

Make an assessment early on, don't let costs skyrocket

The primary complaint of any business facing a potential litigation matter is the inability to control the cost of the litigation.

As with every other type of business decision, it is essential to undertake a cost analysis at the outset of the litigation to assess the expenses that are likely to be incurred, as compared to the benefits that the business expects to achieve. Rather than simply writing a blank check, it is critical that a company develop methods with its counsel to limit litigation costs while not restricting the benefits that might be achieved.

Here are some steps to place a limit on these costs to avoid litigation becoming a runaway freight train loaded with expenses.

■ **Budgeting and monitoring costs as they are incurred:** An objective analysis and a budget, along with a plan in place to monitor costs on a monthly basis, can be helpful. A budget needs to be developed

Early assessment can help determine whether the costs will be greater than the benefits.

for both attorney's fees and disbursements, and each month there should be an assessment of whether or not the costs are within budget. It is imperative that the budget be realistic. An accurate economic analysis must include all aspects of the litigation from beginning to end. If the budget is not being met, there needs to be an immediate conference with counsel that determines why the case is not within budget and what steps can be taken to get the costs under control.

■ **Electronic discovery is out of control and needs to be reined in:** As a rule, the most expensive component of litigation is the discovery phase. That phase has become an increasing problem as a result of electronic communications. Before any litigation starts, a company needs to properly train its employees on improving their email habits by instructing them to habitu-



LITIGATION LANDSCAPE

Michael R. Wolford

ally stop and think before immediately responding to an email. Outside vendors can assist, but the company needs to coordinate these procedures.

■ **Employing mediation at an appropriate time in the litigation process:** At the commencement of litigation, there needs to be an early assessment of the likelihood of success and an investigation into a possible early settlement through the mediation process. However, premature mediation is not appropriate if there are a number of unknown components in the case. Unless the case primarily involves a question of law and limited disputed facts, it may be appropriate to wait until document discovery is conducted before employing mediation.

■ **Consider alternative fee arrangements:** With the exception of a plaintiff's personal injury case, the vast majority of litigation matters are billed on an hourly basis. No company should unquestionably accept the initial fee arrangement proposed by outside counsel; investigate fee arrangements other than the hourly billing format. For example, the business should consider a flat fee, or a fee that depends on certain incentives. A cap on litigation costs should also be explored so that the company can be certain that the litigation costs will not exceed a set amount. It is smart business practice to research alternative arrangements before an engagement letter is finalized and the budget implemented.

■ **Maintenance of current set of employment policies and procedures:** Before litigation starts or is even contemplated, any business must have a current set of employment policies and procedures in place that is consistent with both federal and state regulations. Employment litiga-

tion can be very fact-intensive and, as a result, can be expensive. If the company's written employment policies and procedures are compliant with both federal and state regulations, however, an employment claim can be cut off at an early stage.

■ **Consider more than one law firm when litigation is on the horizon:** Although it is customary to retain the law firm or counsel with whom you are familiar, it is prudent to interview additional law firms on any litigation matter. Commercial litigation is a very competitive environment, and it is reasonable to interview more than one law firm in order to not only look at different hourly rates, but also explore different methods in the handling of a litigation matter. It is more important to do that process at the outset rather than halfway through the case—after you have invested time and expense with the initial firm.

■ **Fast track the litigation:** The longer the case remains in litigation, the more costly it becomes. As a result, you need to insist on a scheduling order that is to be implemented by the court to move the matter along in the most efficient and expeditious manner. In essence, seeking court intervention at an early date can keep costs down.

■ **Expert expense can be substantial:** In a case requiring an expert, the company must engage in a dialogue with counsel in selecting the expert. You should shop around and make certain that not only are you comfortable with the expert, but also the expert's fees are reasonable. You need to check references and review transcripts of prior testimony to be certain the expert has the proper experience.

■ **Being part of the process:** By becoming involved with the case, the company can assist in litigation to keep the costs down. It can aid in reviewing documents, selecting an expert or providing some of the litigation support services that an outside vendor would provide. As a result, fees are minimized and costs reduced.

■ **Employing summary judgment at the appropriate time:** In many instances, once discovery is complete, a summary judgment motion may be in order to

eliminate or substantially reduce a very expensive trial. Although some trials cannot be avoided, there are instances where a partial summary judgment can be a substantial benefit, and more importantly, it can limit the number of issues that need to be litigated.

An early assessment of a case can help determine whether the costs to be incurred in litigating the matter are greater than the benefits that may be achieved. Once the case is underway, it may be too late to reassess the decision to litigate. Implementation of the above methods can assist a

company in making a well-reasoned decision that will stand the test of time.

Michael R. Wolford, a partner with the Wolford Law Firm LLP, has been engaged in litigation for 47 years. He may be reached at (585) 325-8000 or mwolford@wolfordfirm.com.