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Top 12 tips for saving money in litigation

We want to tell our client's story, execute cutting cross-examinations and deliver a powerful closing argument when litigation and trial are in our client's best interest. The challenge is making this affordable so that it proves to be the right decision.

Damon W.D. Wright
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Too many cases settle because the client cannot afford litigation. No doubt, settlement should always be explored, but some disputes should be litigated and tried. This is why we have courts. This is also what we are trained to do. Our clients may have the stronger position, may want their day in court, and may need the court to uphold their rights. We also enjoy this. As advocates, we want to tell our client's story, execute cutting cross-examination, and deliver a powerful closing argument when litigation and trial are in our client's best interest. But litigation is not cheap and our clients cannot write a "blank check."

Not long ago, I handled a case for a friend's friend involving rare baseball cards and five-figure damages. Meanwhile, I was handling a case for an international energy company over a complex asset sale involving eight-figure damages. While the cases were completely different (one involved a few documents; the other a potential terabyte of data), the emphasis on focused, creative ways to control litigation costs remained the same. In all cases, our clients will be happier when their most important decisions are driven more by the merits than by the expense of litigation. So how do you make litigation a cost-effective and winning proposition? These tips and some discipline and creativity should help.

No. 1: *Conduct targeted preservation and collection.* When a party reasonably anticipates litigation, it must preserve potentially relevant documents and information. This is not supposed to cause business operations to grind to a halt. Rather than launch into overkill mode and broadly preserve every company back-up tape, hard drive and document, the focus should be on the specific subject matter, evidence and likely witnesses in the case. In most cases, you will satisfy your obligation by promptly investigating the case — finding out what is likely discoverable, where it is stored and who the likely witnesses are; ensuring with oral and written litigation hold instructions that the documents and information are preserved and not destroyed; and then collecting and copying the documents and information so they are preserved. If the litigation does not concern ongoing activities, the client may then be able to return to its regular retention practices. An informed preservation plan will save your clients money while protecting them from charges of spoliation.

No. 2: *Calibrate the budget to the amount and importance of the case.* There is no one-size-fits-all approach to handling a particular type of case. A $250,000 breach-of-contract case and a $2.5 million breach-of-contract case require different budgets. You must prepare to win, but must also be prepared to litigate on a shoe-string when the amount in controversy requires this. To be sure, there are times when the client is prepared to spend more to avoid damage to reputation, adverse precedent or other non-monetary concerns. Whether by limiting motions practice, the scope of discovery, the number and length of depositions, expert selection, trial preparation or trial time, however, the lawyer needs to develop and implement a case budget that takes into account the amount in controversy and the importance of the case.

No. 3: *File in a fast-moving court.* A quicker case is usually less expensive. For the plaintiff or defendant who can remove or pursue transfer, you should examine where you can proceed, what forum is most convenient and how quickly the case will likely proceed in each potential forum. A valuable resource is the federal court system's judicial caseload statistics Web page, which provides the average time from filing to disposition for each of the federal district courts. You also should consider whether the court is familiar with the parties or issues in the case. For instance, with patent cases, the litigation can be less expensive if the court has local patent rules or a judge specially assigned to patent cases.

No. 4: *Know the court.* You should either know the court and its local rules and customs or retain local counsel with this experience. This will avoid unnecessary time, research and mistakes (e.g., idiosyncrasies in the local rules, how to comply with filing requirements, how pretrial conferences or jury trials are held). Knowing the judge's temperament, style and reaction to certain issues will also help you to focus and avoid unproductive effort.

No. 5: *Have a key client liaison.* The more the client can do and do well, the less expensive the case will be. By contrast, litigation is far more expensive when there is poor client communication, the lawyer has trouble getting information and no one at the client has responsibility for assisting with the case. For case updates and strategic decisions, a corporate client's officer or in-house counsel is usually the primary contact. Additionally, you should have a client liaison who can facilitate witness interviews, fact-gathering and document collection, deposition scheduling and other day-to-day matters. Given all the time and follow-up this entails, it is not always practical for this person to be the client's officer or in-house counsel. The ideal candidate will know the organization well and have the authority, perseverance and communication skill needed to get the attention of others.

No. 6: *Select vendors and experts with care.* With electronic discovery vendors, you should always obtain price estimates (comparing "apples to apples") for collecting, processing and producing electronically stored information. This includes examination of per gigabyte processing charges, hosting fees and consulting fees. With court reporters, you again should know the costs in advance. You can limit transcript costs by not ordering an original, hard-copy (a manuscript by e-mail should be fine) or copies of exhibits (provided you identify them on the transcript and can keep them organized). With experts, you should ensure that the testifying expert's team is lean. Because it is the testifying expert who ultimately will testify, it can be inefficient and expensive for the expert to be supported by several subordinates. With Fed.R.Civ.P 26(b)(4)(C), you may be able to avoid hiring a separate consulting expert because the attorney and testifying expert's communications are now generally protected from discovery.

No. 7: *Try to get along with opposing counsel.* If you can get along and reach reasonable compromises with opposing counsel, you will serve your client's interests and help to keep litigation costs under control. The Fed.R.Civ.P. 26(f) conference should be in-person, over lunch, and should thoroughly address discovery limits, form of production, privilege and other issues in a cooperative way. When your client will not be prejudiced and the favor may be returned, you should agree to reasonable requests for time extensions. Although you must be aggressive in advancing your client's position, being civil as well as personable will help limit unnecessary discovery disputes, extensive letter-writing campaigns and other time-wasting skirmishes.

No. 8: *Allow opposing counsel to inspect and copy documents at their expense.* The production of documents and electronically stored information is often the most expensive part of any litigation. Yet, in many cases, less than 1 percent of the production will ever be admitted at trial. When you anticipate this and there is asymmetry with the parties' resources or anticipated production, you should consider making voluminous hard-copy documents available for inspection and copying by the other side at their expense. This is most appropriate when the documents are covered by a strict protective order, are not controversial and are known to not contain privileged material. For example, in a patent infringement case involving years of research and development, this could be appropriate with lab notebooks or testing documents. In a case over a troubled merger or asset sale, this could be appropriate with due diligence documents shared with the other side before the transaction. Your client will save a small fortune if the other side pays for its own copying and you review just what the other side has selected.

No. 9: *Limit e-mail production by custodians, search terms and date range.* In all cases, you should limit the scope of e-mail discovery to certain custodians, by identified search terms and by date range. There is growing legal support for limiting the scope and costs of electronic discovery. Under Fed.R.Civ.P. 26(b)(2)(C), the court must limit the scope of proposed discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." The Model Order Regarding E-Discovery In Patent Cases, endorsed by Federal Circuit Chief Judge Randall Rader and now entered by many district courts, is also very helpful. Absent leave of court or party agreement, a requesting party may seek e-mail only from five custodians per producing party and is limited to five search terms per custodian, with the terms "narrowly tailored to particular issues" and "combined with narrowing search criteria that sufficiently reduces the risk of overproduction." This is the right approach in many cases.

No. 10: *Seek agreement on a narrowed privilege log and a no-waiver order.* Even with the best review tools, the creation of a privilege log can require countless hours in reviewing and describing all the documents being withheld for privilege. Most of the time, the log does not advance the litigation and merely reflects dozens of documents that actually are privileged. To reduce or eliminate this cost, you should ask the other side to agree that the log need not include privileged documents generated after the lawsuit was filed; need not include litigation counsel's correspondence with the client; or, with some cases, need not be created at all. For protection of all parties and again to reduce costs, it is also wise to enter into a no-waiver order, as contemplated by Fed.R.Civ.P. 26 (b)(5)(B) and Fed.R.Evid. 502. With a no-waiver order, the parties agree that, when a producing party notifies the receiving party that a document is privileged and was inadvertently produced, there has been no waiver and the document will be promptly returned or destroyed.

No. 11: *Pursue cost-shifting for discovery.* This is also appropriate when there is asymmetry between the parties' resources and anticipated production. When the requesting party expects the producing party to pay for the production, there is little incentive to serve targeted discovery requests. By contrast, when the requesting party is required to pay, the requests can suddenly become far more reasonable. To pursue cost-shifting, you should rely on Fed.R.Civ.P. 26(b)(2)(C) as well as Fed.R.Civ.P. 26(b)(2)(B), which provides that a party need not produce "electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Again, the Model Order Regarding E-Discovery In Patent Cases is helpful. Should a party seek e-mail from more than five custodians or the number agreed by the parties or the court, "the requesting party shall bear all reasonable costs caused by such additional discovery." When the requesting party refuses to pay the costs of far-reaching discovery, this can be a tell-tale sign to the court that the discovery is in fact overbroad and unduly burdensome, and should be restricted.

No. 12: *Stipulate to facts not in dispute.* It is never a bad idea to ask opposing counsel what they seek from a deposition or a broad discovery request and to then consider whether you can save money and short-circuit matters by stipulating to basic facts not in dispute. When the facts are clear, the early use of stipulations can avoid costly discovery and testimony about corporate hierarchy and organization issues, communications and conduct between the parties or other matters that otherwise would require discovery and trial testimony. For example, if representing the customer of an alleged patent infringer, you may be able to avoid exorbitant document and deposition discovery into years of sales and financial records by stipulating under oath that it sold the alleged

infringing product and generated certain revenue over the relevant period. If presented with a motion to compel or your motion for a protective order, the court may limit broad discovery when it understands you have clearly offered to stipulate under oath to the very facts at issue.

When our clients have a dispute, we want them to have the opportunity to have a judge or jury decide the merits. Without creativity and discipline, however, it is very easy for a zealous, well-intended counsel to over-lawyer a case such that the client can no longer afford it. This can also happen simply because litigation can be very expensive. For the good of our justice system, our clients and our own professional fulfillment, we should push back and look for efficiencies to streamline every case. Settle where appropriate, and smartly litigate the rest.

Damon W.D. Wright, a partner in Venable's Washington office, is a first-chair trial attorney focusing on commercial, business tort, advertising, and intellectual property litigation for clients including government contractors, retailers, financial services firms, manufacturers, technology companies, investment groups and construction firms. He can be reached at dwdwright@venable.com.