

What Will it Cost?

Paying Close Attention to the Economics of Litigation – A View From Outside Counsel

Cost budgeting is a critical and necessary exercise for any party engaged in civil litigation. When the topic is broached by in-house counsel, however, the reaction from their outside counsel counterparts can range from guarded acknowledgement to indifference. Corporate legal departments are facing significantly increased pressure to reduce legal expenses, yet outside counsel are often uncomfortable with or ill-equipped to adapt to this reality. “What is it going to cost?” is a question that can and should be answered – without wholesale qualification or equivocation – at the outset of any legal assignment. The time-worn responses “Litigation is expensive,” “It’s difficult to predict given the vagaries of litigation,” or “It depends...” are unacceptable today. While litigation is a dynamic process and not always predictable, such broad pronouncements do not excuse one from committing to a strenuous and strategic analysis of likely cost and then sticking to a budget. A good commercial litigator with a strong command of the facts and the law is well equipped to provide in-house counsel with a much more definitive response to the question “What will it cost?” With ninety percent of today’s corporations currently engaged in litigation, outside counsel must not only be prepared to confront the legal issues of a matter, they must also be capable of addressing, head-on, the economics of litigated disputes.

Early Case Assessment

Hindsight being 20/20, any postmortem of a litigated case invariably raises questions about the wisdom (advice) that set the company on the litigation path in the first place. Oftentimes the end result is unexpected, much less predicted. An early and thorough assessment of the facts and the law surrounding any litigated dispute is imperative. Nothing informs a business decision better than a



PROFESSIONAL OPINION

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clear understanding of the problem at hand and the scope of work involved in its resolution. From there, one can extrapolate legal costs and make measured business decisions on a path to a resolution. For example, a breach of contract claim, which cases dominate commercial courts, is amenable to an early case assessment as to both the legal issues in play as well as the predictable legal costs to obtain the desired outcome. Indeed, the legal costs, as experience dictates, may be measured and plotted very effectively.

Law firms, for the most part, bill their time in hourly increments. From the initial conversation to engage outside counsel, through the conclusion of the matter, there are countless billable activities – case investigation, research, drafting pleadings, discovery, experts, motion practice, court proceedings, trials, appeals, etc. (Costs associated with a billable hour have been compounded with the proliferation of e-discovery litigation support costs and other tasks associated with sophisticated, modern civil litigation). Each of these billable tasks, using the example of a breach of contract claim, may be assigned a billable cost and plugged into the overall equation in the assessment of any case. And as overly simplistic as this appears, it is perhaps the most valuable tool outside counsel can bring to the legal engagement.

In evaluating any case, the objectives of litigation must be kept firmly in hand. Early case assessment requires in-house and outside counsel to agree as nearly as possible on the final objective. If the stated objective is to “win at all costs” while the realities dictate otherwise, the collaboration between in-house and outside counsel is doomed. Mounting legal bills in the face of unclear

objectives and outcomes will only further inevitable discontent. The lawyer’s idea of serving the interests of justice and fairness is a laudable and compelling objective; however, their pursuit in a strictly virtuous sense may be pound foolish. And these objectives may not at all agree with a business reason to settle with the opposing party to preserve an ongoing (and far more lucrative) relationship. As elementary as it may appear, in-house and outside counsel must fundamentally understand the overall business objective in any legal engagement from the outset.

The nuts and bolts of early case assessment – piecing together the constituent costs involved in any litigation – should be viewed with other overarching considerations in mind. For example, what result do you want from the case? What are the effects of litigation on the company, and what is a good (if not the most desired) result? Early case assessment merits consideration of these questions. Answers may differ given the perspectives of the different business units involved. Therefore, considerations such as the reputation of the company, the establishment of a precedent, and ongoing relationships with the customers and suppliers may take precedence over a seemingly black-and-white legal conflict. Further, the costs associated with non-direct legal expenses such as the diversion of employee time, business disruption, and lost opportunity costs are all important considerations that must be evaluated in any case assessment.

Setting and Managing the Budget

Setting the litigation budget requires agreement as to how a legal engagement is going to be compensated. Agreement must be reached as to whether time will be billed at hourly rates, whether an alternative fee arrangement is acceptable and/or whether a flat fee is appropriate. Another issue that necessarily must be considered is appropriate staffing (partner, associate, paralegal). Managing a litigation budget requires the same rigorous attention to a client’s

business objective as does the legal analysis and early case assessment. As with many business decisions, measurement of results compared to budget in legal matters is a must.

A litigation budget that simply tracks the Civil Practice Law and Rules in New York State Court or the Federal Rules of Civil Procedure in Federal Court is not a plan for resolving a legal dispute. Blind adherence to the incremental elements of any civil litigation tends to compel a more protracted dis-

pute and a “check-the-box” approach as each litigation task is accomplished. In managing the litigation budget, in-house and outside counsel should constantly revisit both the budget and the objectives. Regular reports to in-house counsel should be accomplished with the budgeting document close by.

The answer to the question “What will it cost?” may no longer be “How much justice can you afford?” Utilizing the tools of early case assessment, setting and managing

a litigation budget, and maintain close collaboration and communication with in-house and outside counsel can bring a measure of predictability to litigation expenses. ■

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