

Blakes Bulletin

Litigation & Dispute Resolution

Controlling Litigation Costs

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The management of litigation costs has become a major concern to corporations. Effective management of litigation is key to not only reducing costs but to achieving timely and desirable results. Following are some ideas for achieving efficient litigation management.

LITIGATION AVOIDANCE

The best way to avoid litigation costs is to avoid the litigation itself. Identifying problems early and analyzing the legal issues before a matter turns to litigation is often the most important step. Cutting a company's losses and dealing with complaints at an early stage can often avoid having a matter spin out of control and drive costs up. A company need not adopt a crisis management position for each minor problem that may potentially involve litigation; however, there should be a reporting system which encourages potentially litigious issues to be reviewed. Ideally, the reporting function should involve a corporation's counsel. Although there is no substitute for a formal opinion, very often an early "smell test" can avoid creating a monster.

AGGRESSIVE INITIAL CASE EVALUATION

A detailed analysis of the merits of a case, including interviewing known witnesses, reviewing and analyzing key documents, should be undertaken at the front-end. While this amounts to a material investment at the initial stages of litigation, it saves significant resources in the long term and assists in early risk assessment and settlement. If a defendant's assessment is that their case is weak, early settlement avoids the opposing side learning of supporting facts which may later be disclosed in discovery. If an early assessment reveals a winning case, it often identifies strategies to employ early to assist in winning the case. An early assessment of the case also streamlines and assists in the progressive and orderly handling of the matter. Key to the initial case evaluation is some form of basic probability analysis or "risk tree" which determines likely outcomes and, typically, places some

dollar values around the claim for working purposes. Another key element of the initial case evaluation will be the identification of whether there are important public relations issues, corporate policies or business relationships at stake, including those that may pertain to the reputation of company representatives and whether directors' and officers' insurance might be involved. All of these elements will inform the settlement strategy adopted at the outset.

DECIDE YOUR LITIGATION GOALS

Not all litigation is bet-the-company litigation where a full panoply of resources needs to be expended. Sometimes a small payment and confidentiality agreement early in a process may prevent an aggrieved and otherwise resourceful plaintiff from being a representative plaintiff in a class action. The point is that all litigation should not be treated as equal and a triage approach should be adopted to ensure the proper amount of resources are engaged in a matter. Innovative and unconventional approaches to resolution should always be assessed through well-considered litigation goals instead of adopting a "we're going to show them" response in all cases.

USE OF A LITIGATION PLAN

After conducting an early evaluation, decide your litigation goals and, if the case cannot be settled, some type of litigation plan should be prepared. It should include a plan of how the issues will be attacked, what discovery needs exist, investigative requirements and specific steps required to be completed. Not all eventualities in litigation are predictable so the litigation plan will occasionally have to be revised. That is preferable to not having a plan, which can create significant inefficiencies. An essential element of the litigation plan will be some form of budgeting process. Again, the uncertainties of litigation make forward-looking budgeting difficult in many cases; however, as costs and expectations diverge, the re-evaluation of the budget is often a beneficial process since it assists in allocating resources to the most useful steps in the litigation and also tends to keep settlement at the forefront.

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PROCEDURAL APPLICATIONS WHICH SAVE MONEY

Procedural applications which have little or no impact on the ultimate result occur too frequently in litigation. Other applications are relatively inexpensive compared to the potential cost savings. For example, all of the common-law provinces recognize the inherent jurisdiction of the court to make orders for security for costs where deemed necessary in the circumstances. Forcing a plaintiff to post security for costs avoids the "free-option" to pursue litigation and may force a litigant to be more compelled to accept a reasonable settlement offer or adopt a more realistic approach to the litigation. In some cases, failing to post security when ordered to do so will result in the action being dismissed. A further example is demanding particulars of a claim which may not only limit the generality of a claim but dramatically reduce the document discovery obligations of a defendant.

MEDIATION

While proceeding with mediation may not be recommended when defending against a weak or frivolous case, mediation allows direct access to the opposing party in the absence of a filtering effect of counsel. The process is non-binding and relatively inexpensive compared to other forms of alternative dispute resolution. Moreover, the risks are generally limited and the parties, even if they do not settle, often emerge with a better understanding of the real issues and facts in dispute which may more easily pave the way for later resolution. The choice of a well-respected and effective mediator greatly assists in the process.

OFFERS OF SETTLEMENT

Most common-law jurisdictions have specific rules allowing a party to make a "without prejudice" offer with attendant penalties (including double costs) if the offer is rejected and the trial judgment awards something less than what was offered. The strategic use of such settlement offers, particularly with corresponding potential sanctions, raises the stakes to have the opposing party seriously consider the offer. In some cases, the penalty of additional cost sanctions is often the catalyst to settlement with a recalcitrant opposing party. It often forces the opposing party to more realistically assess the risk of continuing with the lawsuit and necessarily engages clients to focus on settlement where they are otherwise not engaged.

EXPLORING ALTERNATIVE BUSINESS SOLUTIONS

Often parties to existing or potential litigation have ongoing business relationships with a number of outstanding disputes and commercial arrangements. A higher level analysis of those relationships can reveal innovative commercial solutions which achieve the commercial interests of both parties. Rolling a small litigation problem into a much larger business deal is often an acceptable way to resolve a dispute without having to focus all of the parties' efforts on "who was right".

MANAGING EXPECTATIONS

Litigation is, by its nature, costly, slow and an imperfect process. Litigating "on principle" is seldom particularly rewarding because the process of getting to judgment day is often difficult and the "principle" can even get lost along the way. Departing employees, fading memories and less-than-ideal document retention, combined with the normal costs and delays in litigation, can weaken the resolve of litigants. A realistic assessment of the obstacles to litigation should be assessed at the front-end of a matter so executives and others are aware of the time and cost commitment needed to proceed with litigation.

EFFECTIVELY MANAGING STAFF

Having the wrong staff person at the point of contact with a potential plaintiff or class of plaintiffs can be disastrous. It is very often the case that the person most deeply involved in the background to a dispute may not be the right person to attempt resolution once litigation begins to loom, despite their background knowledge. The involved person often feels the need to vindicate prior actions and this can restrict their effectiveness in dispute resolution prior to or during litigation. Spending time on identifying the right individuals to deal with a dispute is critical and results in greater efficiencies and prospects of a favourable settlement.

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