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It still frequently pays for a company to litigate

There are ways to sensibly handle commercial claims to ensure maximum value for legal services.

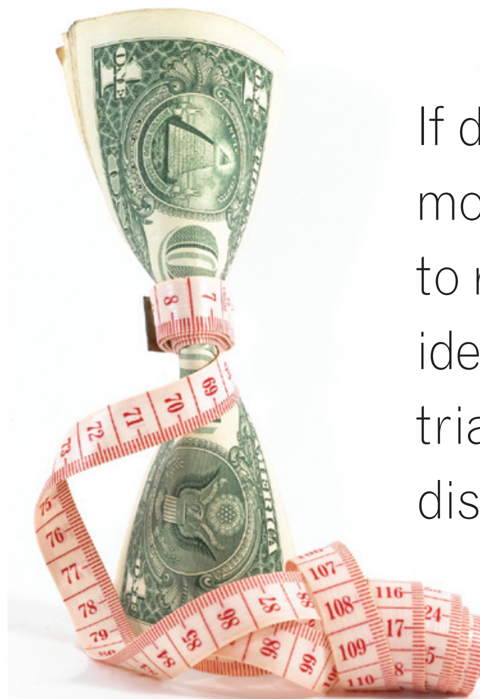
BY LEE ANN STEVENSON

Even before the economic downturn forced companies to take a serious look at their expenses, corporate counsel had begun to push back on rising legal costs with increasing frequency. Companies may view litigation in particular—unlike some other so-called "value-add" legal services—as a pure cost center. As a result, they may be reluctant to take the plunge and defend against a potential claim or file an offensive lawsuit, eager instead for a quick, and cheap, resolution. But failing to litigate a claim with merit or to defend a baseless lawsuit can be harmful to a business, not only in terms of lost dollars but also because of the dangerous precedent set for the company's competitors, vendors and customers.

Litigating a claim does not have to be a cost-prohibitive proposition. There are ways to sensibly and effectively litigate commercial claims to ensure that the client receives the maximum value for its legal services. Doing so requires corporate counsel and outside counsel to rethink some of the old rules of litigation and tailor their efforts to the case at hand.

Cost-effective strategies include the following:

• *Early case assessment*. Analyze the factual and legal strength of the case within 30 to 60 days of the filing to assess early settlement potential, the likely litigation path and outcome, and the potential costs of the litigation. Outside counsel should discuss the analysis and options with the client and give honest feedback as to whether the client's objectives are realistic and attainable.



If dispositive motions are unlikely to resolve a case, identify and develop trial themes before discovery begins.

• *Have a plan*. Careful planning from the earliest stages of the case is critical to efficiency. Early identification of potential dispositive motions, assessment of their strength and discovery tailored to those motions can be economical and effective. If dispositive motions are unlikely to resolve a case, identify and develop trial themes before discovery is under way. This planning will facilitate more focused discovery while avoiding the need to request every document in existence or depose everyone with any knowledge of the matter. Instead, draft written discovery carefully, review documents with key themes in mind and take only the necessary depositions.

LITIGATION MANAGEMENT FOR GENERAL COUNSEL

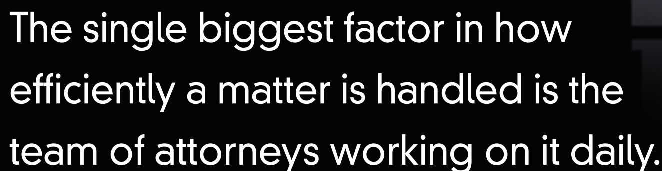
Follow-up discovery can always be done, as necessary.

• *Reach agreement*. Once you understand the discovery you need and want to take, propose reasonable limits to the other side. Attempt to reach agreement on the number, location and duration of depositions; the form of the document production; the content of privilege logs; and other discovery tools that have traditionally become high cost centers. Although an agreement may not be possible on every issue, you can build a record as the more "reasonable" party, which can be useful later in front of a judge.

• *Be proactive, not reactive*. Get in front of legal and factual issues whether representing the plaintiff or the defendant. Being proactive means not only being aggressive in terms of pursuing discovery and motion practice, but also resisting the urge to engage in tit-for-tat when it will fail to advance your case or protect a meaningful right.

• *Lean and thoughtful staffing*. The single biggest factor in how efficiently a matter is handled is the team of attorneys working on the matter on a day-to-day basis. A lean team, including a junior lawyer with a lower billing rate who can focus a significant portion of her time on the matter, leads to better decision-making and lower costs. A well-trained, carefully supervised junior attorney who is allowed to do front-line work will be highly motivated and engaged, resulting in better work product. It is equally important to consider who is leading the litigation team; not every case requires the top name partner in a firm. Most firms have younger partners (with lower billing rates) who also have a lot of experience and can provide hands-on management of the matter.

• *Choice of venue*. Think carefully about venue if there is any ability to select or change the location where the claim will be heard. Although defendants often prefer to be in courts where their cases will move slowly, litigating in a slow docket almost always costs more, whereas a fast docket requires both sides to make tough choices about discovery and case strategy. A mutually agreed upon arbitration process can also achieve this. Limits on discovery and a hearing, however, must be explicit and should be agreed upon by the parties before they agree to arbitrate a matter. Absent such an agreement, an arbitrator may be reluctant to impose limits, and arbitration can quickly become as costly as a court case.



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• *Newer isn't always better*. High-tech, time-saving services, software and programs are available to help in modern litigation. Many of these services are excellent and can dramatically assist in the management of a large document production and/or review, ultimately leading to significant cost savings. But they are often very expensive and their usefulness varies from case to case. Before signing on to a dedicated review site, an electronic document vendor or other high-tech service, make sure that it is really necessary and useful for the particular case. Take into account the expected number of documents, the parties involved and the schedule to make an honest assessment of the ideal level of technological support. Reviewing hard-copy documents is not the worst thing in the world, and in some cases, it may be a better option for the client.

• *Communicate*. Communication between the client and outside counsel is absolutely key to controlling costs. Often, outside counsel are reluctant to bother clients with details of the litigation process, and many clients are either too busy to be heavily involved or prefer to leave matters to the "experts." Certainly the client need not be involved in the drafting of every interrogatory or familiar with the details of each meet-and-confer, but clients often have critical information about the factual record that can save time, energy and, ultimately, legal fees. Outside counsel should be attuned to ways to marshal resources already available at the client, such as accounting experts and legal assistants, to save costs.

• *Set a budget and update it regularly*. Budgeting should be a collaborative process between inside and outside counsel to ensure mutual understanding of how the case will be managed and start off on the right foot. Both parties should monitor and update the budget after each case milestone. The budget can serve as an important planning tool and provide an opportunity to review past performance and identify potential areas for change or improvement.

• *Special fee arrangements*. Many law firms are more open to risk-sharing arrangements than they have been in the past. Gone are the days when the only two options were traditional hourly billing and full contingency arrangements. Many other fee structures such as flat fees, sliding fee scales, partial contingent fees, success fees and countless others are now being used to suit the client and counsel. Allowing the client to shift some of the fee risk to the law firm aligns the law firm and the client's incentives while reducing risk to the client. Discuss these options at the start of a case to determine the best fee structure for a particular matter.

To be clear, "cost effective" does not mean "cheap" or "inexpensive"; litigation is an investment and it should be approached like other significant business decisions. But it should not be dismissed out of hand as cost-prohibitive, as there are ways to control costs and to make litigation a potent, yet cost-effective, tool in a company's arsenal.

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