to ask their outside litigation team whether that budget is being followed and if not, what has caused a departure from the previously established budget. Likewise, outside counsel should be asked to justify any meaningful deviations or departures from the previously agreed to budget and to offer their perspective whether such a deviation has meaningfully advanced the objectives of the litigation. If, as often happens, outside counsel's actual time and expenditures are widely at odds with the projected costs of the litigation, then outside counsel does not have the respect for the client relationship which outside counsel should otherwise demonstrate. Under such circumstances, general counsel should either insist that some portion of future billings be done without charge so as to ensure that the litigation gets back on track for the original projected budget, or in-house counsel must watch future billings with a more careful eye. While the latter course requires greater involvement and vigilance by general

counsel, it can be achieved by putting the onus on outside counsel either to increase the frequency with which they report or to articulate (and honor) strict time parameters in which upcoming tasks in the litigation will be handled.

#### **Be Active, Not Passive**

Another equally effective tool to monitor ongoing litigation is occasionally to appear at a court conference or a deposition. While this presumes that you have the time to do so, often observing a judge or arbitrator's visceral reactions to your outside counsel's presentation and the favorable or dim view in which they react to counsel's presentation will speak volumes concerning the ultimate disposition of the litigation. Similarly, your involvement at one or two carefully selected depositions will give you tremendous insight as to the effectiveness of your counsel's questioning, the demeanor of opposing counsel and whether the strategic direction charted by outside counsel is advantageous to you. Such active involvement will also keep outside counsel honest in terms of the hours billed to the matter as outside trial counsel will realize that you are not relying on them simply for feedback concerning developments in the case, but for honest and accurate assessments of the anticipated time and cost associated with the litigation.

#### **Take Responsibility For Routine Tasks**

In addition to taking a proactive role monitoring outside litigation, in-house counsel should also seek to delegate to personnel within the company tasks that can be readily achieved without the concomitant costs of having outside counsel perform them. For instance, reviewing company personnel emails and files for materials responsive to document demands, preparing chronologies of relevant facts, outlining deposition testimony, and similar document-based projects are the types of matters that in-house personnel can often accomplish far more efficiently than relying upon outside counsel to prepare. As the senior members of your outside litigation team are likely delegating these tasks to more junior personnel (or paralegals) within their firms, there is no reason why companies cannot "deputize" in-house personnel to act as junior staff members for more senior outside trial counsel. Not only is this an effective way of monitoring developments in real time, but it also ensures greater lines of communication

and stronger bonds between your company and outside counsel.

#### **Play Devil's Advocate**

As foreshadowed in an earlier article in this series, one of the most critical tools in general counsel's arsenal by which to monitor ongoing litigation is simply to ask "Why?" Ask outside counsel why they have chosen to embark upon the path they have and what the anticipated response will be by your adversary. Asking outside trial counsel to anticipate your adversary's next move and to formulate the necessary rejoinder will help craft a litigation strategy that is far more likely to prevail. You, as in-house counsel, must continue to inquire of outside trial counsel what your adversary's next move will be in response to your next parry so that moves and countermoves are being contemplated well in advance of their actual occurrence.

#### **Schedule In-Person Meetings**

If geography is not a constraint, in-person meetings are a tremendous tool by which to monitor ongoing litigation. Such meetings require outside counsel to present developments in a logical, orderly and coherent manner which should instill confidence in you that your trial team will also be able to do so before the ultimate fact finder. Also, in-person meetings eliminate many of the unnecessary formalities and trappings that one typically associates with written reports. Everyone knows a "CYA letter" when they receive one, and such rhetorical caveats are often more difficult to fall back upon in person when you, as in-house counsel, have an opportunity immediately to challenge them. Similarly, in-person meetings help solidify the bonds between client and counsel that are intangible but necessary for an effective presentation in a courtroom. These ties should be forged as often as possible and too often are not forged until too late in the litigation process.

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Monitoring ongoing litigation is part art and part science. Much has to do with the interpersonal dynamics between you and outside counsel, and as with all interpersonal relationships, candid, straightforward and honest communication is the key ingredient. By requiring trial counsel continually to articulate the rationale of the litigation strategy and how developments have furthered that strategy, in-house counsel will be well poised to monitor ongoing litigation.