

PERSPECTIVES

Strategies to Manage Your Law Firm's Professional Liability Exposures

MSP L 11/05 "Practice Management Strategies Part 11: Litigation Planning and Management"

November, 2005

Practice Management Strategies

Part 11

Litigation Planning & Management

Recognize that litigation usually is won or lost before the trial starts

Legalities aside, most litigated matters are effectively won or lost before they ever start. This means that the keys to effective litigation management involve what occurs before a trial starts. The first key is to have management committed to take on the particular case and resource it appropriately. The next crucial steps are to do the pre-planning and preparation necessary to get a successful result.

To be successful, think of litigation management in terms of project management

The most functional way to approach litigation is to view the litigation as a project and to apply project management skills. In the critical planning state, the three key areas to address and formulate as part of a written litigation plan are as follows:

- **Litigation Game Plan** – This plan should include the specific goals of the litigation and a statement of the strategies that will be used to achieve these goals.
- **Litigation Budget** – The budget should identify all known and foreseeable expenses and costs of the litigation. These should include any needed hiring of staff, travel, cost of expert witnesses, cost of cash flow, and all other costs.
- **Litigation Timetable** – This is a written estimate of the anticipated timetable that the litigation most likely will need.

To determine whether a particular litigation has been successful, three simple questions can then be asked:

- Were the stated goals of the litigation achieved?
- Was the total cost of the litigation within the litigation budget amount?
- Was the litigation consummated within the initial litigation timetable that was formulated?

Prepare your client for the expense, rigors and timetables of litigation

Most clients, especially if they are novices who have not been involved in a previous litigation, have absolutely no idea of what to expect. Given the costs, delays, and other frustrations that seem to be endemic to the court process, it is almost certain that most parties will become frustrated to a greater or lesser degree.

Since client dissatisfaction is the precursor to professional liability claims, it is critical to manage this

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part of the process effectively. Before your client decides to move forward with litigation, take the time to explain, face to face with your client, exactly what she should expect from the standpoint of costs, time-tables, effort, appearances, and especially the general likelihood of possible outcomes occurring.

Strive to have a total expectation match between what your client expects and what will actually happen. To the extent your client expects one thing but gets another, you are vulnerable to a possible professional liability claim, legal merits and performance issues aside.

Resource for success

The key to handling litigation successfully is to be able to resource the litigation effectively. The key resources you must bring to a litigation are an adequate staff of lawyers and support staff who have the necessary free time, energy, expertise, commitment, and focus to devote to the matter.

In nearly every litigation, the law firm that brings the most resources in the best-organized fashion almost always prevails. If Roy Black is defending an accused criminal and is competing against an assistant prosecutor who graduated from law school two years ago, the legal result is probably preordained.

The key strategy is to be very selective in the clients and cases that you accept, but once you accept a case, resource it to the hilt so that you will be very likely to win. Law firms who “overbook” or “spread themselves too thin” usually win a low percentage of their cases, and rarely succeed on a significant scale in the long run.

Document key decisions and strategies

A growing number of professional liability claims against law firms involve what amounts to a “Monday morning quarterbacking” second-guessing of the trial tactics and strategies you choose. The key to being able to defend yourself against this type of claim is to document key decisions and strategies in writing at the time they are made, along with the factors that were considered, and the reasons the decision was made.

If a decision is at least plausible and is documented, you will often be able to prevail. When appropriate, advise your client at the time of the specific strategy, and if possible and appropriate, let your client share in making the decision.

Use the best centralized case management systems and software – For any complex or protracted litigation, it is critical to use effective and efficient software. The ideal situation in a law firm is to have centralized, computer-based document databases, along with centralized, internal legal research and work-product retrieval systems. This way all appropriate staff members have access to all past briefs and research efforts of your firm.

On individual cases, if there is a centralized database, all users can have complete, up-to-the-minute access to case information. Activities can be recorded and data can be shared by and with everyone involved in the case. ❁

Disclaimer: “Perspectives” is published as a service to lawyers. While the information contained herein is believed to be reliable, readers are advised to consult their own legal and insurance counsel for assistance in applying it to their unique situations.

Happy Holidays
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