EFFICIENT LAWYERING:

Both inside and outside counsel have a place in minimizing legal bills and increasing the odds of litigation success.

STRATEGIES FOR CONSTRUCTION COMPANIES

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Excellent results and a solid work product are a necessity in representing corporate clients, and construction companies are no exception—but this is the tip of the iceberg. Contractor clients demand and deserve excellent results and a solid work product at an efficient cost. The benefits of winning disappear when the cost of the "win" is more than the expense of pursuing alternative dispute resolutions.

An in-house legal department is, in many respects, no different than any other department in a corporation. It is assigned a budget. It is expected to operate within that budget. The legal department is supposed to provide value-added services. This poses unique challenges—particularly in companies facing claims by third parties that require litigation, a common enough phenomenon for contractors. Defending litigation claims can decimate a budget and rarely, if ever, adds to a company's bottom line. Accordingly, hiring efficient lawyers is important.

When stellar outside legal counsel are retained, they assist in-house legal counsel in effectively communicating with management. Outside legal counsel are a general counsel's first line of defense in establishing and maintaining a budget. When good news is presented to management, it is outside counsel's role to make general counsel directly responsible for such successes. Conversely, if results are achieved below expectation, then outside counsel must step forward and bear the brunt of any disappointment, while effectively communicating the reasons beyond that counsel's control for the unanticipated results.

The following list presents ten proven strategies for increasing a construction contractor's odds of obtaining excellent results from its legal counsel. Implementing these strategies with the assis-

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tance of outside litigation counsel will help in-house counsel to shine.

Pre-litigation dispute resolution

Once litigation is filed, everyone puts on his game face. Discovery and communications aimed at efficiently resolving disputes become more difficult and costly. Accordingly, pre-litigation dispute resolution should almost always be used when claims are known to exist, but have not yet been filed. Asking someone to engage in a free and mutual exchange of ideas, information and documents is an effective and efficient manner of understanding a case before significant expenses mandated by the rules of litigation procedure are forced onto the parties. Swapping information *before* litigation saves thousands, allows companies to be better informed at a much cheaper price, and provides all parties to a dispute an opportunity to manifest their own destiny instead of letting opposing lawyers, judges or juries determine their destiny in a more haphazard and less predictable fashion.

ONCE LITIGATION IS FILED, EVERYONE PUTS ON HIS GAME FACE.

Ninety-day early case evaluation

Experience teaches that over 90% of important documents and information can be gathered in the first 90 days of litigation. At that point, a decision can be made as to how best to proceed with a case: should it be settled, marked as a trial candidate, or is further distinct information or documentation required? By implementing a program for the early evaluation of each case, companies can save thousands of dollars by settling cases before further significant costs are incurred. When possible, early case evaluations can and should be used prior to a case being filed. Early evaluations not only save time and resources, they also minimize future litigation and the need to produce confidential and proprietary materials during discovery.

Settling at the right time

How many times have you heard of cases "settling on the courthouse steps?" How many litigation dollars are spent on cases that can and should settle earlier? In coordination with pre-litigation dispute resolution and early case evaluations, it is critical to select the importance level assigned to each case. If a case is viewed as a trial candidate early on, then resources should be devoted to it and a corresponding budget will reflect a case's designation as a trial candidate. Equally important, however, is the communication that will occur from the earliest point possible informing and updating the "business-side" of a company on why resources are being spent defending a particular case. Alternatively, non-trial candidate cases should be slated for settlement with corresponding communications to the "business-side" of a company. This allows everyone to understand why current resources are being spent to resolve a case rather than allowing a "slow-bleed" of invoices over the ensuing 12-18 months of litigation.

Establish a budget

Outside counsel should be required to establish a budget by case, by month, by year and by task. If it is not on the budget, then it just does not get done (or paid for by the client), without prior approval. A budget provides a simple road map to the tasks outside counsel must perform and the client's corresponding obligations to pay. Although a budget is not a wholesale answer to all of the issues that prevent cases from being handled efficiently, budgets effectively prevent "surprise" invoices.

Regular communications

Information is power. Communication breeds accountability. Regular communication of information prevents nasty surprises and provides in-house counsel with the power they need to manage their internal clients. Periodic telephone updates no less frequent than monthly are strongly encouraged. Quarterly status reports and updated budgets are also highly advisable so long as these reports are not cumbersome in

EXHIBIT 1 Ten Strategies to Increase Your Odds of Success and Minimize Legal Bills

1. Engage in Pre-Litigation Dispute Resolution.
2. Develop a 90-Day Early Case Evaluation Program.
3. Choose Trial Candidates Early & Settle at the Right Time.
4. Establish a Budget.
5. Require Regular Communications.
6. Decide Whether a Duffing Strategy is Appropriate.
7. Develop and Maintain Relationships with Opposing and Co-Counsel.
8. Hire Busy Lawyers.
9. Select the Right Mediator.
10. Settle on the Right Terms.

their length. Note: these forms of regular communication not only ensure that only efficient and pre-approved defense strategies are implemented, they also allow all levels of management to stay fully informed and plan business expenses for the following quarters. Additionally, regular reports guarantee that cases stay on budget and allow clients to track progress—or lack thereof.

Duffing

Knowing when to let others lead the fight so that your company does not maintain a high visibility that breeds an expectation of a larger settlement is critical. While this strategy involves some risk, implementing a duffing strategy can save thousands of dollars over the course of a case. Duffing allows clients to take a monitoring role while others perform (and pay for) the heavy lifting. Why should your company pay when other parties are going to notice the same depositions and likely ask 90 to 95 percent of the same questions you would ask? By batting clean-up in a deposition and attending via telephone rather than incurring airfare and other travel expenses, your company's litigation profile remains low and corresponding settlement expectations may also remain low. A duffing strategy is not for all cases, but in matters where multiple defendants are being sued, it can be used effectively.

Relationships with opposing and co-counsel

In today's world, cold and impersonal e-mails are the norm. So, too, is much motion practice that can be avoided by simple, well-placed, telephone calls. Impersonal communications and vexatious motion practice do little to bring adversaries together and often result in attorneys saying things they never would say to each other's face. Instead of retaining counsel who effectively builds adversity, hire a collegial lawyer who builds relationships of trust and respect among opposing counsel. By picking up a telephone or sharing lunch during a deposition, the lines of communication stay open; broaching settlement is always an option and will not appear to be a weakness. By maintaining a cordial course of communication, your attorney can pump opposing counsel, or even co-counsel, for information and in so doing, you will be informed of difficult issues long before you otherwise would. This will help you to prepare in advance, settle if necessary, or develop the proper response so that you will never be ambushed.

When your attorneys are at a deposition, lunch can be a great time to bond with co-defense counsel or even opposing counsel. It's amazing the dividends a $7 hamburger can reap! The legal community is still small. Co-counsel and opposing counsel can keep you informed on recent unpublished trial court decisions where a particular expert's opinions have been stricken, where another lawyer has been sanctioned for the same

conduct that is at issue in one of your cases, and can advise you of the trial schedules of other attorneys or judges. It is also possible to share deposition transcripts and expert reports from other cases involving key witnesses and experts so they can be impeached more easily in the future with previous testimony. All of this information can be of benefit to you in the defense of your cases, but will never be available to you unless your attorney cultivates a positive relationship with opposing counsel.

Hire busy lawyers

There is an old saying: "If you want something done, then give it to someone busy to do." This is particularly apt when retaining legal counsel. A busy lawyer is busy for a reason; others have used, evaluated and determined that the lawyer provides good results. That speaks volumes. Additionally, a busy lawyer is too busy to bring excessive motions and engage in other litigation tactics that necessarily drive up costs and provide limited up-side value.

Select the right mediator

Mediation can provide an effective exit strategy. But it is often an expensive proposition if an ineffective mediator is used or the door to liability is not tightly shut. Agree to use mediators that are experienced, well-known and possess a demonstrated track record of success. These mediators sometimes cost $100 to $200 more per hour, but the added cost pays for itself. The expense of a mediator is typically divided among all of the parties; your pro rata share of incremental increased mediation costs due to a higher hourly rate for a mediator is nominal. Settling a case just one month earlier likely saves any additional amount spent on an effective mediator. Moreover, unsuccessful mediation can actually be more harmful than not having mediated at all because the mediation may result in a disclosure of trial strategy and perceived weaknesses in an opponent's case. If you are going to commit to mediation, then commit all the way; hire the best mediator you can find. Many good mediators resolve the lion's share of all cases they mediate.

Settle on the right terms

Settlement is not a goal in itself; the settlement must be an effective resolution to all disputes. It is critical that the most beneficial terms be achieved. Even good mediators occasionally try to rush a settlement—leaving certain terms open. With rare exceptions, settlement should be "global"—with substantial indemnification provisions to guard against contingent liabilities and unresolved claims involving other parties. Mediation submissions should contain a checklist of difficult issues that need to be resolved and critical settlement terms that must be incorporated into any settlement agreement. If a mediation submission is prepared in this manner, then it can and will be used as a checklist by the mediator and/or your litigation counsel to assure that no loose strings are left to cause problems at a later date. As a rule of thumb, tremendous inefficiencies are achieved when disputes are litigated and settled twice rather than just once. Draft settlement agreements accordingly.

Conclusion

This discussion is just the beginning of a much larger dialogue. When good legal counsel is retained by corporations, great results necessarily follow. Effective communication is one of the keys to success. The relationship between general counsel and outside litigation counsel is a symbiotic one based upon a shared common understanding of the company's goals, regular communications and realistic evaluations of the cases at issue. Hiring efficient outside litigation counsel to assist in accomplishing the company's goals results in a true "win" for your corporate client. ■

SETTLING A CASE JUST ONE MONTH EARLIER LIKELY SAVES ANY ADDITIONAL AMOUNT SPENT ON AN EFFECTIVE MEDIATOR.