Limiting Litigation Costs: Techniques to Consider

Unbundling discovery activities. The traditional model of litigation management assigns to law firms responsibility for handling the gamut of litigation-related activities. A more progressive model, seeking lower costs yet comparable quality, unbundles litigation into various tasks that can be parceled out to service providers other than law firms.

These litigation tasks are many. For example, imaging thousands of documents can be a task for a company that specializes in that detailed and costly process. Reviewing medical records can be separated from purely legal analysis and placed in the hands of a boutique that offers the specialized service. Research, the golden goose of many law firms, can find its way to one of the many firms that offer quality research and lower costs.

Perhaps the development and maintenance of an extranet can fall to a legal technology consultancy. Or some firms use legal-writing experts to alchemize legalistic briefs into golden, effective prose. When a major firm is handling the lawsuit, or a family of lawsuits, that firm can unbundle some tasks in favor of a local, less expensive counsel when those tasks suit the local firm.

Unbundling services offers specialization benefits

Each of these kinds of activities separates from the bundle of traditional litigation activities those that service providers other than law firms can handle. The possibilities and potential are widespread. One large health care company has retained partners from three firms to coordinate its defense in a massive set of litigation because each partner brings to the action a specialized background. This, too, could be viewed as unbundling.

If general counsel want to pare their corporation's costs of litigation, they should look at what pieces they might have done for them other than by their lead law firms. They will find that they must manage their multiple contributors differently from the way they managed their single law firm, but they can increase their quality, decrease costs and manage litigation more successfully with unbundling.

Offshoring legal work. A spate of recent publicity has brought to the attention of law departments the possibility of using low-cost lawyers in other countries. Not that using local lawyers in countries is novel, but having them handle U.S. legal matters gives a different twist.

India has been in the news for its legal offshoring, a term that describes having specified litigation support services done in low-cost countries. General Electric Co. makes uses of Indian lawyers to prepare contracts. Accenture, a consulting company, does the same thing. These and other leading-edge law departments are arbitraging skills and costs by offshoring.

Offshore lawyers are performing several tasks

More telling, a company called Mindcrest intermediates between law firms and law departments in the United States and providers of legal services in India. The attraction of using offshore resources to review voluminous discovery materials, to prepare the first drafts of responses to interrogatories or to do preliminary privilege reviews will continue to grow. Rather than unleash legions of junior associates in U.S. law firms, law departments can hack away at litigation bills with offshore support. BusinessWeek recently cited a Forrester Research study that predicted that by 2005, close to 15,000 legal jobs will disappear in the United States because of offshore competition.

Not that this idea of using legally trained personnel in the Philippines, India, South Africa or other countries is limited to litigation. The cost advantage-and the time-zone advantages of having work done while lawyers in the United States sleep-can apply to any legal services that resemble commodity work. One can easily envision this "overseas change" upsetting the accustomed economics of large-scale litigation.

Competitively bidding groups of cases. If law departments can reasonably anticipate a dozen or more similar cases being filed against the company during the coming 18 to 24 months, and if they project spending more than several hundred thousand dollars on those cases, they should consider soliciting bids from several firms. The key to the bid process should be that the firms will represent the company in all the portfolio cases for a fixed fee.

Briefly, here is how to use this cost-saving technique. A law department should pick four or five firms it knows have the skills and bench strength to handle the anticipated portfolio of lawsuits. Then it should send the firms a request for proposal that explains as much as the law department reasonably can about the company's history with the cases, except what it has spent on them in the past few years, and what the law department foresees on the road ahead.

Ideally, in-house attorneys can reconstruct the number of hours their current [or former] firms devoted to like cases in the past. Also, they should describe the basic allegations, venue, typical legal issues, status of document discovery and other facts that acquaint the firms with the projected case load. They should also arrange for a conference call or other methods of permitting the firms to conduct due diligence, and be sure to send all the information and answers to all the bidders.

Law departments should also consider seeking a fixed fee from the firms. With the department paying a pro rata share of the overall fee each month, the law firm turns its attention to delivering its services on a basis other than cost-plus; instead, the firm will look to achieving the goals most cost-effectively. Often, the new arrangement will turn up new ideas for how best to manage the litigation.

Law firms should get a chance to rethink their bids

Once the firms submit a bid for what fee they would accept to handle the portfolio, the law department should send back to them the range of bids submitted. This second-step bid will help the high bidders think twice about their assumptions on cost and encourage the low bidders to do the same, lest they improvidently underbid. The law department can address the assumptions made by the firms so the firms gain confidence in the plausibility of their bids. Eventually, the law department can pick the best arrangement and negotiate the contract. During the period of the fixed fee, it should pay the firm a pro-rata portion of the fee at the start of each month and continue to receive bills in the usual format.

In some matters with nearly $150 million worth of bids accepted, the savings that were pocketed from competitively bidding portfolios of cases ranged from 10% to 15% of the status quo fees as projected. Law departments can set up some benchmark metrics to further help keep the deal on track and the performance up to snuff.

Even with the best bidding process and the fullest disclosure on both sides, the arrangement's overall outcome may stray too far in favor of the buyer department or the seller firm. Then, it is useful to have collars above and below the fixed fee. In one consulting project, the two sides agreed to split the underage - to avoid a windfall in favor of the law firm - on a 50/50 basis if the actual hours and costs were more than 10% below the accepted bid. Or, if the work took more than 10% of the firm's standard fees above the accepted bid, the department agreed to pay 50% of the overage.

Much more can be said about competitive procurement of fixed-fee services, but the point should be clear: Those who manage litigation - and want to drive down costs - should be alert to grouping future cases and seeking bids to structure the representation of them.

Budgeting several months into the future

Phased budgets. The fourth technique for managing litigation costs relies on budgets. Of course, everyone knows about budgets. But phased budgets have three distinguishing characteristics. First, these budgets cover reasonably foreseeable periods of time, such as six months. Second, an inside lawyer studies the firm's budgeted tasks and staffing and approves or modifies them. As much as reining in costs, the value created by budgets often stems from the discussion between the inside lawyer and the firm's partner about methods, timing, emphasis, staffing and other drivers of cost. Third, if the law firm exceeds the mutually approved budget for the phase, the law firm absorbs all or most of the excess.

Each of these three characteristics must be in place and have some teeth. By most accounts, holding the line on budget-busting is the hardest step; for this reason, it helps if the law firm is handling several cases under this budget regimen. By contrast, the form of the budget can be simple and the review, if the discipline exists, can be straightforward.

These four techniques are not talismanic. They do not magically make litigation pounds melt away. But they each have dietetic tendencies. Even more, this quartet challenges the prevailing orthodoxies of litigation management: Hire a big U.S. firm to do everything on a per-case basis, using hourly billing rates and bills submitted periodically. No one claims that these are the best four, or that they have burst on the scene lately as novel ideas. But they work.