

Building an In-house Litigation Team
By R. Jeffery Kelsey¹

Any corporate attorney having responsibility for litigation faces increasing pressure to handle more cases with the smallest budget possible. In-house counsel face challenges seemingly from all sides - from the plaintiff's bar on the prowl for the latest "judicial hellhole," to the outside counsel forced to raise billing rates to pay for the best talent coming out of law school, to the CEO who needs to squeeze every profitable dollar out of the budget. What follows is a method of controlling rising litigation costs by bringing some of that work in-house to be handled by a trial team made up of corporate counsel and support staff. Although the concept is not a new one, it is an idea that many companies seem unwilling to explore despite the seemingly obvious cost savings. However, my experiences at FedEx, and a review of the experiences of other companies who handle at least some of their work internally, leads me to the conclusion that most companies facing a significant volume of litigation can save money and produce outstanding results by handling lawsuits with inside counsel.²

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Prior to joining FedEx, Mr. Kelsey was in private practice in Memphis, Tennessee and Birmingham, Alabama where he represented defendants in medical malpractice, products liability, and personal injury cases.

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² The Association of Corporate Counsel's annual Value Challenge recognizes a handful of corporate legal departments each year which take proactive approaches to corporate legal work, simplify processes, and collaborate to reduce litigation. Many of the winning departments increased their use of inside resources for routine litigation and transactional work. *See*, https://www.acc.com/valuechallenge/valuechamps/avc_valuechampions_2017.cfm.

Why Handle Lawsuits Directly with In-house Counsel?

Although the economic proposition will be different for every company, there is little doubt that using inside counsel to handle litigation is generally cheaper than hiring outside counsel. Depending upon the industry, it is not uncommon for companies to pay on average \$300 – \$450 per hour for outside counsel work on “ordinary” litigation matters. Of course, the price goes up for increased complexity (i.e. class actions, mass torts, antitrust, patent) and in certain legal markets such as New York, Washington D.C., and San Francisco. If a company has a reasonable expectation of 2000 hours of work from its in house attorneys doing the same work as outside counsel, that equals \$600,000 to \$900,000 per year that could be spent on each in house litigation attorney for salaries, benefits, and overhead. Given the average salaries paid to in house attorneys, it is easy to see that there is money to be saved.

But perhaps more importantly than the economic savings, is the benefit that in house litigators provide in understanding the company, producing outstanding results, and preventing future litigation. Lawyers practicing within a legal department have a unique view of the company that no outside attorney, no matter how talented, can obtain. The ability to understand the long term goals of the company and make strategic decisions in litigation based on this understanding provides an immeasurable benefit to the company. As a result, in house counsel are uniquely positioned to provide outstanding results to their client. Outside counsel are undoubtedly loyal, zealous advocates, but in the final analysis, one case for an attorney in a private firm is only one of many cases for many clients. In house counsel may be much more invested in their cases because they see a more direct impact on their company from a bad result. For

example, every settlement or loss can be viewed in terms of the amount of revenue a company must generate to pay for that case. If margins are 10%, the company must generate \$1 million in revenues to pay for every \$100,000 judgment. That analysis puts an in house counsel's role in perspective and forces the attorney to gauge each settlement or loss against the greater goals of the company, which exists not to handle lawsuits, but to serve its customers.

In house counsel's knowledge of the company also translates into more efficient and cost effective handling of cases. Companies who use attorneys in private practice invariably spend a great deal of money teaching those attorneys about the company's policies, procedures, and systems. That education process may have to be repeated numerous times each year if the company faces suits in many different jurisdictions. By contrast, in house litigators have ready access to all the information they need to defend the company, and do not require retraining for each new case. This efficiency gained by having institutional knowledge of the client allows the attorney to spend less time "getting up to speed" and more time working on substantive issues in the lawsuit.

Finally, corporate counsel's unique role in the company creates opportunities to prevent litigation, or at least, position the company to win more cases. Every lawsuit provides an opportunity for a company to improve its systems and, perhaps, prevent the next lawsuit in that arena. In the employment arena, for example, in house litigators have the ability to work directly with their Human Resources departments to resolve issues that are damaging in litigation. Perhaps new policies and procedures need to be created to deal with changes in the law, or differences in the law in a particularly troublesome

jurisdiction. Perhaps existing policies need to be more rigorously enforced, or managers in the field need further training. In house counsel can play an important role in all of these areas, and their knowledge of issues gained from handling lawsuits directly can be invaluable in correcting such problems and preventing further litigation.

What Work to Handle Inside

When contemplating handling litigation with in house counsel, the first issue to resolve is what exactly should the Legal Department be handling and what should be given to outside counsel. The answer to the question obviously depends on the industry in which the company operates, but as a general rule, those areas of the law where the company consistently defends cases, and which are inherently important to the company are ripe for a more active in house role. For example, a manufacturer may consider bringing in house all of its product liability cases in one or more of its product lines; a retailer with many hourly employees may want to invest in defending its single plaintiff employment cases, or a regional hospital may be able to economically defend its malpractice claims with in house attorneys. The decision in this area should be based on a review of the pending litigation with an eye toward staffing to handle “normal” levels of one type of lawsuit. No one would suggest hiring a team of antitrust attorneys when the company only sees antitrust cases once every five years, nor would it be economical to hire enough staff to handle mass tort cases that spawn copycat lawsuits and multi-district litigation proceedings. However, there is undoubtedly some “routine” aspect of any company’s docket that could be handled directly by in house attorneys whether it is single plaintiff employment, product liability or breach of contract cases.

Overcoming Barriers to Implementation

A General Counsel hoping to bring litigation work in house may face numerous barriers to such a litigation model. Senior management may view the Legal Department as a necessary evil rather than a business partner, or may believe that the company should focus on its “business” rather than getting into the “business” of litigation. There may be little understanding of the cost savings that can be achieved or of the tangential benefits of this model such as litigation avoidance. There may also be a simple resistance to change from the traditional model of referring litigation to outside counsel. In the end, simple economics may win the argument. There are a number of good benchmarking tools that can assist in convincing the skeptical that in house litigation attorneys are good for the bottom line. The Association of Corporate Counsel provides numerous benchmarking reports on everything from average hourly rates of outside counsel to average in house attorney salaries. HBR Consulting, among others, compiles a yearly benchmarking survey on a wide range of legal department metrics that can be used to develop an economic rationale for adopting an in house model. Finally, the company finance department may be the best ally in any debate regarding the economic advantages of using in house litigators. If the accountants are convinced that adding attorney headcount reduces outside counsel spend, there is a good argument to implement an in house litigation model. The finance teams can create important metrics, such as the fully loaded hourly rate of in house attorneys, which allows for a relevant comparison with outside counsel fees.

Hiring the Right Team

Perhaps the most challenging portion of any implementation is hiring the right people for the job. The position of in house trial attorney is unique and requires unique

skills. Unlike a law firm which has a vested interest in hiring young attorneys and training them to become successful partners, legal departments do not have the resources to train a lawyer how to handle a lawsuit from complaint to trial. Therefore, experienced attorneys with trial experience are required. For most companies, lawsuits appear in a multitude of jurisdictions, perhaps all over the country, so extensive travel is also a requirement of the job. Finally, the successful candidate must be prepared to leave behind the structure of the billable hour and the joy of client development in exchange for the rewards of representing a single, very demanding client.

Conclusion

Directly handling lawsuits with in house attorneys can provide innumerable benefits to the corporate client including cost savings and litigation prevention.