

A preliminary litigation budget should be prepared for every case of consequence.

Well-managed business projects should develop a focus and direction at the outset through identification, articulation and recitation of the project's goals and objectives.

Lawyers, in contrast, tend to be undisciplined and, as a consequence, operate their business that way. To be cost-effective, however, a legal environment demands planning, an important part of which is risk analysis and evaluation that can be reviewed properly only in the context of a budget.

Budgeting need not be an exact science. In many areas of a particular case, application of real world rule-of-thumb or educated guess-estimates often are sufficient. For corporations involved in significant and repetitive litigation, budgeting methodologies — and difficulties — may not differ significantly from those in other non-production areas, such as research and development. In business, significant decisions very often are founded initially upon best-guess estimates. Lawyers practice denial when they claim the same cannot be done in litigation.

With the development of a working relationship is developed, in-house counsel and paralegals can, in many instances, readily identify and interview knowledgeable employees. Relevant documents can be located and reviewed before voluminous interrogatories and production requests are received. Also, potential non-employee witnesses often can be identified and, where appropriate, contacted, thus avoiding the requirement later of pro forma depositions.

Interviewed out of the coercive glare of litigation, potential witnesses may be more relaxed and, accordingly, more forthright and direct. This often provides more clarity to in-house counsel for witness identification and evaluation, which in turn permits counsel to respond formally in discovery with narrower, more accurately developed lists of knowledgeable witnesses.

Document review conducted before discovery progresses also can save money in both document handling and later attorneys fees incurred in discovery disputes. In a less harried environment, litigation rationales for the selection of responsive information can be precisely defined and articulated during the review process, leaving the good faith of the corporation less open to question later.

When fact witnesses have been identified accurately, it reduces the cost and time counsel spends preparing for depositions, and the number of depositions counsel attends. Lost employee-time costs similarly will be reduced because fewer employees will be deposed. With fewer depositions, examinations can be better scheduled for the convenience and benefit of the corporation's demands, and with a knowledgeable witness, opposing counsel's examination often will be more focused and direct. This leads to shorter depositions and often eliminates entirely the need for multiday examinations.

EXPERT WITNESSES

Trial counsel's expanded use and reliance upon expert witnesses has contributed significantly to the increase in corporate litigation expense. Although experts can be very helpful — and, indeed, often are required — for the corporation to be successful in court, opportunities are available for cost control. For example, if the expert's involvement will be limited and focused, and required pri-

need for broad-based secondary discovery likewise can be lessened, and, in many instances, eliminated.

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John A. Rupp is litigation partner at Ungaretti & Harris, Chicago, concentrating in intellectual property, product liability, commercial litigation and appeals. Prior to that, he spent 11 years as senior counsel at Navistar Inc., Chicago. He received his J.D. from DePaul University College of Law.



In-House Counsel, Executive Must Play Strong Role To Win in Litigation, All Players Must Take the Field

BY STEVEN A. LAUER

For in-house counsel, litigation is an unavoidable part of managing the legal affairs of the company.

The significance of litigation for corporate clients is exemplified by the results of a recent survey by the Economic Analysis Group in Washington and Craig Consulting in New York. The survey of corporate law departments about cost-containment strategies found that "[a]lthough litigation's share of total legal expenditures [by the responding companies] was down from two years [previous], it still accounted for the largest single expense in the budgets of

the law departments of the 1,000 largest companies." The costs of litigation (the process costs, rather than the outcomes, such as payments of judgments, settlement amounts, etc.) averaged 30 percent of 1995 law department expenditures, or \$3.75 million of the average \$12.5 million legal costs.

Unfortunately, many companies have not dealt effectively with litigation. In-house counsel all too often abdicates any involvement with the matter to outside counsel, often asking only for infrequent status reports and occasionally contesting invoices.

This is a disservice to everyone involved. The company doesn't benefit from the skills of the in-house attorney. The in-house attorney will play a more ministerial role. I have heard many outside attorneys express a strong desire for greater direction and involvement by the in-house attorney.

FILLING THE ROLES

The business executive views his or her function as "doing deals" and believes litigation, which relates to past events, cannot contribute to the company's bottom line. Many executives try to have as

little involvement as possible. But litigation to secure damages for a past injury or to prevent interference with an anticipated transaction is a potential source of funds. And even defensive litigation costs directly affect a firm's bottom line; anything that reduces those costs will improve the company's results on a dollar-for-dollar basis.

The inside attorney also often avoids involvement. They prefer to apply their skills to new business and deal-making. The inside attorney believes close involvement with litigation can lead to negative consequences, personally and profession-

COSTS

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marily for record or foundational purposes, the use of a local or possibly less well-known expert may be justified. This can result in considerable savings from lessened attorney and expert travel expenses, as well as reduced billable hour preparation time by both individuals. The local expert can more readily, conveniently and cost-effectively review relevant materials and consult with in-house counsel and/or employee witnesses on an as required basis at the corporation's place of operation.

While important corporate litigation positions are presented to the jury through retained experts, supplemental record or foundational technical evidence often can be presented through corporate employee experts. Employee experts can hold their own at trial when providing testimony in their area of technical expertise. When the corporate client has been properly identified in advance, counsel can capitalize on client knowledge and resources. And, in addition to cost reduction, using corporate experts in this protected context provides the company an excellent opportunity to humanize the corporation with the jury.

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The inside attorney also often avoids involvement. They prefer to apply their skills to new business and deal-making. The inside attorney believes close involvement with litigation can lead to negative consequences, personally and profession-

ally. If he allows the outside lawyer to handle the matter with little direct involvement on his part, negative results will not reflect on him.

Whether or not that position ever was defensible, it isn't now. Savvy corporate executives won't permit their inside counsel to foist the blame for litigation expense or results on unsupervised outside attorneys.

In the 1990s, corporate clients demand their counsel apply a cost/benefit analysis to every decision. That may require innovative approaches to ordinary tasks. As clients search for cost efficiency, they are asking their outside firms to "unbundle" certain services from their core counseling role, such as document management, legal research and computerized litigation support.

HOW TO HANDLE LITIGATION

Proper management of litigation is a team effort. No one person has all the insights and perspectives necessary to fully represent a company's interests. That is the basic concept of "strategic strengths."

Strategic strengths can result from the organizational "place" of the person — inside counsel, outside counsel or executive. Some of them derive from personal characteristics of the individual. Once strategic strengths of each member of the team are identified, they can be used to accomplish goals.

Just like a football team that blends the talents of tackles, guards, tight ends and running backs, the litigation team must have various players to fully defend its own end zone and advance toward the opponent's goal line.

MISSION STATEMENT

Law departments in medium-to-large companies typically have a comprehensive mission statement. For example, the law department at The Prudential Insurance Company of America is charged with "provid[ing] high-quality legal services to The Prudential ... at reasonable cost."

A company's decision to employ in-house counsel usually means it has determined its legal affairs to be the responsibility of that counsel. Because of that, the law department's representative should serve as the quarterback of the litigation management team. In-house counsel understands the nuances of the firm's attitudes about the case and litigation, the facts underlying the dispute, and other important considerations.

The first task of in-house counsel is to determine what legal talents are necessary to represent the company best in a given situation. To do this properly, the inside attorney must seek an outside counsel sensitive to the company's culture.

Another important responsibility of inside counsel is risk counseling. The most effective means of reducing the cost of litigation is to avoid it altogether.

Risk counseling requires familiarity with corporate culture, a sense of the value the company puts on the case and an appreciation of corporate business and other goals, as well as how risk-averse the audience is. That appreciation can only be gained over time.

All these are gained through daily toil in close proximity to other employees, so it is much easier achieved by an inside attorney.

LAW FIRM LAWYERS

Outside counsel are involved in litigation directly on a more constant basis than inside counsel. Law firms are better able to respond to the time-sensitive demands of litigation because they are organized to do so more than are corporate law departments.

Outside counsel's role may be viewed as more purely "legal" than that of their in-house counterparts. Many in-house attorneys have legal and business responsibilities for their employers, particularly when the in-house staff is a small one. That has led some courts to recognize the attorney-client privilege and the attorney-work-product doctrine only when outside counsel are involved. If an investigation conducted under a privilege is expected in the course of an assignment, retaining outside counsel may be important for the conduct of that investigation.

EXECUTIVE DECISIONS

First and foremost, every case has its genesis in business affairs. If a company thinks of litigation as lawyers' business and not executives' business, that company may repeat mistakes of the past that led to litigation.

An executive can make a positive contribution toward litigation management. Business professionals may be more familiar with documents and files relevant to a dispute. They can help locate fact witnesses, such as present or former employees familiar with the underlying dispute from the perspective of the company. Executives also can provide the business sense needed for decision-making.

CHANGES IN THE LITIGATION TEAM

The manner in which the legal profession conducts its affairs is being examined by clients in ways unheard of only a few years ago. Companies are asking law firms to outsource tasks that they previously handled with law firm personnel. Firms are being asked to use temporary personnel, without markup, rather than staffing up for a large case.

With fewer outside counsel who have lengthy involvement with a case, the company's needs will place a greater premium on the management skills of the inside lawyer.

USBL

Steven A. Lauer is assistant general counsel of The Prudential Insurance Co. of America, Newark, N.J., where he serves as in-house environmental attorney for the company's real estate investment operations and oversees environmental litigation. He is chair of the litigation committee of the New Jersey Corporate Counsel Association and, in March, will participate in a litigation management program from the perspective of the in-house attorney. He received his J.D. from Georgetown University Law Center.

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Texas lawyer Stephen D. Susman's 16-year oscillation between plaintiff and defense representation is like a barometer of legal trends. Basically he follows the money.
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Columnist David Robinson looks at a Ralph Nader group that has made a cottage industry out of class action lawsuits. The surprise is what side they are on.
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