

Effective Collaboration: 20 Practical Considerations for Corporate Counsel to Obtain Value
While Containing Costs

By W. Scott O'Connell and Marcus E. Cohn

As the fees and costs associated with major and systemic litigation continue to grow, so too do the pressures on in-house counsel to manage and contain these expenses. Ensuring that the fees and costs bear some reasonable relation to the inherent risks and business objectives of the case is among the more complex tasks which confront any legal team. When cost is not an issue, it's comparatively easy to preserve all options and defer difficult strategic discussions while the earth is "scorched" and no stone is left unturned. Cost, however, is an issue more often than not, and containing of expenses requires strategic, focused, and disciplined effort. Informed surgical strikes often are more valuable than overwhelming "shock and awe" force.

Focused strategies for cost containment, while delivering the "reward" of increased cost savings, also contain commensurate "risks." By focusing and investing in certain perceived high-yield activities, other promising areas of attention are ignored or undeveloped. Tough choices have tough consequences at times, a reality that must be acknowledged and embraced by the entire litigation team. Many a productive relationship between inside and outside lawyers has broken down because of the failure to identify, manage and accept responsibility for this type of "risk/reward" approach. Success requires collaboration and discipline.

Developing effective collaboration is more of an "art" than "science." Certain guidelines, procedures, and strategies, however, are helpful in creating the environment for productive collaboration. In assessing the effectiveness of your collaborative efforts, consider how you have dealt with the following:

1. Define "Value"

Clients want and need "value" for the litigation investment made. "Value" -- like beauty-- is in the eye of the beholder and is a function of many things, including the risk of loss and the cost of success. Ensuring that the entire legal team has a common understanding of what "value" means in the context of any case is essential and becomes a guiding principle against which all decisions are made. Detail the business objectives and make sure that both your client and outside lawyers have a common understanding on this essential point.

2. Build Your Legal Team Starting With The Lead Trial Attorney

Execution of a strategic and focused strategy to contain costs requires thoughtful and informed choices about activities that will have a direct bearing on how the case is tried. Treat the case from the beginning as if it is going to trial, and assign the lead trial lawyer immediately. Insist that he or she participate from the beginning in building the case strategy. Often, where the trial lawyer is not involved from the initial strategy meetings, inefficient and costly adjustments need

to be made before trial. Make certain that you have the right supporting legal team. Pay attention to the qualities of the middle and low level members.

3. Build A Trusting Relationship On The Basis Of Candid, Direct, And Honest Communications – Check All Egos At The Door

At its core, a trusting relationship is built on honest, direct, and candid communications that are free from distracting baggage such as overbearing ego, unexpressed expectations hidden agendas and fear of ridicule. Empower each member and encourage a respectful reception to ideas.

4. Retain And Involve Consulting Experts Early

Consulting experts -- whether specially retained or employees of the company -- are essential contributors to a focused and strategic litigation strategy. Use their expertise to separate and prioritize the high yield from the lower yield activities. Too many legal teams operate unguided by this assistance, which often results in unnecessary legal fees.

5. Develop A Clear, Concise, And Jury-Friendly Theory Of The Case

This is by far the best device to stay focused and on point. Ensure that all activities fit within the theory. Modify the theory as necessary or discard activities that do not fit.

6. Identify The Risks Inherent In The Strategy Adopted And Obtain Buy-In From Your Client

In order to manage risks, it is essential to know what they are. Do not avoid a direct discussion on the consequences of pursuing a narrow strategy. For the collaboration to succeed, the client -- who wants the reward of lower fees -- must understand that a strategic focus may have consequences. Most companies are well equipped to manage risks that they know exist. Unidentified risks, however, can cause great difficulty.

7. Use Clear, Concise, And Easily Applied Billing Guidelines Effective collaboration and value-added activity is often unintentionally undermined by the adoption of cumbersome billing guidelines and procedures. These devices may be designed to force the legal team to develop a theory of the case and the resulting strategy and action items that flow from it. Unfortunately, some use these guidelines in lieu of these other communications with the hope of attaining cost control. While there are, no doubt, benefits to be had through the application of uniform guidelines, they are only a small piece of the significant impact in-house lawyers can have on cost containment through other, more direct, collaboration.

8. Explore Alternative Fee Models For Different Types Of Matters

While most defensive litigation continues to be delivered on a “time and material” basis, some companies continue to explore new billing mechanisms to make overall costs more predicable. For certain routine litigation, fixed fee models may work. In non-routine matters, in which the services delivered will be highly stylized and customized, some form of success premium may be appropriate. Firms are eager to please and will engage you on these subjects.

9. Leverage Technology: Insist On Effective Knowledge Management

Ensure that the entire legal team has direct access to systems which capture the work product, documents, information and contributions of all team members. From case preparation tools to Extranets, exciting technology exists that, when effectively used, become a valuable means to limit duplicative efforts and streamline case preparation.

10. Use Mandatory “Meet And Confer” And Pretrial Conferences To Resolve Differences

Take pre-motion meet and confer sessions seriously. Narrow any motion as much as possible. Document agreements clearly. Use Fed. R. Civ. P. 16 conferences to narrow the triable issues.

11. Obtain Cost Estimates For Every Substantive Motion

Have counsel provide a cost estimate for every motion he or she suggests be brought, an assessment of the overall “value” to be obtained, and the percentage chance of success. You will

be surprised how many times this simple exercise will keep the team on task and away from expensive frolics and detours.

12. Discourage Efforts To Secure Small Procedural Advantages Or Perceived Psychological Edges Through Motion Practice

Be very wary about efforts by trial counsel to secure small procedural advantages. More often than not, these activities have more to do with ego than with any real benefit to the case.

13. Use Fed. R. Civ. P 30(b)6 To Identify Critical Systems And Witnesses

Lots of time and energy continue to be put into preparing written discovery responses and related motion practice. If you need information about potential witnesses, files or electronic systems, it is usually faster and less expensive to pursue this information through the deposition of “The Person Most Knowledgeable” provisions of Fed. R. Civ. P. 30(b)6. Interrogatories are often so stylized and full of objections and qualifications as to be without any value.

14. Ask For Essential Documents As Specifically As Possible

To be strategic and focused, you must avoid broad, vague, difficult to pin down categories of information. Only permit a motion to compel to be filed for documents you asked for, you are entitled to, and you need.

15. Develop Written Goals And Strategies For Every Witness To Be Deposed

This device helps ensure that high yield activity is pursued. Be wary when a compelling reason is lacking. Be selective about who should be deposed and who should examine. Prepare with partners, defend with associates.

16. Settlement Discussions Are Never A Sign Of Weakness

Don't let anyone try to convince you that settlement discussions are a sign of weakness. Statistically, the overwhelming majority of cases settle before trial. Revisiting the subject of settlement during logical intervals in a case just makes good business sense. Remember, you can

always walk away. Settlement discussion can, however, be a distraction and may interfere with the orderly development of a case. Where possible, stick to your strategy and don't let settlement discussions interfere with your case preparation. Also, make sure you protect all settlement discussions so they do not become bollixed up in the case itself.

17. Avoid Stupid Futile Gratuitous Conduct – It Always Costs You Somewhere Along The Line

Leave matters of courtesy solely to the discretion of outside counsel. Insist upon civility and a respectful attitude between counsel. Stop your counsel from demonizing your opponent or opposing counsel. While the vibrato may sound good, it results too often in the unnecessary expenditure of energy and time. It stands in the way of money-saving cooperation. Discourage letter writing campaigns.

18. Mediation Is Not A Trial – Don't Treat It Like One

Some parties prepare for mediations as if they were preparing for trial. They marshal the evidence, write argumentative summaries and practice open and closing arguments as if the mediator is a juror who will decide the case. Sometimes plaintiffs need this as a surrogate to their "day in Court." Most of the time, however, this activity is a complete waste of time and expense and a distraction from the important task of determining whether there is a business basis upon which the parties can resolve their difference.

19. Don't Discourage Internal Team Meetings

Reject the Myth: Internal team conferences by lawyers are a waste of money. Fact: Internal team conferences, focused properly, permit: (i) quick identification of key issues and those that are less important; (ii) increased team focus on the discovery of essential facts; (iii) improved delegation and better logistics; (iv) discarding bad ideas rapidly; (v) isolating problem people within the client organization; (vi) empowerment of team members; (vii) creation of ownership and initiative and reduced opportunities for mistakes; and (viii) allocation of work at the appropriate level. Make certain conferences occur early and often. Have a scribe. Read the notes.

20. Keep Control Of Your Client

Be supportive and facilitative when outside counsel needs company witnesses with facts and documents. An ounce of your authority accompanying a request is worth a pound of time sheets.

Experience supports the broad view that legal fees shrink when focused, disciplined and effective litigation plans are followed. Fees grow uncontrolled when counsel flail, become emotional, lack focus, work without a consistent strategy, or take unreasonable positions. Most of all, fees are misspent when unnecessary battles are fought or fighting the necessary ones is overdone. Strategic and thoughtful decisions at the beginning of a case -- and discipline in following the plan -- can result in a truly beneficial collaboration.