Managing Litigation Costs

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Presented on behalf of:

INTERNATIONAL MUNICPAL LAWYERS ASSOCIATION

70th Annual Conference

September 25-28, 2005
Savannah, Georgia

Litigation! The very mention of the word often evokes feelings of fear and loathing from management. Yet, if viewed as merely just another exposure that must be managed, then litigation may be reduced to a petty tyrant. Although the traditional loss and cost control methodologies of risk transfer and risk avoidance generally do not apply to litigation, having in place a strategy or blueprint designed to both manage the suit and achieve early case resolution, can assist your organization in controlling the runaway costs inherent in many cases. Such a litigation plan is essential in an era of soaring attorney's fees, expert witness fees and deposition costs as well as the practice by most jurisdictions around the country of raising filing fees in response to budget deficits and shortfalls.

By ensuring that the risk manager is an integral part of the litigation plan and process for the life of a lawsuit, the potential for controlling costs grows exponentially. Consequently, the days of the risk manager asserting, "Don't ask me, the case is with legal," are but a memory. The risk manager should be as glib about the status of the case as well as the costs of litigation as is the trial

lawyer. Anything less creates the potential for unnecessary, rapacious, and most important, excessively costly litigation.

It is important to note that this article presupposes that pre-suit negotiations have broken down, a lawsuit has been filed and either mediation or arbitration have come to naught. Clearly, there exists a virtual panoply of paradigms designed to avoid lawsuits such as:

-Having in place a alternative dispute resolution system;

-Requiring claims staff and counsel to aggressively handle files;

-Utilizing pre-suit agreements or contacts that contain clauses requiring binding arbitration

Once the above and related attempts have failed, it is time to begin your litigation management program.

Selecting Your Attorney

If you serve an organization that has an in-house litigation team, you may not have the luxury of picking and choosing your attorney. And, in all fairness, you may very well have a team of staff attorneys whose expertise negates the necessity of looking elsewhere. However, that is not to say that you should refrain from discussing a particularly complex or technical case with your chain of command and ultimately recommending it be referred to outside counsel. There does exist certain cases that merit the services of an attorney who specializes in the matter at hand. An overburdened in-house attorney staff often lacks the time, human resources and, in some instances, the expertise and experience to handle the myriad types of cases that make their way into the courts.

The flip side, if you will, of the above scenario involves cases that are perfunctory or routine in nature such as small claims, collections or foreclosure

actions. Some organizations have experienced a drop in litigations costs by outsourcing such routine matters for a fixed rate per case, rather than getting

locked into fees billed on an hourly basis.

Regardless of how you proceed, it most helpful to create a comprehensive selection process that includes:

-Interviewing prospective attorneys;

-Educating oneself as to the attorney's reputation in the legal community;

-Becoming knowledgeable of the attorney's litigation track record;

-Ensuring that the attorney has the requisite expertise in the particular body of law at issue and has the ability to site to specific cases and their outcomes; On this note, beware of the attorney who boasts he or she "does a little of this and a little of that."

-Discuss in detail the attorney's approach toward litigation. On one end of the continuum is the attorney who strives to achieve quick, lucrative settlements without regard to the entity's exposure. At the opposite end is the attorney who will employ dilatory tactics and, colloquially speaking, "milk the case for all its worth," thereby insuring that a hefty attorney's fee is in the offing.

-Insure you are aware of who is doing what at each phase of the case and never hesitate to object to work being improperly assigned. For instance, high-priced trial lawyers should not be doing work that a less costly junior partner/associate or paralegal can competently do. Taking this one step further, why pay for the

services of paralegal to do the work of legal secretary? Beware of double billing,

which is the practice of sending two or three lawyers to do the work of one.

The above scenario often arises when a firm dispatches young lawyers to tag

along experienced trial counsel, “for the experience.” You should not pay a firm to

train its staff on your budget.

-Insure the attorney has a clearly defined theory of the case and works toward achieving clearly defined goals as compared to blindly fighting back.

In summary, direct questions about an attorney’s expertise, experience, technical competence and delegation of duties should receive direct answers. Anything less is suspect.

The Litigation Budget

Due to the complexity of certain law suits, some law firms increase their hourly rate every time one of their lawyers enters the courtroom. It is therefore essential that you establish a realistic litigation budget, and take great pains to stick to the budget. Some organizations, in an effort to reduce and control its litigation budget**,** pit law firms against each other by putting their litigation work out to bid. The firms are given a synopsis of the facts of the case and are requested to submit a proposal that outlines a trial strategy, and most importantly, a detailed budget. The organization closely monitors the progress of the work by requiring weekly billing updates to ensure the law firm is on track with their proposed budget. The bills are then compared with the estimates originally proposed by the law firm. If the law firm exceeds its proposed budget, the firm is not paid. An extreme measure, to be sure, but one that works for some organizations.

While on the subject of billing, you should insist upon itemized billing that outlines with specificity all charges. Further, if you feel weekly billing updates to be excessive, you should, at a minimum, demand monthly updates. Some entities go as far as requiring outside firms to submit monthly bills using a format selected by the entity. The format identifies each attorney and paralegal and other support staff member by name, the number of hours exerted by each person, and a detailed description of the services rendered.

When reviewing litigation budget proposals, it is essential that the submitting firm be required to justify the estimates submitted. Such justifications, at a minimum, should come in the form of research conducted reflecting the length of time such cases take to litigate, the frequency in which such cases are dismissed outright, recent judge o r jury awards for like cases, and the frequency in which such cases are filed and ultimately appealed.

In short, if you don't know where the money goes, you can never hope to control litigation costs.

COST SHARING

A fairly recent cost-cutting device that is gaining popularity amongst lawyers is the practice of sharing resources and the expenses involved in litigating a case with opposing counsel. There are several cost areas where attorneys can enter into an agreement with their opponent and in so doing, pass the savings on to their clients. For example, all the parties in a dispute could reduce their overall costs of document imaging and photocopying by agreeing to contemporaneously copy non-sensitive documents with the same

company at the same time. Many chain and independent print shops are more than willing to negotiate a price break for volume copying. This savings is Similarly, opposing attorneys can often save their clients thousands of dollars by sharing the costs of document numbering services, inventory indexing, hiring stenographers and court reporters, and calling neutral experts. Of course, any such arrangement should be outlined with specificity, with the organization given veto power in the event a conflict of interest arises.

In-house Litigation Support

One litigation cost-cutting measure that has proven effective is the use of in-house staff to serve as your organization's litigation support team. More often than not, this untapped resource is qualified to prepare deposition summaries, perform legal research, prepare witnesses for depositions or take/sit in on depositions, as well as perform basic administration. They are often equally adept at organizing the file, pulling and copying documents, retrieving public documents, scanning documents, preparing trial exhibits, and serving as messengers/couriers. It is not at all unusual to realize a significant savings as compared to the costs inherent in outsourcing such duties. Further, you enjoy a level amount of command and control over these often burdensome costs.

Depending upon the size and expertise of your in-house counsel staff, you may wish have them complete such tasks as basic computerized and traditional legal research, the conduct of informal interviews and witness searches, the drafting of memoranda of law, or attending perfunctory hearings such as case management conferences, motions to continue or for extensions of

time, etc.

PAPERWORK, **PAPERWORK, PAPERWORK**

The notion of a paperless society is about as foreign to litigation as tofu is to the beef industry. Before the case is over, a flurry of documents will change hands between counsel. It is therefore imperative that either a computerized or sophisticated manual document storage and retrieval system either be in place or be created.

The system should be designed in such a manner that the attorney and her staff can quickly and efficiently organize, analyze, index, and quickly retrieve any one of the pieces of voluminous documents that are generated over the life

of the law suit. You should insist upon such a system and test it periodically by requesting copies of particular documents and measuring response time. If the attorney is disorganized at the discovery phase (the time preceding trial when parties exchange information, take depositions, etc.) then its downhill from there as you approach trial time**.**

MOTION PRACTICE

In most jurisdictions, there are various pre-trial motions an attorney may file that may serve to affect the dismissal of the case, or reduce the number of counts or claims asserted in the law suit. The two most common motions, the Motion to Dismiss, and the Motion for Summary Judgment, both have the potential, from a tactical standpoint, to assist your organization in avoiding costly, prolonged litigation. Although there are some cases that are so factually

complex that it is only through protracted discovery that you can ever hope to flesh out the issues, still, there are many cases that are rather straight-forward. Rather than waiting until after discovery has been completed or until the eve of trial to go on the offensive, sometimes it is prudent to file such motions immediately after answering the suit. The distinctions between the above-referenced motions are as follows:

-Motion to Dismiss:

As the term implies, the Motion to Dismiss essentially tests the legal sufficiency of the law suit. Although the filing and granting of such a motion rarely serves to get rid of the case outright, it often does serve to rid the complaint of infirmities in the form of frivolous, improper or illegal claims. Further, the granting of all or part of such a motion by the court has a psychological effect on the other side.

-Motions for Summary Judgment:

A Motion for Summary Judgment is designed to avoid the expense and delay of trial by permitting a judge to dismiss, outright, a case in which there exists no material or genuine issues of law or fact in dispute. In most jurisdictions, the moving party has the burden of demonstrating that no material fact on any issue is in dispute. Once that burden has been overcome, the opposing party is required to refute the allegation. If the opposing party is unable to do so, summary judgment is usually granted and the case dismissed.

Depending upon the facts of a given case, early summary judgment motions, filed before the discovery process has been exhausted, can be a very effective tactical move for avoiding protracted, costly litigation. Most judges, laboring under burgeoning trial dockets, are usually amenable to early case resolution. Of course, not every jurisdiction permits the filing of such motions

prior to the close of discovery. Your attorney should be aware of whether such a motion is feasible.

DEPOSITIONS

Depositions are designed, in spirit, to assist the opposing attorney in understanding the facts of the case by taking the statement, under oath of witnesses to the litigation. They are more often than not, however, a weapon wielded in an effort to discredit the witness your case while bolstering their case. They can also be lengthy, costly affairs, especially when witnesses and counsel are ill prepared. There are four principal uses for testimony given at

a deposition:

Evidence at the trial. Depositions may be used as evidence by attorneys at a jury or non-jury trial.

Impeachment of a witness. Deposition may be used to impeach - challenge the credibility of the witness - if the testimony at trial varies from the testimony given during the deposition.

Discovery. A deposition may be used by counsel in an effort to discover leads or to develop or discover facts that will help their case.

Review of the witness. A deposition gives the participating attorneys an opportunity to evaluate a witness for candor, jury appeal, honesty, clarity of of response as well as jury appeal.

To summarize, the deposition is not, as most attorneys will tell the deponent, “just my chance to hear your side of the story.” More often than not, it is used to impeach, to discover, to evaluate both the case and the witness, and to flesh out inconsistent testimony.

There are several things your attorney can do to minimize the time

involved, and consequently the money involved when witnesses are deposed. All of your witness should, at a minimum:

1. Know the Basis and Facts of the Lawsuit

Before attending a deposition, the deponent should familiarize him or herself with facts leading up to the lawsuit. Deponents should know why they were selected to be deposed and should get answers to any questions they have before being deposed.

2. Understand the Question Prior to Answering

It is essential that the deponent completely understand the questions asked and avoid answering based upon what the deponent thinks the question might or should be.

3. Answer the Questions Asked

This suggestion is not meant to be pedantic, nor is it as flippant as it looks. The advice is designed to emphasize the importance of not offering information that is not direct response to the questions asked. By volunteering information or by answering in a narrative form, the deponent is only subjecting his or her comments to attack and providing the other side with free fodder.

4. Be Wary of Details

The deponent should be wary of giving exact information, such as measurements, dates, time intervals, and business statistics, if he or she is uncertain about the details, particularly when the information is available as a public or business record.

5. Answer Truthfully, but Wisely

Deponents should attempt to avoid such responses as “I think,” I believe,” or “ “to the best of my knowledge.” These answers generally imply either uncertainty or untruthfulness. And finally, the deponent should never give the appearance of being flip, sarcastic, evasive, or obstructive. Such antics can cause a judge to react harshly and a jury to view the employee’s testimony with skepticism.

6. Take Care with Exhibits

Often, the deponent will be asked to authenticate, describe, or comment upon exhibits, in the form of documents, photographs, diagrams, or the like. When asked to examine an exhibit, the employee should take the time to examine it carefully before answering any questions about it.

Further, prior to answering, the deponent should not assume that the entity’s attorney has seen the exhibit before. It never hurts to pass it to him or her to ensure that it is not appearing for the first time at the deposition.

7. Prepare for the Trial

If the case proceeds to trial and employees are listed as witnesses, it is essential that they be provided with a copy of the deposition transcript before the trial so they may refresh their memory.

8. Take a Break when Necessary

Some attorneys are more than willing to turn a deposition into a marathon session that subjects the deponent to anything from an uncomfortable chair to

air-conditioned room that feels more like a meat locker than a law office. The deponent should not hesitate to request breaks or fluids as such needs arise.

By listening to the questions asked, responding directly to the questions, and not volunteering information, deponents can go a long way toward taking the dread out of their depositions and can take the wind out of the sails of opposing counsel.

SUMMARY

Just as a trial lawyer will develop both a theory and corresponding trial strategy when faced with a litigation matter, so should the risk manager develop both a theory and corresponding strategy designed to control litigation costs. By assessing a case from a cost/exposure perspective, establishing a realistic litigation budge, soliciting bids from several law firms and keeping abreast of where and to whom the organization's money goes, the risk manager can go a long way in controlling and managing the costs and fiscal stress of protracted litigation.

End Notes:

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10. Id.