

10 Ways to Reduce Litigation Costs

By Joseph M. Callow Jr.

Let's start with the obvious: in survey after survey, the No. 1 goal of in-house counsel is to reduce outside litigation costs. Litigation is expensive, time-consuming and distracting to businesses and individuals alike. Recognizing this reality, here are 10 action steps to consider in reducing litigation costs.

1. Conduct an Insurance Review—Before You Get Sued

Typically, companies get sued and then ask their counsel whether they have coverage. At this point, there is little to do if the answer is “no” or “probably not.”

Instead, find your policies and conduct an insurance review with outside counsel — before you get sued. Anticipate the types of suits you may have in the future and analyze in advance where you may have coverage; where you have duplicative coverage on different policies; or no coverage at all. You should also look for important provisions like coverage for defense costs/pre-suit investigations and authority to choose defense counsel. You may want to request these provisions during your next renewal. During the review, remember the difference between claims made and occurrence policies (and clarify which type of policies you have); establish procedures for providing notice; and make sure you understand when notice is required (which under some policies may be before a complaint is actually filed).

A company with time to negotiate insurance coverage should not accept standard policy language without consulting with counsel beforehand. Reviewing your insurance coverage before litigation is filed could save your company substantial fees and monies down the road.

2. Review Boilerplate Dispute Resolution Clauses — and Monitor the Progress of the Arbitration Fairness Act of 2007

When is the last time you spent 15 minutes and reviewed your boilerplate contract terms or standard terms and conditions?

For example, most companies years ago added a standard arbitration provi-

sion requiring arbitration of all claims through the American Arbitration Association. Do you really want to arbitrate all claims? And do you really want to arbitrate through AAA? My personal experience is that the latter is an administrative cost drain, and many clients have not recently evaluated the benefits and burdens of mandatory arbitration.

If you are a proponent of mandatory arbitration, make sure to monitor the progress of the Arbitration Fairness Act of 2007 (Senate Bill 1782) proposed by Wisconsin Senator Russ Feingold. The bill, as currently proposed, would “make pre-dispute agreements to arbitrate employment, consumer franchise, or civil rights disputes unenforceable.” No action has been taken to date on this bill, but it could have a profound impact on your company's litigation/arbitration budget in the future.

More important than arbitration provisions, consider a mandatory mediation provision in your standard forms. I often hear that counsel and clients believe that mediation is not going to be successful until we score points in discovery — which certainly benefits litigators but is not necessarily the case. Pre-filing mediation forces parties to evaluate the merits of their respective positions; generally provides some early and relatively free discovery; and usually results in a neutral, non-binding evaluation by an independent mediator. And even if only successful 10 to 20 percent of the time, that still represents several cases where you can save litigation costs for the price of the mediation.

Finally, review the pros and cons of mandatory venue provisions; and if you have a “governed by Ohio law” provision, ask yourself if you know what Ohio law holds for the particular contract or transaction.

Think about the rationale for these standard provisions before you have to enforce them or are bound by them in litigation.

3. Schedule a Lunch Program and Talk with Employees about the Use of E-mails in Litigation

Lately I've been spending time with clients at lunch meetings and giving a short presentation to employees about »



CBA member Joseph M. Callow Jr. is a partner at Keating Muething & Klekamp PLL. He focuses his practice in several areas of litigation, including class actions, copyright infringement and intellectual property, securities, ERISA and qui tam litigation. He can be reached at (513) 579-6419 or jcallow@kmlaw.com.

the use of e-mails in litigation. Many employees still do not understand that their e-mails are discoverable in litigation — and that “delete” does not actually mean delete. E-mails are often the key pieces of evidence that impact document requests, depositions, pretrial motions, settlement discussions and ultimately juries.

Some companies have adopted formal e-mail policies, which is one way to educate employees and try to limit the use and subjects of e-mails within a company. Personally, I believe a short presentation and discussion about e-mail common sense is more practical and productive. Here are some points I cover:

- (1) Proofread and use proper grammar; avoid emoticons and acronyms in business e-mails.
- (2) Think twice before simply copying and blind copying people on e-mails (Rule of thumb—the more people copied, the more depositions down the road).
- (3) Avoid arguing by e-mail and attempting to address and resolve problems by e-mail (which will limit the “I told you so” and “let me set the record straight” e-mails that litigators have come to love).
- (4) Tell employees to ask themselves some basic questions before hitting the send button:
 - “Would I say this to the person if she was in my office?”
 - “Would I put this in a memo on company letterhead?”
 - “Would I like to see this on poster board before a jury?”

One of the best ways to reduce litigation costs is to discuss better ways to communicate to limit potentially damaging documents (and future discovery costs) before litigation begins.

4. Implement Your eDiscovery Policy

I know you have been bombarded with articles and CLE about eDiscovery for months. I also know that your policy is probably in the stack of documents on the back of your credenza. I’ll leave it at that, and remind you to implement the policy.

5. Consider the Benefits of An Outside Coordinating Counsel

Google “Outside Coordinating Counsel” and the search results will provide you days of reading material. After you sort through a bunch of law firm advertisements, you will find that employing an outside coordinating counsel — for all claims related to a particular incident, event or product or all similar claims over time with a common history or issue — can save significant litigation fees and costs.

The benefits of an outside coordinating counsel include consistency in defense strategy and discovery; efficiency and expertise in defending litigation; and a higher level of comfort among your employees dealing with a single outside counsel over time. You also receive a comprehensive defense by one set of attorneys at one set of billable rates with only one bill to review.

Outside coordinating counsel are business partners who should prioritize your company’s litigation and work with you to prevent litigation and minimize overall litigation costs.

6. Involve Outside Counsel at Investigation, Pre-Complaint Stage

The first call I generally receive is “I have been sued.” After we discuss whether there is insurance coverage (see point one above), I sometimes hear “don’t worry — I already investigated and have all the facts.”

Regardless of whether that statement is accurate, the larger issue is whether the “investigation” is privileged — and it may not be. Working with outside counsel during the investigation stage can increase the likelihood that the investigation is privileged. Outside counsel can also retain consultants and third parties to assist in investigations on a privileged basis.

Further, involving outside counsel before litigation has commenced also allows for potential pre-complaint settlements or resolutions — before sides become entrenched and start drawing lines in the sand. Good litigators look to settle disputes before litigation ever commences.

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Request Litigation Plans, Litigation Risk Assessments

Each litigation matter is a business opportunity. As with any business opportunity, you need to identify potential options/alternatives; prioritize allocations of resources; establish a timeline and sequencing of events; determine staffing considerations; and most importantly outline goals and potential exit strategies. It is not always easy, but litigation costs can spiral when there is no game plan and no exit strategy in place.

Litigation Plans or Litigation Risk Assessments (“LRA”) establish the business plan for the case. A good LRA should not be prepared at the beginning of litigation and ignored through the course of discovery. A basic LRA should summarize known facts and identify unknown facts and variables; analyze legal issues and relevant case law; discuss strengths and weaknesses; provide budget parameters; and evaluate possible results and probabilities. Litigation budgets provide a financial overlay to the LRA and should also be updated and discussed as the case proceeds.

As any good poker player knows, you need to know and evaluate your “outs.” The same holds true in litigation — always know your exit strategy and exit options — whether you are settling at the first opportunity, appealing to the United States Supreme Court, or perhaps something in between.

9. Reflect on Alternatives to Billable Hour Arrangement

According to the *Report of the ABA Commission on Billable Hours*, more than 90 percent of attorney-client relationships are based on a billable hour formula — despite numerous articles advising clients and law firms alike to consider alternative billing arrangements. The reason: “The dominance of hourly billing rests on interlocking and reinforcing pressures: simplicity, familiarity, profitability, efficiency, and amiability.”

Law firms are increasingly willing to consider flat fee arrangements, volume discounting, blended rates, and contin-

gent fee arrangements in litigation. These arrangements can enhance efficiencies in litigation and provide more predictability for clients in budgeting litigation costs.


Alternative billing is different, and it may be uncomfortable at first given the pressures identified above. But it also may provide a new opportunity to lower litigation costs in the long run.

10. Brainstorm with a Litigator Anticipating and correcting problems is always the best way to avoid litigation — and who is going to know more about this than a litigator?

Spend some time talking with a litigator and discussing some basic non-case specific issues:

- What is the next wave of litigation to affect my business?
- Why are my competitors being sued and what can I do so I am not next?
- How is a litigator going to attack my company's new product/concept/contract language?

Companies expect litigators and outside counsel to keep track of new issues and monitor trends in the law — consider gaining the information and answers before litigation is filed and spend time and money addressing the issues before you get sued.

Whether any or all of these action items are applicable, one final word of advice — find a litigator who you trust and with whom you want to spend a lot of time. There is no substitute for trust, confidence, and open communication in litigation. 

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