

Managing The Cost Of Litigation

ONE OF THE MOST CHALLENGING – YET critical – aspects of litigation is controlling the cost. Regardless of the size of the matter, it is essential

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that both inside and outside counsel carefully develop and pursue a strategy that can be expected to yield a net benefit, or at least minimize the overall risk. This is no easy task given the inherently unpredictable nature of litigation. And, while you certainly cannot control your opponent or the judge, there are many costly variables that can be contained by exercising prudence, assessing potential outcomes early in the case, and engaging in frequent and thoughtful communication with your litigation counsel and the individuals who are privy to the key facts.

Assess Your Case

To control costs, you must foresee the possible eventualities and, to foresee the possible, litigation counsel must understand the case. Understanding the case includes an assessment of the causes of action and defenses, the salient facts, the judge, the opposing party and counsel, local rules, deadlines and potential damages, among other components. This entails investigation and communication with the knowledgeable business persons. Counsel should endeavor to assess not only the client's positions and perspective, but also any bad facts and legal hurdles in order to anticipate the opposing party's position, devise effective strategy and develop an informed budget. Managing litigation costs requires an early investment of time to avoid expensive surprises that will undermine decision-making down the road.

Carefully Consider Whether Litigation Is Appropriate

Inside and outside counsel should determine whether litigation is actually the most efficient or effective means to achieve the overall business objectives. In some cases, the best approach to managing costs may be simply to avoid litigation altogether. While this may seem like obvious advice, parties often resort to litigation without fully appreciating the costs and benefits. Defendants may not have a choice, although any pre-litigation opportunities for resolution

should be carefully assessed. Where your chances of success multiplied by the potential gain are easily outweighed by the likely cost, the choice to avoid litigation, or to at least pursue a business resolution outside of litigation, is a simple matter. Clients hoping for a quick resolution of even a small dispute should be advised that once the judicial process is in motion, obligations to the court and associated deadlines will be imposed, counsel will be engaged by both sides and, consequently, the opportunities to exit the litigation for a satisfactory price may be limited.

Agree Upon the Desired Scope of Litigation Efforts

If litigation is the appropriate course of action, inside and outside counsel should reach consensus as to the desired scope of litigation efforts. Although there are many things that are beyond a litigant's control, parties can control a number of variables, including the claims they elect to allege, the entities or individuals against whom claims are brought, and the discovery that will be pursued. Outside counsel must advise clients as to the costs and benefits of various strategies because, while looking under every rock and pursuing every possible claim may have its advantages, these pursuits may not be cost-effective relative to the amount at issue. Thus, inside and outside counsel should strive to reach an understanding at the outset in order to allow for a strategy and a budget that are feasible and consistent with the broader business goals.

Determine and Adhere to the Most Cost-Effective Staffing Solution

Typically, one of the largest litigation costs is attorneys' fees. Because fees are usually determined by the lawyers' rates multiplied by their time, careful attention should be given to the law firm and individual attorneys selected to handle a matter. Counsel should consider whether the law firm's rates are commensurate with the amounts at stake, and whether the individual attorneys staffed on the matter are the most cost-effective to perform the work. For instance, it may be prudent to involve junior lawyers to accomplish certain tasks, but consideration should also be given as to whether a more experienced lawyer will be able to perform the tasks more efficiently and at a lower overall cost notwithstanding a

higher billing rate. Likewise, controlling the number of lawyers handling a case may avoid unnecessary costs associated with communication and information-gathering within a large team of attorneys. Clients should evaluate the need for a level of continuity of staffing of the lawyers on the case to ensure outside counsel minimizes costly transitions of lawyers on and off the matter.

Streamline Discovery Where Appropriate

One of the most expensive aspects of litigation is discovery. Thus, efforts to streamline discovery, particularly in connection with smaller or mid-size cases, may be necessary in order to control costs and adhere to a budget that is in line with the disputed amounts. It may be worth the effort to attempt to reach agreements with the opposing side, or obtain approval from the court, concerning various elements of discovery such as the number of depositions, the scope of document collection, the need for experts (or at least third-party experts), or the nature, scope or even requirement to prepare and produce privilege logs – all time-consuming and expensive components of discovery. That said, opposing counsel may resist efforts to streamline discovery and may have their own litigation strategy of seeking extensive discovery in order to try to force settlement. Efforts to streamline discovery will be more effective if made early, not after the parties are in the midst of a combative discovery process.

Create Litigation Turning Points to Facilitate Resolution

In addition to discovery, the other very expensive (and unpredictable) portion of litigation is trial. Litigation counsel should seek to avoid expensive and unpredictable trials by creating opportunities and incentives for pre-trial resolution, particularly for large, complex matters where much is at stake. Litigation counsel should devise a plan early in the process that will allow for negotiation points, typically after some discovery has been taken. Alleging claims or defenses that are susceptible for resolution at summary judgment, moving to compel sensitive discovery or thwarting burdensome discovery via a motion for protective order are all examples of tactics for achieving pre-trial litigation success that may, in turn, create incentives for resolution. Litigation counsel should devise strategies to create these litigation “turning points” at the outset of the case and should pursue those opportunities throughout the process.

Pick Your Battles

Parties must also exercise prudence in approaching the countless procedural and substantive disputes that arise throughout litigation. Parties should carefully select the pre-trial battles worth pursuing and seek to avoid the clashes that are not likely to yield a net benefit. Of course, you cannot control actions by your opponents that needlessly increase time and expense, but litigants can avoid exacerbating the associated cost or at least avoid the initiation of similarly fruitless endeavors. Oftentimes, the most effective and efficient approach is to negotiate stipulations or compromises with your opposition concerning procedural or substantive matters where an ensuing fight is not worth the price and resources can be more effectively dedicated elsewhere.

Develop and Regularly Review an Informed Budget

Although developing a budget is not an easy task given the unpredictable nature of litigation, devising a comprehensive budget may assist in controlling costs and ensuring that the litigation process is effective in terms of achieving broader goals. Breaking the budget down according to each phase of litigation, i.e. fact investigation, pleadings, fact discovery, expert discovery, etc., with further segmentation by individual task, may provide greater clarity as to the costs and benefits associated with various litigation strategies, staffing choices, and other decisions. And, as litigation proceeds, inside and outside counsel should regularly review and reassess their budget assumptions.

In sum, the cost of litigation is never completely predictable, but there are methods to contain the expense. Controlling litigation costs requires, at a minimum, regular communication, an early assessment of the case and thoughtful strategy that includes informed cost-benefit analyses in order to predict and contain costly variables where possible.

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