Controlling legal expenditures

How to keep the cost of litigation in check **Interviewed by Chelan David**

The cost of litigation can be prohibitively expensive. One way to curb legal expenditures is by using a process called litigation management. This process includes proactively identifying critical legal and factual issues, identifying key personnel that will be involved with a case and determining a budget. Also, it is important to set benchmarks so, as the case progresses, a decision can be made as to whether it should be tried or settled.

While no business person likes to be sued, if it happens, he or she needs to know — and are entitled to know — at the outset what to expect from his or her attorney.

"It's all about communication between a lawyer and a client," says Mark Morley, co-chairman, executive committee of Secrest Wardle.

Smart Business spoke with Morley about litigation management, how to prepare a litigation budget and how to determine whether to litigate or settle.

Mark Morley
Co-chairman
Executive committee
Secrest Wardle

How should a company go about developing an action plan with its legal team?

Good litigators work backwards, so to speak, to determine what they need to have, at the end of the day, in order to flat out win the case or to minimize the plaintiff's claims so it is manageable from a monetary standpoint. In order to do that, it is important to have a frank and open discussion with the client to get the necessary facts, identify documents and determine if these documents are readily accessible, identify the key witnesses, including company employees, and their accessibility, and identify which defenses are available. It is important to set up your action plan and then proceed to the point where you're going to start to implement the plan in order to position the case for either settlement or eventual trial.

How should a litigation budget be prepared?

This involves the action plan being translated into specific required activities and related 'real world' dollars and cents. Lawyers have a pretty good feel for what it takes to accomplish certain activities. You can't predict these things with absolute precision because, in all cases, you have at least one other party involved who knows what it wants to accomplish in the case, and if it is a complex piece of litigation, you're going to have other defendants who are initiating their own action plans over which you have no control. That being said, a lawyer can flesh out a projected budget for the particular time frame in question. There is no need to budget the case in its entirety upfront. It is better to work in a time frame of 90 to 120 days. Then you measure yourself as you reach the 90 to 120 day benchmark by asking such questions as: Have we been able to accomplish what we set out to do? If we didn't accomplish these goals, then why not? What adjustments do we need to make? If you do that on a regular basis, every 90 to 120 days throughout the course of the case, then you're staying proactive and in control of the litigation rather than letting the litigation control you.

How should a business determine whether to litigate or settle?

This decision will be the product of having prepared, implemented and followed a proper action plan. In some instances, the case may be simple enough that your attorney can give an evaluation almost at the outset of what the potential of the case is. In most cases, however, the attorney will have to engage in some level of discovery to obtain the facts necessary to provide a sensible evaluation. Once the attorney can project for the client the so-called 'worst case' and 'best case' scenarios and where a reasonable resolution of the case should fall in monetary terms, then they can determine together how the litigation could conceivably impact their business and whether settlement or trial is the better choice to resolve the matter. The election between the two then becomes an informed business decision.

If it is a case to settle, why is it so important to develop negotiation strategies?

As with any business plan, if there is no strategy in place, then events control you and you do not control events. The client needs to know what the claim is all about and what are the strengths and weaknesses of the claim or defense. It is the job of the lawyer to provide this information as soon as he possibly can and to project what it is going to cost to achieve the desired end result. Once you have this information, there are several different types of alternative dispute resolution (ADR) available. Today, both facilitation and mediation are commonly used as vehicles to bring closure to litigation without having to invest any more dollars. Facilitation and mediation allow the parties to have the discussion that is frequently necessary, in a semi-public forum using the services of an independent facilitator or mediator. In many instances, litigation is about parties feeling that they have been wronged in some way. They are looking for the opportunity to tell somebody their side of the story. Achieving that objective can frequently lead to a reasonable resolution of their grievances without having the case go all the way through trial.

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