3 Essentials for Successfully Managing Business Litigation

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A company is sued, and the lawyers are brought in. Motions are filed, and thousands of documents are exchanged, each one meticulously eyeballed. There are interrogatories, objections and depositions. And in the end, there's a settlement in an amount that could have been predicted at the outset. Yet, the litigation budget has been blown. Isn't there a better way? In fact, there is.

While litigation often follows a predictable and routine pattern, it is generally an inefficient way to resolve a business dispute. The answer lies in a plan that is laser-focused on the business solution rather than the litigation process.

There are three essential principles in successful litigation management:

• Relationship between lawyer and client;

• Objective focused on solving a business problem;

• Establishment of incentives.

First, the client needs an attorney who is not only trustworthy, competent, and honest, but also personally and professionally compatible. The lawyer also must be a person who understands the client's business. A lawyer's value should be measured by the skills needed to resolve a case, not by litigation prowess. Look, too, for the litigation skills necessary to go to trial if it comes to that. The lawyer must be willing to put the client's

interests first. Ideally, the client and lawyer will already have a long-standing professional relationship. Expect that one lawyer to be in charge of the entire engagement.

During the litigation, the client and lawyer should deepen that relationship. Discuss other business issues, go to dinner, enjoy each other's company. There will be times when all does not go according to plan, and both client and attorney need a reservoir of mutual trust to fall back upon at those times.

Solve the Business Problem

Corporate counsel spend too much energy making sure that outside lawyers are actually doing the work they bill for, and too little energy on making sure they are doing the work they should be doing. The key to managing litigation and controlling litigation costs, however, is to focus on what the lawyers should be doing, rather than on how they bill for what they do. When litigation is managed on this basis, cost savings naturally result.

At the outset of any litigation matter, both corporate and outside counsel must develop a laser-like focus on the business problem, or business opportunity, that the litigation represents. And working with the client, they must determine the acceptable range of resolution. Then, they must predict the end game and identify the strategy to reach the desired result. Here's an example:

Company A hires a senior marketing executive from Company B, a competitor. Company B sues both the executive and Company A for misappropriation of trade secrets. The business objective of Company A is to use the executive's ample skills and expertise—not confidential information from her former employer. Under this scenario—rather than follow the typical litigation schedule and spend tons of money—Company A's lawyers could: 1.) produce, for attorneys' eyes only, all communications in the recruitment and hiring of the executive as well as all internal communications from the executive discussing her former employer, thus establishing no wrongdoing; 2.) draft a carefully focused interrogatory asking what the former employer contends is confidential information possessed by the executive; and 3.) agree to a permanent injunction (or confidential agreement) that the executive cannot use such information while employed with Company A. The business objective is reached, and the cost is greatly reduced.

But what if Company B isn't really interested in protecting its confidential information and sees the litigation as an opportunity to tie up Company A's marketing department while the dispute is pending. Again, keeping the business objective in mind, the path might be to: 1.) issue a designated representative deposition notice for employees at Company B having the most knowledge of the confidential information to which the executive had access, and depose them; 2.) tender an offer of judgment that none of the identified material will be utilized; 3.) set the preliminary injunction for hearing and have an order entered that, as long as the offending material is not used, there is no violation.

The permutations are endless, but the point is that by keeping the objective in mind, by not letting litigation dictate its own pace, costs can be saved whether or not the opposing side shares the same goals, or is even acting reasonably.

Reward with Incentives

There are three litigation parameters that can be the subject of incentives for counsel. First, of course is result. The second is time-to-completion. The third is the cost to complete. The importance of each parameter varies case-to-case. On the plaintiff's side, the result is customarily the parameter that is incentivized, usually through a bonus or contingency fee. But even in some plaintiff business cases, time-to-completion is important. In those cases, a contingency percentage could be structured to decrease if the litigation is not resolved on schedule. On the defense side, the result can be incentivized through a bonus, or reverse-contingency. Again, on this side of the docket, the lawyers' fees can be reduced if the litigation is not resolved in a timely way, or a flat fee can shift the risk of prolonged litigation to counsel.

Given a collaborative relationship with counsel, both client and attorney can focus on the business problem—rather than the legal problem. Together they can frame the litigation objective, and manage, and incentivize, toward that objective.

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