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IN-HOUSE FOCUS



LITIGATION COSTS

Getting A Bigger Bang for Your Litigation Buck

5 Tips to Minimizing Costs

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LITIGATION IS TIME-CONSUMING, stressful, and—in our experience—can produce early onset gray hair. But, most of all, it's expensive. Oftentimes, very expensive. But there are steps companies can take to control litigation costs and maximize the value of outside counsel.

Here are a few we've learned over the years:

1. Work together on the budget. When preparing a litigation budget, in-house counsel and outside counsel should work together closely. The process of creating the budget is oftentimes as valuable as

the final written document itself. Discussing billing expectations, likely scope of discovery, the need for experts, expected motion practice and potential trigger points can all help maximize efficiencies and minimize unwanted surprises. Budgets should also be reviewed periodically and revised as necessary to account for changed circumstances. Litigation is predictably unpredictable, so budgets are only as good as the efforts put into creating and maintaining them.

2. Communicate early and often. Don't assume outside counsel knows what in-house counsel wants: Make it known from Day 1. Clearly convey expectations, desired outcomes and any hot-button issues. Consider scheduling regular calls with outside counsel



to assess how things are going. If issues or concerns arise, address them quickly; Don't let disagreements linger.

Here are a few other issues we think are important to discuss early on:

- Who is the designated leader of the outside legal team? Without a clear leader, productivity, consistency and direction are often sacrificed.
- Is the team staffed adequately, but not overstaffed? Too many lawyers on a file naturally leads to less efficiency and higher bills.
- What process is in place to ensure tasks are assigned to appropriate-level team members? Are partners doing associate-level work?
- What capabilities does the in-house team have in areas like e-discovery, records collection, witness preparation, business-specific technical assistance, etc.?

The answers to these questions directly impact the cost of litigation. By setting clear expectations at the outset, in-house counsel can help ensure that outside lawyers know how the company defines success, and can limit budgetary and strategic surprises down the road.

3. Stay involved. Contrary to popular belief, in-house lawyers often spend as much time in the office



as their outside colleagues, and in an age of corporate austerity, they are frequently stretched thin in the time department. Nonetheless, it's important that in-house counsel actively participate throughout the litigation process. Without in-house counsel's support, outside counsel's job is more difficult and the bills are likely to be higher. We are not suggesting micromanaging capable attorneys, but we do encourage being an integral part of the team.

Active in-house counsel participation also, in our experience, leads to better litigation outcomes. Engaged in-house lawyers are better equipped to make smart decisions for their company. And all but the greenest of in-house

lawyers will have better insight than outside counsel into risks the company faces beyond the courthouse (consumer relationships, third-party contracts, shareholders, investors, etc.). In-house lawyers are also well-positioned to play devil's advocate, prevent "group think" and ensure that outside counsel's strategy comports with company ideals and goals.

4. Work backwards. As baseball legend Yogi Berra said, "If you don't know where you're going, you'll end up someplace else." So, a good place to start is to ask what the end will look like. Specifically, what will be on the jury charge? What testimony or evidence will be needed to prove the elements?



What's the best and most efficient way to get that testimony or evidence? These important questions should be addressed before discovery begins and should be re-evaluated as the case progresses.

How many a poor trial ad professor has preached about the importance of drafting the charge at the outset of a case only to have this sage advice promptly forgotten as soon as their young charges leave the academy and start down the hourly billing path? Too many in our experience. But focusing on the charge early in the case is one of the best ways to keep discovery efforts focused on the important issues while minimizing expense for interesting but ultimately low-value issues. In-house counsel should ask outside counsel for a draft charge early on and should use it throughout the case to gauge the likely benefit of costly discovery.

5. Invest early to save later. Early development of trial-focused themes and identification of hot-button issues likely to resonate with a jury is another good way keep discovery focused while improving the odds of success at trial. Investing the time and money to brainstorm potential themes with a jury consultant and or conducting focus group or other mock juror exercises early

in discovery can pay big dividends in the long run and can end up saving money on the back end. Here's how:

- Why travel down many paths if only a few are needed? Early theme development helps narrow the issues for discovery, and ensures that issues likely to be persuasive to a jury are identified and vetted.
- Sometimes, less is more. Early theme development also helps minimize the "noise" of the unimportant issues that can confuse decision makers and lead to unfocused trial strategy. Judges and juries want to know what's important, not every detail.
- Have the right storytellers. Some witnesses who might otherwise appear peripheral or legally irrelevant should nonetheless play an important role in trial presentation by virtue of their position, credibility or personality. Such witnesses can be critical to juror decision-making and focusing on trial themes early can help identify these people.

The only thing certain about litigation is that there are no certainties. Unexpected developments are the norm. That's why it's such a challenging, interesting

and expensive area of the law. By engaging early, working closely with counsel, communicating often and planning strategy with the end in mind, in-house counsel can help their companies minimize the costs of litigation while improving the odds of winning.



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