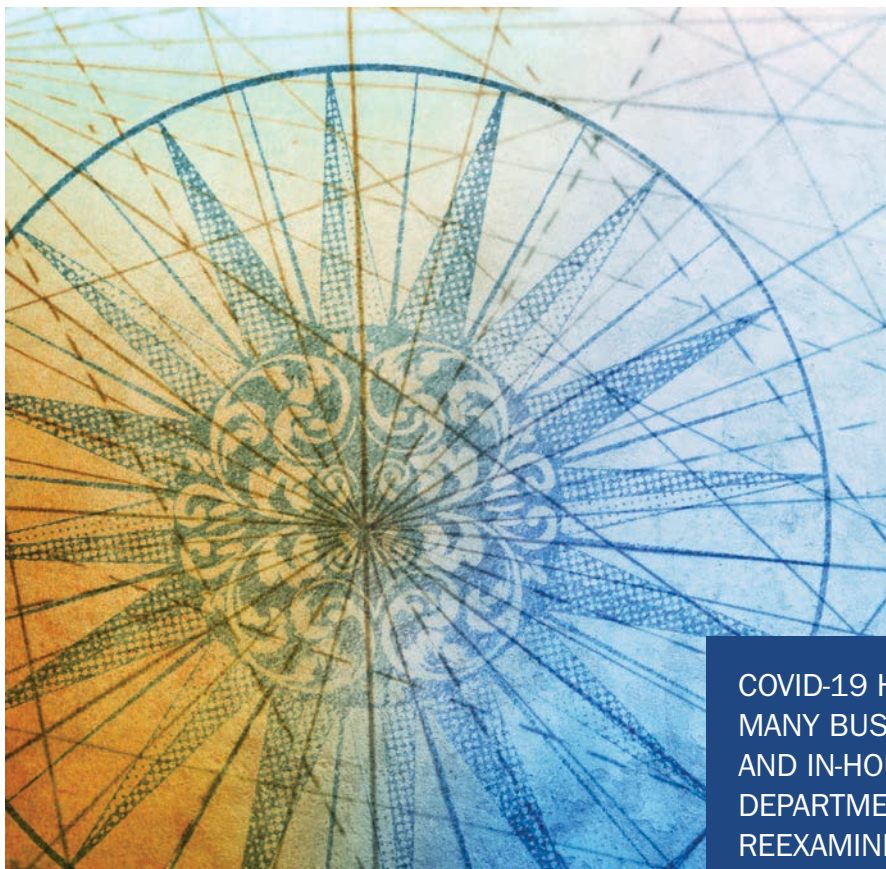


Today's GENERAL COUNSEL

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Cutting Litigation Costs in a Post-Covid World

By Mark B. Wilson



COVID-19 HAS FORCED MANY BUSINESSES AND IN-HOUSE LEGAL DEPARTMENTS TO REEXAMINE STANDARD OPERATING PROCEDURES.

Covid-19 caused most industries to suffer unprecedented financial loss, which may even get worse. Covid-19 will likely increase litigation for many companies struggling to tighten legal budgets. Consequently, general counsel must consider new ways to increase efficiency and predictability in complex litigation.

REQUIRE A LITIGATION ROADMAP AND BUDGET

That great legal scholar and Yankee catcher Yogi Berra said, "If you don't know where you're going, you'll end up someplace else." The days of litigating without a well-planned litigation strategy and carefully developed budget are over. Attorneys

who do not create litigation analyses and budgets early in the case cost clients money in wasted effort and unnecessary tasks.

Many law firms resist preparing thorough written analyses of their clients' cases at the outset of litigation, opting instead to figure it out as they go. Early assessments are time consuming, take careful thought and can hold attorneys accountable for bad advice. Attorneys are sometimes unwilling to give clients comprehensive budgets that allow general counsel to make business decisions on whether to proceed with litigation. Even when attorneys reluctantly generate budgets, they are often grossly inaccurate.

Unfortunately, only lawyers with significant trial experience can prepare

meaningful case evaluations and realistic budgets. Many experienced trial lawyers refuse to spend time poring over facts, documents and legal issues until they are preparing for trial. By that time, it's too late to undo

mistakes that could have been avoided with planning. And much of the client's litigation budget will have been spent — a financial reality that often forces clients to settle cases that should be tried.

Regrettably, old habits die hard. Those habits have allowed law firms the freedom

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to file pleadings and initiate expensive discovery without first plotting out a written plan from complaint to verdict. This same “wisdom” has permitted law firms to invoice clients hundreds of thousands to millions of dollars of fees without once placing a parameter on spending.

There is a solution. Require law firms to prepare a comprehensive litigation roadmap and budget as soon as counsel has had enough time to review the case, usually within the first 60 days. General counsel should insist outside counsel understand the client’s goals from the beginning and draft a written case analysis. This should (a) confirm the client’s goals and present a path to achieve them; (b) identify the facts at issue and the legal issues raised by those facts; (c) opine on a resolution of those issues to the extent possible; (d) identify case strengths and weaknesses; (e) prepare a meaningful and concise discovery plan (e.g., identify the witnesses the firm anticipates will be deposed and the reasons why); (f) identify expert issues; (g) evaluate damages; (h) identify anticipated motions; (i) develop case themes; (j) predict a likely trial outcome; and (k) present a thorough litigation budget based on known facts and reasonable assumptions.

The budget should identify (a) the timekeepers assigned to the case; (b) the specific tasks they are expected to perform; (c) how many hours they will spend on the tasks; (d) the hourly rate of the timekeepers; (e) the expected number of trial days; (f) who will attend trial; and (g) a detailed presentation of anticipated costs the client will incur, such as expert witness fees, deposition expenses, travel expenses, and so forth.

Once the client is armed with the case analysis and budget, then the client can make an informed business decision

whether to contest or settle the case. Early and comprehensive case analysis leads to more predictable outcomes, minimizes wasteful discovery and motion expenses, and saves overall legal fees.

RETAINING LITIGATION BOUTIQUES WITH TRIAL EXPERIENCE

As litigation stakes get higher in terms of outcomes and fees — and litigation budgets get smaller — more companies are hiring trial boutiques with proven trial experience. Even so, many companies still hire law firms in which litigation partners have little or no trial experience. Such decisions can lead to poor trial results. Lawyers without trial experience frequently overstaff cases believing more is better. Bloated trial teams lead to extra costs and confusion. Inexperienced trial attorneys focus on issues jurors find unimportant and miss the issues that will decide a case. Attorneys without trial experience do not know how to capture key admissions during videotaped depositions that make the difference between winning and losing trial. Attorneys who have never presented an opening statement to a jury don’t know which facts are case dispositive and which ones can be ignored.

As the trial date gets closer, “litigators” without trial experience get cold feet and recommend unjustified settlements, fearful they will lose the case and the client. An attorney’s first trial should not be a jury trial where millions of dollars are at stake. When economic times were better, general counsel felt compelled to retain “blue chip” law firms that provided cover for bad results.

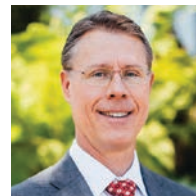
But in a Covid-19 world where every dollar counts, hiring expensive blue chip firms without trial experience, when the

case demands trial experience, is a luxury few companies can afford.

Covid-19 has forced many businesses and in-house legal departments to reexamine standard operating procedures. As we head into troubling economic times, in-house lawyers are faced with the responsibility of controlling legal spending while at the same time preventing disastrous litigation outcomes. It is not a simple task.

But the task is easier if you spend time and money in the beginning of the case to ensure that you have a comprehensive strategy and the right team in place to execute the strategy in a cost-effective manner.

Before Covid-19, many companies would never have considered hiring smaller litigation boutiques to try big cases. Now, small firms with tremendous trial experience provide a cost-effective solution to shrinking litigation budgets. And as companies begin embracing retention of experienced trial counsel and see the benefits, small trial boutiques representing the largest companies in the United States may become the new normal.



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