

Litigation Management: Strategies for Aligning Cost with Value

It is nearly a decade since the “Great Recession” of 2008. As in most industries, the aftermath of the Great Recession has had a significant impact on the business of law, both for the consumers of legal services – in-house law departments – and for the traditional suppliers – law firms. The goals for each have remained largely the same, but are now increasingly in conflict with each other.



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The overarching goal for most in-house law departments is to efficiently achieve successful outcomes, while the goal for most law firms is to increase profitability. These goals can happily co-exist when the cost of legal services is not an issue. However, we all know those days are long gone. Post-Great-Recession law departments are now reporting to the CFO as well as the CEO and the board. Law department leaders are challenged with managing risk, handling budget pressure, creating predictability and doing more with less – and yet must still achieve successful outcomes. Law firms have their own challenges to manage risk, handle client pressure on fees, combat commoditization and maneuver competition from technology and non-law firm legal service providers – and yet increase profitability to retain top talent.

Has the new economic environment created a dynamic where it is impossible for law departments and law firms to meet their sometimes shared, but often conflicting challenges and goals? No, but changes in approach and structure are required from each.

Law firms have been slow to adapt. Those that have been able to break away from decades of traditional thinking have done well. The firms that have made a disciplined commitment to their place in the market are thriving. Firms that have narrowed their focus to exclusively high-tolerance/bet-the-company matters are able to command a premium for their services. Also doing well are firms that have restructured to eliminate ancillary and low profit margin practices and who have changed compensation structures to more business-like models. Alternatively, firms that are handling commodity work

have had to find ways to cut costs, employ technology and be mindful to stay within their niche. Finally, the rise of high quality boutique firms is increasingly filling the need for sophisticated legal services at more reasonable rates. (See 10 Boutiques Giving BigLaw a Run For Its Money, Law360, July 8, 2015.)

What can law department leaders do to align cost with value in litigation? Like law firms, law departments have to function and think differently. There are three main strategies that law departments are using in this regard: disaggregation, alternative fee arrangements (AFAs) and aggressive case management.

Disaggregation

The newest trend among law departments is to disaggregate the supply chain of legal services. It is no longer the norm to only use a select group of outside law firms to satisfy all legal service needs. While the largest shift away from using outside counsel is to bring more work in-house, it is a pendulum that swings every five to 10 years and is not terribly innovative. The more interesting disaggregation strategy has been to divide the legal services pie into three parts: outside law firms; technology and technology service providers; and non-law firm or non-traditional law firm service providers, often boutique firms.

Horses for courses are important. Within a disaggregation strategy is the critical need for selection of the appropriate outside counsel, and clearly defining the scope of work to be performed by that lawyer or firm. The law departments that are leading the charge on disaggregation not only choose counsel that are best suited to handle a case, but



they often will involve more than one firm. This allows them to create a virtual firm or team of lawyers who will handle the specific aspects of a case that are best aligned with their strengths and abilities to achieve cost efficiency. For example, in a complex litigation, one firm may act as discovery counsel, while another handles substantive motion practice and yet a third is designated as trial counsel. Law departments also use their consortium of firms to provide value outside the context of a specific case. By using technology, law departments can further facilitate the virtual law firm model. Firms can be required to participate in a secure web portal where they share knowledge and make their work-product produced for the mutual client, or if not otherwise confidential, available to other firms in the consortium.

Alternative Fee Arrangements

Alternative fee arrangements (AFAs) are another useful tool to align cost with

value. The landscape of different AFAs is large and beyond the scope of this article. However, caution should be exercised in any AFA to ensure that the firm selected is the one most appropriate for the matter. An AFA with a firm that is not structured to realize a profit from the AFA could produce a poor outcome for everyone. Think of an AFA as an *appropriate* fee arrangement.

Aggressive Case Management

Apart from the above, how a case is managed is one of the most crucial areas where cost and value can be aligned. Nothing is more valuable than early case assessment. Get your outside counsel on the same page in terms of your business goals for a case. Clearly define what a successful outcome will be. Is it settle early and get out, or is it to take a strong case to the end as precedent to discourage other potential plaintiffs? Define the scope of the case, what are the key issues to defend or pursue, how can discovery

be reduced, is mediation or other forms of alternative dispute resolution (ADR) appropriate and when?

Of course the best strategy to align cost with value in litigation is to invest in activities that can reduce or even eliminate the incidents of litigation. A proactive risk avoidance program can provide high value returns. Employee training, a robust compliance program, review of form contracts to eliminate repetitive cases or require mediation, are all effective methods to reduce a law department's expenditures.

"The times they are a-changin'." Thinking more expansively, striving to innovate and moving away from the traditional legal services supply chain will help to align cost with value in the new economic reality. **P**