

Litigation Planning and Budgeting – The Use of Task-based Budgeting to Manage Litigation

By Steven A. Lauer © 2003 *

Litigation is a fact of corporate life. No company of which I am aware likes it (or admits to that perversion!). Since all in-house counsel have to deal with it somehow, it's best to do the best with it that you can. In fact, as a professional, you should do no less.

Managing litigation (or more properly, managing disputes, of which litigation is a subset) is quite distinct from serving as first or second chair (or third, for that matter) chair in a case. The management of litigation is a role for which in-house counsel are uniquely qualified. It takes skills and tools that are very different from those used by trial or litigation attorneys, but it also constitutes one of the greatest responsibilities of in-house attorneys, as well as one of the most difficult tasks that they face.

What is "litigation or dispute management"? It is the application to disputes of business tools that enhance a company's or party's ability to achieve its goals in the dispute. The precise tools and the means of applying them may vary from dispute to dispute or from company to company, but the general thrust is to use business concepts within the context of a realm of business-related activity that heretofore has resisted management.

One of the goals or tasks within the general scope of litigation management, at least for most companies, is budgeting discipline. The management of disputes is improved by the application of strategic planning to the exercise. Careful budgeting for the effort is a critical facet of that exercise. Proper budgeting informs the planning of the litigation, in fact, and it should be undertaken at the commencement of the matter as well as periodically thereafter.

The **process** of planning and budgeting for litigation is, in some ways, as important as the **product** of that planning and budgeting for a variety of reasons. First (and most important), it forces those who are doing the planning to review thoroughly the issues in the case and to attempt to identify possible courses that the litigation might take. Second, the planning process should include an effort to identify and assign priorities to the various issues that counsel anticipate. The priority-assigning process is a valuable exercise that can assist counsel to identify those areas that have the greatest likelihood for success or present the greatest risk for the party and to determine what is an appropriate effort to apply to the matter that should maximize the benefit or reduce the risk for the party of the expenditure of effort.

A properly prepared, well-thought-through litigation plan should contain many of the same elements as a litigation notebook typically prepared by a thorough trial lawyer. By regularizing the planning process, one should accomplish at least the following: (1) assure that the appropriate strategic considerations will be addressed in each case (regardless of the results of that consideration in each instance); (2) provide sufficient time for due attention to each issue; and (3) enable the proper sequencing of tasks necessary to develop the party's litigation posture and to present that posture to the court in an appropriate manner.

By bringing to bear on litigation some simple business systems and techniques, you should improve the management of litigation. This fundamental concept requires that you view litigation as a

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process, a process to which systems and tools that are routinely used in other business contexts can be applied. Unfortunately, lawyers have long resisted the application of many of those tools to litigation.

Budgeting is one such tool. Litigation does have many features that make budgeting less precise than it may be for other business efforts. Many of those features relate to the fact that litigation is a process that, by definition, involves the efforts of multiple parties with explicitly antagonistic goals. The antagonism of their goals leads many litigants to pursue divergent purposes even for the process – one party might pursue an immediate decision by the court on a pending motion, for example, while the counterparty seeks or prefers the opposite -- delay.

Despite those features, however, a litigation budget is feasible. In fact, it may be even more important in the context of litigation than in other situations. The budget for litigation should be different than one for other efforts in an important respect, however. It should not be a tool by which the efforts of the party or its counsel are unduly constrained. It would be very counterproductive to shortchange your defense of a lawsuit because you have overspent your budgeted dollars in defending depositions of your most-senior executives.

Preparation of a Case Budget

How should a litigation budget be prepared? What should it include? What format should it follow? How should it be used?

An exercise that is preliminary to development of a case budget is the preparation of a litigation plan. In fact, a litigation plan is necessary in order to construct a proper budget.

Without presenting all the detail and elements of a litigation plan, for present purposes, suffice it to say that a litigation plan will include a fairly extensive review of the facts and law that underlie a dispute. In the litigation plan, the party also should (1) identify with specificity and discuss its goals in the litigation, (2) describe its central themes for the case, (3) develop alternative strategies for presenting that position to the fact finder (judge or jury) and the court (the party should be sure to include the assumptions underlying that position, in the event they prove wrong or need to be re-evaluated), and (4) describe the stages through which it expects the dispute to proceed. A projected timeline for the process is also helpful, since it can later serve as a yardstick with which to measure progress (at least temporally). The litigation plan should also describe the staffing that is planned to prosecute the matter.

The litigation budget should include the monetary ramifications of the litigation plan, at least insofar as counsel can anticipate them. Bear in mind that litigation always includes unexpected events and at least every party but the party drawing up the plan is beyond that party's control. Nonetheless, try to predict what will happen and estimate what it will cost when it happens.

As to certain portions of the plan and budget, greater certainty is possible and should be expected. The discovery that a party wants to instigate, in order to establish its affirmative case or to undermine the opponent's case, is what I call offensive discovery. Counsel should be able to estimate what that offensive discovery should include and what that should cost, with greater precision than when asked to estimate the cost of opposing the discovery that the opponent will instigate (defensive discovery).

The budget should reflect the best-informed judgment of counsel as to what it might cost to pursue the litigation strategy set forth in the plan. It should include an estimate of the litigation-related expenses that will not be included in counsel's bills, such as fees for expert witnesses, testing, jury consulting, etc. While estimates as to those items obviously will merely be "guesstimates" until developments permit more substantial analysis of the scope of those activities, it is important from the start that the client not be unduly optimistic as to the likely cost of the matter.

The budget should be organized in the same way as the litigation plan. To a large degree, that should probably be chronological (since cases typically follow a certain sequence as they unfold). It will

reflect the staffing levels described in the litigation plan and the relative costs of those personnel in light of their anticipated involvement (in terms of types and amounts).

To the degree in-house counsel handle certain tasks described in the litigation plan, outside counsel should not be expected to itemize the costs of that participation. Nonetheless, the litigation plan should describe the types and level of in-house counsel's involvement. The total budget for the matter that is presented to and discussed with in-house counsel's internal client should include some estimate of that internal cost, even if not expressed in dollars but in terms of the amount of time involved. All strategic decisions in respect of the litigation should be made with an appreciation for the all-inclusive cost of the litigation.

The budget should reflect the amounts initially forecast for each component and allow for specification of the most-current actual expenses for each such item. These "budgeted" and "actual-to-date" entries are important because they permit easy review of the budget at certain points and comparison of the progress of the case (in monetary terms) against that originally predicted. At each review, the "actual-to-date" entries should be updated to reflect fees and expenses incurred since the next-previous review.

Task-based budgets

To facilitate the budget-review-and-update process, counsel should use task-based billing codes to format and submit invoices. Several years ago, an industry task force whose members represented approximately two dozen law departments and approximately the same number of law firms devised several sets of task codes. The task force hoped that its work would lead to an industry-standard set of task-based codes. The codes that it developed (called the Uniform Task-Based Management System) have been endorsed by the American Corporate Counsel Association and the American Bar Association. One set of those codes was designed specifically for litigation.

If the budget and the invoices are based on the same task codes, then the data included in each invoice can be transcribed into the budget so that the budget remains an ongoing reflection of the current cost of the case. Moreover, since the same task and activity codes are used, one is able to monitor adherence to the various budget categories as fees and expenses mount. The in-house counsel thus gains a powerful tool with which to manage the case more expertly – not just on the gross expense but in terms of the more-specific elements of the cost of the case that can be so important. For example, with the data categorized by phases of the litigation, one can see if the budget overages are due to excessive discovery demands of the adversary, or whether they result from over-zealous representation by the client's own firm. Perhaps the motions-related practice mushroomed beyond a reasonable level. A well-planned budget can assist you to determine where the budgetary shortfall originated.

Even when a firm has agreed to a fee that is not based on the amount of time that it devotes to the case, task-based billing and task-based invoices can improve the information available to the firm and the client. The firm gains a greater understanding of how its efforts stack up against its budgetary forecast. This enables it to monitor the accuracy of its fee as reflecting its efforts measured in time.

The client also gains an improved yardstick with which to gauge progress in the case, not for purposes of managing the fees and costs (since the alternative-fee presumably eliminates the need to do so to some extent). This yardstick is a valuable mechanism by which to monitor adherence to the litigation plan (which should be developed in conjunction with the budget, as outlined above), because overages in the budget will signal that events are not proceeding as expected. This is important information for both the in-house and outside attorneys.

Used in that fashion, a litigation budget can and should lead to more and better communication between in-house and outside counsel. As outside counsel prepares the budget and submits invoices that update that document, and as the in-house attorney reviews those invoices and analyzes their impact on the budget previously agreed upon by the inside and outside attorneys, they will be able to discuss the status and prognosis for the case with much greater understanding of those issues. Rather than simply railing

about the escalating cost of the dispute, the in-house attorney will be in a position to review with his or her outside counterpart why the costs are increasing and whether they can exert any restraining pressure in that regard. With the related litigation plan, they will be in a position to understand the substantive implications of steps that they contemplate taking, for budget-related reasons, in order to better weigh the advisability of doing so.

From a macro perspective, the use of task-based billing conduces to an improved understanding of litigation generally. As data are gathered from multiple cases, it will become possible to identify “norms” for the costs of certain litigation procedures. While we should not accord such norms too exalted a position in the litigation-management firmament, they should provide another test for the reasonableness of litigation. Further, to the extent that outside firms analyze and understand those data, they will better understand their own cost structures and be able to price their services more intelligently. This is particularly important in light of clients’ heightened interest in alternative fee arrangements. (The subject of fee arrangements, and alternative fees generally, is beyond the scope of this article. Nonetheless, the compensation arrangements between counsel and client are relevant to the manner in which they address the costs of litigation, since the fees paid by the client constitute such a large part of its litigation costs.)

Task-based billing is important for an additional reason. That reason is based on the need to analyze legal invoices and the difficulty of properly doing so. Codes such as those in the UTBMS lend themselves well to computer-based invoice analysis. The codes can be read by software and sorted in myriad ways. This enables a computer to highlight relationships among time entries that are otherwise impossible to notice due to the volume of data and the opacity of time entries arranged chronologically. A computer can display relationships in easily understood ways, such as pie charts, graphs, etc. This makes the review task even easier and better simultaneously.

Conclusion

Planning and budgeting are important for corporate law departments. Those techniques allow in-house counsel to gain greater control of litigation than is possible otherwise. They allow counsel to apply to litigation some of the basic tenets of project management. By following this approach, one can monitor the course of litigation more capably and, from that position, exert more control than is otherwise possible.