

# Building the Law Department of Tomorrow



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## Chapter 7:

# **You *can* do more with less – an innovative and holistic approach**

*By Paul Williams*

Doing “more” with “less” is becoming a corporate budgetary mantra. Whether you are trying to handle more of the legal work in-house or trying to achieve greater value from your outside providers, the reality is that the demands for legal services are increasing but the resources to meet those demands are not. Some companies are also facing increasing numbers of lawsuits and escalating outside counsel spend, both of which compound the resource problem. These circumstances make in-house counsel hard pressed to accomplish the proverbial “more” with literally “less”. And yet, there is no choice – the business must go on. So how? Where do you start? What do you do? One successful approach is to choose a right-fit partner who can help you:

- Learn from your litigation experience;
- Perform an in-depth risk assessment of the business;
- Develop holistic solutions; and
- Deploy a strategic litigation management approach to manage your claims and lawsuits.

You will discover that you *can* do more with less with a partner that will help you implement this innovative and holistic approach.

For starters, it’s essential to engage a right-fit law firm partner – one that puts the client first. One that itself invests to know your business as well as you do in order to craft solutions that work for you. A partner that listens and provides “fresh-eyes”, outside-the-box solutions. A partner that integrates with your team to help you see around the corner, to provide advice and counsel about what is about to happen and avoid the risks and lawsuits that otherwise would follow. Partnering with a right-fit law firm is essential to filling out your legal team, to expanding your existing experience, and to identifying innovative solutions that

enable you to improve your litigation metrics and obtain better litigation outcomes.

### **Learn from your litigation experience**

You may be surprised at what you can learn from your litigation experience. Analyze the data underlying your litigation metrics – the providers, the cycle time, the spend. Critically, examine your substantive litigation experience – the way it came about, how it was managed, and when and how in the lifecycle the case was resolved. And when you do, be ready for some eye-opening revelations.

### **Capture and analyze your litigation metrics**

Litigation metrics include many things and are (hopefully) captured by you and/or your partner law firm(s) to allow you to track and study any data associated with your litigation. The data broadly includes names, places, dates, case types, activity codes, and dollars spent in many categories, and the list can go on and on. Some key metrics to analyze include the following:

- Identify your providers (law firms, third party vendors). How many different providers do you presently use? Is there any strategy for their use – by business, by geographical location, by area of practice?
- Identify the types of cases (product liability, employment, tort, commercial, intellectual property). If you have the details, break down each type into subtypes. Do you notice any trends with any of your businesses that stand out (in a good or bad way)? Any business with significantly greater or fewer cases than other businesses? Is there an escalating trend of any particular type of case with any particular business? Is there a corresponding new product launch, change of services, or loss of continuity of business leadership to explain the trend?
- Evaluate where the cases are venued (aggregated in regions, widely dispersed). Do the locations align with your business operations? Or your main customer locations?
- Compare the date of the incident, the date of notice of the claim, and the date the lawsuit was filed. Importantly, compare the date thereafter when the claim or lawsuit was resolved. Cycle time is a telling metric and can reveal a number of potential contributing factors to explain why case counts are increasing, spend is on the rise, and outcomes are not what you want them to be; and

- Sum up the expenses (legal and indemnity spend). Do the spend trends correspond with the trends in case counts, with certain case types, or with litigating in certain venues? Does one business or one assigned firm account for a sizeable portion of the spend? Are the indemnity payouts commensurate with the legal spend?

All of these details analyzed together can reveal contributing factors to the challenges you are facing. There are many possibilities. For example:

- Do you have too many providers working for the same businesses on the same types of cases? Can you consolidate your providers and create better continuity and consistency for the cases and reduce impact on the business, as well as decrease legal spend? Are your providers in tune with your objectives and sensitive to the timeline required for the business?
- Is one of your businesses requiring a disproportionate allocation of legal resources to address its issues, and if so, why? Is the reason there is a dramatic increase in claims and lawsuits from the jurisdiction where you just engaged a new distributor a coincidence – or is there some additional training and mentoring required to ensure the distributor is fulfilling its obligations to educate, train, and provide customer service to your customers in that territory?
- Is an increase in case filings related to a change in the law in a particular jurisdiction that explains why your employees are now filing civil lawsuits for accidents on the job? Have you met with your risk management team and insurance broker to address that change in the law?
- Are cases lasting much longer than you thought they were – 500 days, 900 days, 1,300 days from date of filing to date of resolution? Can you quantify how many times your business team was diverted from business activities to assist with the litigation over the life of the case? Have you had personnel changes in the business that required repeat preparation of witnesses for discovery or trial?
- Have you had personnel changes at the law firm that has required re-learning the file, re-training of the attorney for your business, and further accumulation of legal spend? Cycle time is key to reducing the inherent impact of litigation on the business, decreasing legal spend, and improving your case outcomes.

Any one or an aggregate of a number of these contributing factors can initiate what becomes an adverse trend. As you become aware of the factors and develop an understanding of how they interrelate, you will be better equipped to manage them and mitigate their adverse effect. This learning opportunity can also accelerate the pace towards improved metrics and better outcomes. You may come to realize that some of your providers are holding you back (which is a factor that contributed to you being in your current situation). And you may conclude that you need more right-fit providers on your team; those who innovate and adapt to help you evolve to achieve success.

### **Capture and analyze your litigation experience**

The last step helped you learn from your litigation metrics. This step will help you learn from the specific substance of representative litigation experiences. Choose several cases (resolved and pending) and dig into the details of those litigations to dissect how you got there in the first place and how it played out. Whether you will continue working with your previous/existing providers or not, you can still learn from how those past lawsuits came about, how they were developed and managed, and when and how those lawsuits were resolved. You can improve your future litigation strategies by better understanding the risks that created the lawsuits and the strategies that were effective (or not) in resolving them. As will be discussed later, you will also be better able to avoid adverse outcomes in the future if you understand what steps can be taken to eliminate or mitigate the risks before they occur.

Pull the complaints and motions that were filed. Review the claims and theories advanced against you and proffered in support of your position. Study the experts offering opinions each way and the legal arguments surrounding the underlying issues in the case. Critically examine the circumstances and the outcomes and carefully review the cause and effect of positions taken, evidence offered, and arguments made. Ask yourself candid, probing questions:

- What was the crux of the situation that gave rise to the lawsuit? How did that situation come about?
- Were the front-line legal defenses available that you expected to be available? If so, were those legal defenses leveraged for your early exit from the case?
- Did you have any risk-shifting opportunity early in the case, and was it pursued? Was it successful? Why not?

- How did the experts retained to support you compare to your opposition's experts? Was the expert line-up better than a coin-flip, a she-said versus he-said situation? Was your expert by credentials, demeanor, substance, and presentation credibly persuasive to the decision-maker(s)?
- Was your legal team on top of or out-maneuvered on factual and/or legal issues?
- Was the theme offered in support of your case plausible, credible, and compelling?
- What ultimately happened? Did the outcome logically follow the facts, the law, and the presentation of the case? Why not?

This post-mortem “autopsy” of representative cases (highly recommended at the close of every litigated case) can reveal key lessons learned that will enable you to implement valuable changes in the business (i.e. modify design process for a consumer product; enhance warnings provided with your product or services; implement a document retention/retrieval system so that key contracts and risk-shifting provisions are available for use in litigation). These lessons learned can also help refine your business and litigation strategy and better prepare you and your legal team to address the needs in pursuit or defense of litigation. Time spent now, in reflection and review of your litigation experience, can save you substantial time, resources, and legal spend in the future.

### **Perform an in-depth risk assessment of the business**

Knowing what you know now about your litigation (and what brought it on), it is time to look carefully at the business – the operations, the processes, the products, and the services. Work with your law firm partner and business teams to perform a 360-degree risk assessment of the business. Most business principals are highly experienced, bright, engaged, and passionate about what they do and about protecting the company's interests. Leverage their experience and enthusiasm – make them feel a part of the team. Together the team will be able to identify gaps creating risks and to identify solutions to eliminate or mitigate those risks. A self-critical analysis and candid assessment of weaknesses can lead to a more robust operation with better processes, products, and services. This shared experience can also provide a stronger, healthier rapport with the business and a better overall litigation experience in the future.

A risk assessment should evaluate both the products and services at issue and the operations and processes in place to manage those

products and services. Essentially, a risk assessment examines the who, what, when, where, why, and how, as well as the “what if?” and “what then?” aspects of business operations, processes, products, and services. The various areas of focus for a thorough risk assessment include:

- Safety;
- Research and development;
- Design and engineering;
- Testing and compliance;
- Procurement and purchasing;
- Labeling (including warnings and instructions);
- Vendors, distribution, and installation;
- Contracts and warranties;
- Sales and marketing;
- Customer service;
- Technical support;
- Risk management;
- Insurance; and
- Information technology and document management.

A thorough risk assessment will reveal gaps in existing processes and spur creative planning for new or improved processes to take the business to a higher level of awareness, focused effort, and accomplishment. Additionally, the risk assessment can proactively identify potential liability risks and prompt effective counter-measures that can be implemented to eliminate or mitigate those risks. A risk assessment can also preserve institutional knowledge, identify potential favorable witnesses, create a resource for future decision-making, and uncover previously unaddressed issues. A thoughtful review of the businesses’ warranty, product return, and customer complaint histories can provide a wealth of valuable lessons learned for the design/engineering and marketing/sales communities, which can drive future product, service, and process improvements. Benefits abound for the business and for the legal needs of the business.

### **Collaborative problem-solving with holistic solutions**

By now you should have a robust understanding of your litigation experience. You have likely also identified a number of the business factors that contributed to those litigation risks. Now it is time to review your findings with senior leadership and together determine how these risks and liability exposures can be reduced or avoided. The business wants the law department to add value to the business – here is your opportunity. Share the lessons learned from your litigation experience and the 360-degree risk assessment. Provide examples of how and why the liabilities occurred and outline detailed actions that may be taken to avoid those liabilities in the future. Be specific.

The senior leadership team is focused on the business (and the return on their investment) so they likely will have many questions about priority, effect, and investment costs. Be resourceful. Leverage your partner firm’s experience in such matters, and prioritize your recommendations for maximum return for the investment. Many solutions are low or no cost changes to enhance the business culture, ensure compliance with existing policies, and to emphasize best practices. Other solutions with favorable impact are internal checks and balances to mitigate against one department getting ahead of another (i.e. the marketing department launching a new advertising campaign before engineering has finalized the testing to validate the marketing representations about the product or service). Other changes, though higher in cost, provide for long-term benefits, allowing for the value provided to be “amortized” over the long-term.

Business and legal priorities do not always align; however, with specific, business-focused examples and creative, tailored solutions, you (and your business) can accomplish more than either of you thought possible in the beginning. Thoughtful planning, timing, and budgeting along with prioritizing and sequencing of related remedial measures can accomplish more in less overall time and have a greater impact with less overall investment.

### **Leverage your experiences with a strategic litigation management approach**

At this stage, you and your partner law firm have game-planned going-forward strategies to leverage lessons learned. You have also partnered with the business teams to assess risks, identify solutions, and implement fixes to support better business operations, processes, products, and services. In doing so, you and the business have set up better litigation positions for improved litigation outcomes. To lock in

the value of your efforts, you now need to deploy your partner law firm to act as an extension of you – of your law department – to execute the game plan in a strategic, cost-effective way to ensure your efforts and the business' investment is realized in reduced legal spend and better litigation outcomes.

Your partner law firm should be equipped to provide a right-fit case team doing the right things the right way, to provide the best possible outcomes at unsurpassed value. You should expect each of the following from your partner law firm:

- Client-first philosophy – focused on managing the litigation so as to limit the cost and business disruption of the litigation and to understand what “success” means to the business; also staffing the litigation with team members familiar with the industry, business, and type of litigation involved and legal issues faced, who know how to minimize the disruption to your business;
- The right-fit approach – focused on a proactive understanding of the product, service, or conduct at issue; the client’s perspective; the business implications of the claim affecting the business; the potential impact of the case on other or future litigation; and quickly developing a strategy that addresses the client’s needs;
- Early strategic case assessment – focused on a comprehensive analysis in the first 90 days of case assignment to help you make early, well-informed decisions about your cases and, where possible, capitalize on opportunities to exit the case early, saving substantial time, resources and legal spend. The key objectives underlying a strategic early case assessment include:
  - Front-end analysis to rapidly identify exit strategy and focus on resources;
  - Drive targeted case activities, not merely a “litigation machine”;
  - Work strategically and efficiently for effective results;
  - Enhance client communication and coordination;
  - Provide earlier notice of client decision points;
  - Provide complete information to leverage timely decisions; and
  - Build experience and improve outcomes by documenting, road-mapping, and banking key issues, witnesses, and defense theory development.

- To value your dollar as their own – focused on credible, compelling trial themes, ready for a jury or mediator alike. Few cases reach trial anymore. But strength in negotiations comes from presenting a credible trial threat and the ability and confidence to act on that threat. With a polished, trial-ready team, with jury-ready defenses, you will have the opportunity to decide for yourself which path best meets your needs for the litigation (and potential future litigation); and
- Adding value with each engagement – focused on you, your business, and your collective objectives; your partner law firm should make it part of its business to add value to your business, separate and apart, above and beyond the claim or lawsuit assigned to the firm. From supporting your business team members' participation in industry groups, to sharing updates on the challenges facing your competitors, your partner law firm should look around the corner and offer solutions to anticipated obstacles before you and your company are in harm's way.

As can be seen, partnering with a right-fit law firm and using a creative and holistic approach, you *can* reverse the escalation of case counts and legal spend. You *can* add value to your business. And, you *can* do more with less. Further, as you and your business continue to evolve, you will see that you can innovate and succeed again and again.