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Considerations to Help Contain the Cost of Today's Litigation

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I have been on both sides of the attorney-client relationship, both retaining counsel and rendering legal services. Early in my career as a claim unit manager at a property-casualty insurer, I worked closely with the outside counsel we retained to handle various litigation matters facing the company. For the last 16 years I have practiced law in Massachusetts at both a large firm and a small litigation boutique. With the cost of litigation continuing to rise, what follows are things to consider while pursuing cost-effective dispute resolution for your organization, whether it faces an insurance coverage case, insurance defense matter, employment litigation or other type of business dispute that arises with insurers, reinsures, agents/brokers or others involved in the insurance industry.

Selecting Counsel and Establishing the Litigation Team

The selection of the right attorney with the requisite skills and expertise is a fundamental yet critical decision that will impact the cost of your dispute. Seeking a cost-effective advocate does not necessarily mean that your decision should be driven by rates. Too often, businesses focus on an attorney's hourly rate, and while that is a relevant consideration to be sure, it is just one of many things to consider.

With the continued increase in hourly rates, a senior partner at a large firm may charge roughly $750 per hour. But that senior attorney may possess the exact expertise and precise skills you are looking for, which justifies the lofty rate. The area to focus on, however, is the other attorneys that he or she may include as part of the team working on your case. It is critical at the outset of the engagement to confer with your counsel as to the number of attorneys who will be involved on your matter and the experience level and billing rate associated with each. While the senior partner may be worth $750 per hour, you may find that the junior associate initially assigned to your case may not provide sufficient value at $450 per hour. Work with your counsel to determine the associate or associates that are the best fit for your case and attempt to keep the number of timekeepers limited to what is necessary to reduce the time you are billed while attorneys learn the background to your dispute.

At the other end of the spectrum, make certain that those firms that are charging you much lower hourly rates are still working efficiently, assigning experience-specific projects and not spending excessive time on tasks that add little value and that the more experienced attorneys contribute to the strategic decisions that can impact the direction of the case.

Early Settlement Assessment

For decades, businesses have bemoaned the notion that so many cases settle "on the courthouse steps." Yet to this day, while the vast majority of civil cases settle, many (if not most) still settle late in the process and after the lion share of the legal fees have been incurred by both sides. Why does that continue to happen? One factor is that parties never know if a proposal they have been offered is the best possible deal they can achieve until the case is nearing trial. They contemplate the fact that if they settle earlier in the process, they could be settling at a price point that may have been improved later. While there can be critical business considerations that preclude pursuing an early resolution, many times an early attempt at settlement is sensible.

Many cases ultimately settle through mediation, but much of the time the mediation occurs after the close of discovery and following any dispositive

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motion practice. At that point, most of the fees have been incurred and the case is close to trial. Often times, however, the parties already have a solid sense of the strengths and weaknesses of their case long before that. A settlement early in discovery can save thousands of dollars in attorney time and litigation expenses. There are too many instances in which the delta between the litigants is chewed up in legal fees; a realistic early settlement assessment can help avoid those instances in which a successful outcome is undermined by the costs associated with achieving it.

Managing Electronic Discovery

One major development in current litigation is the prevalence of e-discovery and the exchange of electronically stored information (ESI). The prevalence of email in our business activities can result in document productions that can implicate thousands of email communications in even a straightforward dispute. The retrieval of ESI can be disruptive to the litigants who possess the data and the document review can consume hours of attorney review time if not managed properly with a plan for retrieving, reviewing and processing the ESI. Time spent negotiating with your opponent over the scope of the searches, the search terms to be utilized and the format of the material to be exchanged can help limit the costs. Oftentimes your counsel will suggest an e-discovery vendor to conduct the harvesting of hard drives and the hosting of the data.

Work closely with counsel and the vendor on decisions about the format of the productions that can impact cost. In some instances, it will be worthwhile to use a review tool to facilitate a massive review and production. In other instances, that cost and others, such as whether to make files searchable or available in a certain format, may not be justifiable. Sometimes, an elaborate electronic production may not be necessary and your production can be completed by simply burning a disk or sending a banker's box. Work with your counsel to be certain the steps undertaken fit the appropriate circumstances of your case.

Controlling Expenses

Parties tend to focus on attorney time in assessing their legal bills, but oftentimes a material percentage of the total cost of litigation can be tied to expenses. For instance, deposition transcripts often cost between $500 – $1,000 per witness, depending on the number of pages of testimony. The cost per page is often increased if counsel requests that the court reporter expedite the preparation of the transcript. The cost is also increased oftentimes if the attorneys use a real-time feed (typically by iPad) during the deposition. In certain cases those measures are warranted, but often not. Work with your counsel to decide what makes sense for your case as the difference can be significant. Also set expectations with your counsel on other expense issues, such as the cost per page of copies, the cost of legal research programs and other expenses that some firms may bill to clients while others do not.

Arbitration as an Alternative

It is currently popular to claim that the binding arbitration process is "broken" and no longer a less expensive alternative to litigation. My personal experience, however, has been otherwise. I have found arbitration to be a cost-effective means for resolving a dispute. While there are costs associated with arbitration that do not exist with court proceedings (*i.e.* the administrative cost for the arbitration and the arbitrator), these costs are typically offset and then some by the savings associated with a typical arbitration. The savings arise from the streamlined process which often includes, among other things, telephonic hearings, communication by email, more limited discovery, adherence to an agreed-upon schedule and a timeline to adjudication that is typically much faster than court proceedings. For instance, it is not uncommon for arbitrators to limit discovery to one set of document requests, a set sum of deposition time per side and no interrogatories.

Expedited procedures typically apply to disputes involving smaller dollar values, which can result in an expedited timeline and proceeding spanning 90 to 120 days from demand to award.

Many reinsurance contracts contain arbitration provisions that establish a panel to decide the dispute with two party-appointed arbitrators and a neutral umpire. Use of a panel as opposed to a single neutral arbitrator can increase the costs of the proceeding significantly. Parties should review the express terms of any arbitration provision contained in their contracts so that terms establish a proceeding with the parameters that are intended.

Cost-Shifting Mechanisms

Under the American system, each side pays its own legal fees regardless of the outcome of the case, unless there is a statute or contractual provision that alters this default rule. Businesses can consider including a term in certain contracts, where appropriate, to alter the default rule and establish that the losing side in a dispute pays the prevailing party's legal fees. Such a clause deters the assertion of frivolous claims or meritless defenses as the party that advances such a position faces the risk of paying the other side's legal fees and expenses if the matter is adjudicated. Finally, when the plaintiff seeks recoveries of monies owed, you can consider entering a contingent fee agreement that ties your counsel's compensation to the monies recovered. ■

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