

Litigation is a hugely expensive exercise, especially for most organizations without dedicated litigation managers to keep costs and business outcomes aligned. However, new solutions are appearing.

Few law firms deliberately over-lawyer the litigation process, yet senior managers can be surprised to see teams of attorneys at every court application and an ever-increasing cast list deployed on tasks such as

gets, with litigation often consuming the biggest share.

- Many law firm litigators appear to have been living in a bubble as their corporate colleagues introduced fixed pricing, risk sharing and countless other alternative methods for connecting legal costs with value. (Just read any of *Docket* author Jeff Carr's excellent articles on controlling litigation and other outside counsel costs). Many of these initiatives remain foreign to

## Litigation Costs Management: Revolution or Evolution?

BY RONALD F. POL

research, discovery and drafting. Costs seem to rapidly increase without much progress toward organizational goals and concerns arise about a disconnect between legal cost and value.

In many organizations, the pressures on corporate legal budgets are unprecedented. A decade ago, I knew scores of in-house counsel who confided that their legal budgets were unconstrained. Their primary role was to get good results; costs didn't really matter much. Today, however, I can't think of a single in-house lawyer in that position, and now know scores whose budgets were first cut before being set in stone.

Savvy general counsel now focus intently on areas that can be better managed without adversely affecting organizational goals, and litigation often attracts a steely gaze for several reasons:

- Outside legal costs are typically the largest single component of many organizations' legal bud-

some litigators, clinging tenaciously to the concept that litigation is complex and unpredictable, "so it's not really possible to estimate costs," they say. "We just need to deal with each issue as it arises."

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Litigation cost management is therefore brimming with opportunities for change.

Some years ago, the flexibility of arbitration and mediation was to be the revolutionary savior of cost-effective dispute resolution. Yet the theory never quite managed to survive the onslaught of litigators introducing their favored practices, overseen by retired judges replicating

courtroom systems. Nowadays, some arbitrations are too slow, too expensive and differ from litigation only by the indignity that the parties pay for the decision-maker as well. Increasing numbers of companies now strive for early dispute resolution on a business-to-business basis whenever possible. In one case, rather than litigate over a multi-million dollar dispute, two chief executives famously arm wrestled to resolve a dispute and avoid the legal costs and business disruption. It seems they figured business is all about making and selling stuff — not answering interesting questions of law or even "winning" cases. Generally speaking, litigation is an abject manifestation of business failure and should therefore be avoided or resolved expeditiously.

In many jurisdictions, courts introduced revolutionary case management systems, empowering judges to expedite cases in a variety of practical ways. But some of these have largely been abandoned, swamped by lawyers' constant appeals on the details of countless rulings.

The trick, it seems, is a more evolutionary process, with outside counsel "on the same page."

Working to get agreement amongst the company's various law firms, Cisco famously migrated 75 percent of its huge legal spend to fixed fees, including litigation. New law firms like Exemplar Law, set up expressly to reconnect legal costs and value, exclusively offered fixed price certainty.

Many large organizations also hired specialist litigation managers to work with outside counsel and rigorously test the need for proposed applications, research — and all the other tasks associated with litiga-



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tion — to refine legal work. Organizational goals, improved resolution times and reduced litigation exposure and costs became the focus.


But if you don't have multinational clout, your preferred law firm doesn't do fixed pricing and you don't have the huge docket of cases to justify in-house litigation management specialists — or you figure like Jeff Carr once told me: “the head of litigation might not do the right thing and try to work themselves out of a job” — recent developments suggest an alternative. In Australia, Ally Group ([www.allygroup.com.au](http://www.allygroup.com.au)) was

set up by a specialist litigation manager specifically to project manage litigation on an outsourced basis.

Some businesses without legal teams may not know how to get the best value from their law firms. Yet even some of the most experienced general counsel may not have the core litigation management skills to know what work is really necessary in major litigation, so when a firm is briefed “it's almost like giving them a blank check.”

Having managed significant litigation in multiple jurisdictions for a large company (and ultimately work-

ing myself out of a job by “clearing the decks”), I've seen major commercial disputes tie up management resources for years and cost millions of dollars more than necessary, which a good litigation manager could have short-circuited to great effect. This sort of expertise is now more widely available, either through outsourced specialists or by locating an independent contractor for the time necessary to resolve a major dispute, saving external costs without adding to the internal headcount.

Whether this new breed of litigation managers was created perfectly formed, or evolved in some Darwinian process, the outcome is the same — better litigation outcomes at less cost. 

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