

Four Tips for Reducing Outside Litigation Counsel Spend

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According to the recent Norton Rose Fulbright's 10th annual Litigation Trends Survey, the amount that U.S. companies are spending on litigation is sharply on the rise. The survey of more than 400 corporate general counsel found that companies are hiring more outside attorneys and are paying those lawyers more money than ever. 71 percent of corporations spent \$1 million or more on litigation cost in 2013, up from 53 percent the two previous years. More than 26 percent of companies saw their litigation costs exceed \$10 million last year, compared with only 11 percent in 2011. Faced with ever increasing pressure to buck these trends and reduce costs, here are four suggestions for in-house counsel to consider:

1) Hire the Right Firm

While there are some large and complex matters that require the capacity and infrastructure that can only be provided by a large firm, these matters are the exception and not the rule. With some research and networking, companies are likely to find experienced and skilled attorneys practicing at small and medium-sized firms that can handle the great majority of litigation - including large and complex cases. In addition to providing lower rates and more efficient staffing, smaller firms are also more likely to be receptive to alternate fee agreements. Attorneys at smaller firms are not only likely to bill a fraction of that charged by a large firm, but are also likely to provide superior and more attentive service and obtain better results than attorneys at larger firms.

2) Consider Using Contractual Provisions that Limit E-Discovery

One of the more recent, and perhaps overlooked, tactics employed by in-house counsel to reduce litigation costs is to reduce e-discovery risk by using contract provisions to address e-discovery issues and establish discovery protocols before litigation ensues. For example, companies can include in their contracts language which specifies when a party's duty to preserve evidence begins, the types and sources of data to be preserved and searched, shifts fees and costs associated with E-Discovery to their opponent, and limit the availability of discovery sanctions. While it is unclear whether courts will ultimately enforce these provisions, they do provide the potential to reduce the burdens of e-discovery by reducing preservation and production costs. Such provisions will likely be most useful when used in contracts involving arm's-length bargaining between sophisticated parties of equal bargaining power.

3) Consider Early Mediation

It has been estimated that approximately 97% of civil litigations settle or are resolved before trial. While every case may not be appropriate for mediation, the overwhelming majority are. A "win" at summary judgment or at trial is pyrrhic if the cost to defend exceeds the amount that the case could have settled for. In-house counsel, either by itself or with the help of outside counsel, should not only make an early and honest evaluation of the merits of a case, but also continue to reevaluate the merits as the case develops. While mediation at any time in the proceeding is often a good idea, whenever possible it is best to mediate a case as early as possible -- even prior to the filing of a lawsuit if possible -- to maximize the cost-savings benefits of this increasingly popular form of ADR.

4) **Keep the Work In-House**

Whenever possible, in-house counsel should consider keeping the work in-house. There is a clear trend for large corporations to perform more work in-house. According to an Association of Corporate Counsel/Serengeti Law Managing Outside Counsel Survey, in 2012 companies spent \$1.50 on outside counsel for every \$1 spent in-house whereas in 2004, it was \$2 on outside counsel versus \$1 internally. In the 2013 ACC Chief Legal Officer Survey, almost 50 percent of respondents reported expanding their in-house legal departments in 2012. There are many tasks that can be handled in-house that historically have unnecessarily gone to more expensive outside counsel. For example, if they are not already doing so, inside counsel should consider internally handling preservation and collection of E-Discovery, and could likely handle part or all of many document reviews and productions at a fraction of the cost that it would require to hire outside counsel for the same task.



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