

Controlling the Costs of Defense: The 80 Percent Solution

By *Walter C. Greenough*

A company faced with repetitive lawsuits arising from a single source (be it an allegedly defective product or an allegedly illegal process) must control both the costs of judgments or settlements and the costs of getting them. The top priority, of course, is to avoid a ruinous eight- or nine-figure judgment. The second priority is to avoid repetitive settlements that, in the aggregate, may be as expensive as a single large judgment. The third priority is to control the expenses of repetitious litigation.

Corporate counsel constantly complain about the costs of litigation. Their proposed solutions, however, tend to focus either on the macro (e.g., over-staffing) or the micro (e.g., copying charges). The many ways in which litigation costs can be routinely and significantly reduced are left generally unexplored. The advice that follows aims to help fill that gap.

Let's call it the 80 percent solution or, less elegantly, the good-enough approach. Roughly 80 percent of the benefits of litigation usually can be achieved at half the cost of full-scale war. Put another way, it costs twice as much to improve your chances of winning by 20 percent. Whether that benefit is worth the cost depends on the particular case. Not every case is a bet-the-company affair. Not every case requires that every rock be turned over. Not every case justifies the best lawyering money can buy. More often than not, good enough will do. This is true for one-off cases where the realistic damages are less than \$2 million or so. It is especially true for repetitive cases, such as those alleging defects in a particular product, as the costs of litigating multiple cases can be as ruinous as a single large adverse verdict.

The incremental costs of going from a good to a great defense increase exponentially but frequently provide an unacceptably low rate of return. It is relatively easy, and therefore relatively inexpensive, to identify the probable witnesses and documents that will drive a case. It is

much harder, and therefore much more expensive, to identify every witness or document that might have some bearing on the case. Stories about cases won by finding the needle in the haystack are told only because there was a needle to find. Massive document reviews that fail to turn up anything new or endless depositions of increasingly obscure and repetitive witnesses do not become the stuff of legend. Nobody talks about them, but somebody paid for them.

When good enough will do, litigation costs can be cut in almost every aspect of the case, from initial investigation, discovery, motion practice, and through

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trial. This requires creative lawyering; it is harder to hit a target with a rifle than with a shotgun. It requires a willingness to make early decisions as to what is and is not likely to be important and the discipline to stick with those decisions.

Use Local Counsel and Investigators Effectively

Some companies try to solve the over-staffing problem by using national trial counsel in place of, rather than in addition to, local counsel. This is often a mistake. National counsel may be more familiar with the client's business, but they can't match local counsel's knowledge of and credibility with the court, opposing counsel, local witnesses, and prospective jurors, nor can they match local counsel's reduced billing rates and travel time. Local counsel can perform much of the work of national counsel at a fraction of

the cost. Thus, an investment in good local counsel almost always reaps dividends.

Local counsel can provide guidance concerning local rules and practice that saves time and, therefore, money. Why file a motion (e.g., for an extension of time to respond to discovery) when, under local practice, a letter will suffice? Why serve certain document requests when local rules prohibit them? In addition, local counsel's relations with the court and opposing counsel might encourage cooperation that otherwise would be harder, and therefore more expensive, to attain.

Having local counsel handle routine court appearances and discovery will significantly reduce litigation costs. This delegation reduces all three components of the client's bill: billing rate, time, and travel expense. In addition, the comfort level the court and local witnesses have with local counsel may improve the rulings and testimony obtained from them.

Just as national counsel should pass along work that local counsel can perform more effectively and efficiently, so too should local counsel outsource work that can be done more economically by others. For example, basic information about the case, such as police reports and medical records, often can be obtained simply by asking plaintiffs' counsel for it. These records should then be used by a private investigator to locate and interview witnesses, as an investigator can do so more economically than either local or national counsel.

Reduce the Costs of Discovery

Discovery obligations fall disproportionately on corporate defendants in cases brought by individuals. In products liability cases, for example, plaintiffs have few documents beyond their medical records to produce. Defendants, however, typically have tens of thousands of pages of design, testing, manufacturing, and sales documents that they must find and produce. Plaintiffs have few lay witnesses, and the scope of their knowledge is

limited to the particular accident, its aftermath, and the precautions taken to avoid it. Defendants may have many witnesses with broad knowledge concerning the product and other complaints about it.

Plaintiff's counsel who are creative (or unscrupulous, depending on your point of view) will use this imbalance to their advantage. They will make discovery demands that are increasingly difficult to meet, hoping that the costs of compliance will force defendant to settle or that the failure to comply will lead to sanctions weakening defendant's litigation position.

It is precisely because the discovery burden is so one-sided that defendants should do what they can to reduce it. Although many cost-saving measures are case-specific, the following suggestions can be used in almost every case.

Play offense, not defense. Serve your first sets of interrogatories and document requests at the earliest time permitted by the rules. In most state courts, this will be at or even before the time you file your answer. In most federal courts, this will be the minute after the Rule 26(f) conference concludes. The goal is to serve your requests on plaintiffs before they serve their requests on you. Priority matters—even when the rules say it doesn't. Forcing plaintiffs to respond first helps ensure that they will, in fact, respond. The nature of plaintiffs' responses and objections may provide a template for your own. Most important, plaintiffs have a harder time complaining about the timeliness or content of your responses if their responses are similarly deficient.

Follow the Golden Rule. Do unto plaintiffs as you would have them do unto you. If your discovery requests and responses are reasonable, you may encourage plaintiffs to reciprocate. Even if your effort fails, you will be better positioned to prevail in any disputes brought to the court's attention.

Avoid broad definitions. Lengthy boilerplate definitions and instructions often accompany document requests and interrogatories. Broad definitions of "you" (e.g., "including but not limited to you, your parents, subsidiaries, affiliates, predecessors or successors, and all officers, directors, employees, agents and any other persons or firms acting or purporting to

act on your behalf") are far more troublesome for a corporate defendant than for an individual plaintiff, so you shouldn't invite their use. Similarly, seeking broad electronic discovery from plaintiffs or demanding that they prepare a privilege log will rarely secure any useful information and will always impose a far greater burden on the defendant when the tables are turned.

This same rationale applies to drafting the discovery requests themselves. Rather than asking for all documents or facts relating to a particular subject, ask only for those documents or facts that "principally and materially relate" to the subject. Limiting discovery in this fashion won't significantly reduce the information that plaintiffs might otherwise produce, but it will substantially reduce the costs of compliance for defendant if plaintiffs can be persuaded (or ordered) to reciprocate.

Standardizing document productions can save even more money than standardizing document requests. If a particular product is the target of repeated lawsuits, then you should make a special one-time effort to assemble all potentially relevant documents. The occasional follow-up request for more documents is inevitable, but reducing the number of such requests by painting with a broad brush at the outset can be a real time and money saver.

Once the documents have been collected, you should assign most of them to a core set, which will be produced in almost every case. These documents should include design, development, testing, manufacturing, and, perhaps, sales information. Review them thoroughly to withhold those that are privileged, designate those that are confidential, and determine which, if any, are particularly useful or troubling.

This core set should be routinely produced without further review even if much of it is of only marginal relevance. In particular, you should not waste time trying to sort out arguably irrelevant, but inconsequential, documents from a particular production. Such an exercise is counterproductive for several reasons. First, micromanaging the date parameters, model numbers, or other variables of production for each new set of discovery requests substantially increases your costs.

Second, such micromanaging encourages plaintiffs' counsel to complain that your definitions of relevance were too narrow or that you failed to produce documents you did produce in an earlier case. Third, by producing all arguably relevant documents, you give yourself the opportunity to use whichever of them you ultimately need at trial, whereas a court will rarely allow you to use a document you failed to produce. Fourth, producing a relatively large number of documents increases the likelihood that plaintiffs will miss any needle in the haystack.

You waste a good deal of money trying to avoid producing documents which, if they were produced, wouldn't hurt your case in the slightest and might even help it. The 80 percent solution dictates that if it doesn't hurt you, you should produce it.

This approach encourages the elimination of unnecessary objections to discovery requests. Stick to objections that matter. Don't object to relevance if the requested documents are easy to produce and inconsequential. Don't object to a request as "overbroad" or "unduly burdensome" if you only have a few responsive documents. Don't object at all if you don't have any responsive documents or, if you must object, at least say that you don't have any responsive documents. Otherwise you risk fighting over literally nothing. This is not a time for law school issue spotting. The more objections you make, the more discovery disputes you invite. Multiplying discovery disputes increases both the costs of dealing with them and the likelihood of losing them. Neither result is optimal.

As for depositions, there are three ways in which application of the 80 percent solution can result in significant savings. First, don't take more depositions than are necessary. Instead, use a local investigator to interview witnesses and help you identify those who have little to say. If necessary, the investigator can obtain signed statements from marginal witnesses to protect you against the possibility of surprise testimony at trial, but this is still cheaper than deposing them.

Second, if a deposition must be taken, try to limit its duration. Federal rules now limit depositions to seven hours, and many states limit them to three or four

hours, but the parties usually can impose different durations by agreement. Defendants almost always will benefit from shortening the time available to depose lay witnesses. You should be able to ask a plaintiff everything you need to about an accident, its aftermath, and the precautions taken to avoid it in three hours or less. A diligent plaintiff's lawyer, however, can grill a corporate witness for seven hours or more, picking apart the design, testing, or manufacturing process of a product and demanding details about other similar incidents. Limiting the length of corporate employee depositions will save wear and tear on your witnesses and reduce attorney fees and court reporter charges.

Third, cut the costs of court reporters. The best way of doing this is by reducing the number and duration of depositions. The next best way is by contracting with a national reporting firm to handle all your depositions at a discounted rate. This saves money, improves quality control, and provides an electronic database accessible over the Internet.

Save Money on Motions

Give or take, 80 percent of motion practice is a waste of time. Tens of thousands of dollars can be saved in every case by keeping motions to a minimum. From a defensive perspective, you should make all reasonable efforts to reduce your opponent's opportunities to seek relief against you. From an offensive perspective, you

should seek only relief that is meaningful. Don't sweat the small stuff. From either perspective, you shouldn't fight battles you can't win.

The need for motions to resolve discovery disputes will be minimized if you follow these suggestions. Seize the high ground by serving your discovery requests first and by limiting them to the issues genuinely in dispute. Keep the high ground by objecting to plaintiffs' requests only when necessary. Don't invite disputes by making too many objections or by producing too few documents. If you don't keep control of the discovery process, a court may take that control from you.

Similarly, motions for summary judgment or to exclude experts will not be useful in 80 percent of your cases. They are expensive to prepare, as they usually require extensive documentary or testimonial support. And they are rarely successful, as judges err on the side of letting cases go to the jury. Indeed, these motions can backfire by alerting plaintiffs to holes in their cases while they still have time to patch them up.

Most of the benefits of motions for summary judgment or to limit or bar the testimony of opposing experts can be obtained at a fraction of the cost through the judicious use of motions in limine. These motions can eviscerate opposing experts by restricting the scope of their testimony to narrow areas that do you no real damage. An expert's competency

to testify about a particular subject can be challenged, and the substance of the expert's testimony can be limited by precluding his or her reliance on hearsay or unscientific reports. Thus, motions in limine can cut the legs out from under plaintiff's liability theories by limiting evidence of other similar incidents, recalls, remedial measures, or even causation.

Motions in limine do not offer the dispositive relief that motions for summary judgment or to exclude experts can provide, but they are more likely to be granted for that very reason. Moreover, a favorable ruling is more likely to be upheld on appeal. Most rulings on motions in limine will be reversed only for an abuse of discretion, whereas the award of summary judgment is subject to de novo review. Finally, motions in limine have the advantage of surprise, since they do not come with flashing "Danger" signs. Caught up in their trial preparation, plaintiffs' counsel may not recognize that a particular motion in limine could gut their case or their expert, and counsel may not have time to prepare the necessary response even if he or she recognizes the danger.

Economize on Experts

Good experts are worth their weight in gold. Too often, however, too much gold is spent on experts who don't carry their own weight. Thus, this is another area in which you can cut your costs in half if you are willing to accept a slightly greater risk of an adverse result.

The easiest way to reduce your expert expenses is by reducing the number of experts you use. When possible, share the cost of a single expert with a codefendant. The testimony of an accident reconstructionist, a medical expert, or an economist should not depend on which defendant hired him or her, and sharing an expert prevents plaintiffs' counsel from exploiting minor differences in the testimony of separate defense experts.

If you can't share an expert, then consider whether you need one at all. You shouldn't need a medical expert if the treating physicians can give you all you need. You may not need an economist or even a life-care expert if plaintiff's experts take either reasonable or inherently

Practice Tip for Young In-House Lawyers

Regardless of whether you report to another lawyer at your firm or you are the firm's chief legal officer, keep the person you report to well informed of potential problems and legal losses. As a wise CEO once told me, "I can take good news and I can take bad news—just don't surprise me." Advance warning to your client allows for planning, setting the necessary reserves, and even potentially averting the disaster. When an adverse outcome cannot be averted, even the most horrible legal outcome is easier to bear if it is expected. While the adverse outcome may not be your fault, you will be rightfully blamed for adding shock to misfortune.

—By Penny Phillips, Corporate Counsel,
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outrageous positions. In either instance, you should consider making your case through cross-examination of plaintiff's expert rather than hiring an opposing expert of your own. This approach saves you the fees your experts otherwise would charge. It also sends a strong signal to the jury that your focus is on liability, not damages.

A final method of reducing the number of experts you need is to use an expert who combines two areas of expertise. A biomechanic with a medical degree, for example, can testify about both the cause and the significance of an injury. Similarly, a single expert may be able to testify both that the product was not defective and that the warnings accompanying it were adequate.

The same constraints that guide your selection of experts when good enough is sufficient should also guide your use of the ones you do retain. Ask your experts to do only what you need them to do—no more and no less. While the determination of what needs to be done should be a collaborative one, you must resist the temptation to let your expert be the final arbiter. Most experts prefer to review every document available and run every test imaginable. Unscrupulous experts do so to increase their billable hours; scrupulous experts do so to ensure that their opinions are based on all available information. The result, however, is the same: experts

reviewing documents and depositions that are of little or no relevance to their opinions and running tests that are unlikely to provide useful information. The savings you realize by curtailing such work will usually offset the risk that your expert is successfully impeached by not having done it.

Save Money at Trial

Applying the 80 percent solution to trials is equally easy and effective. Just say no: no mock juries, no jury consultants, and no transcripts of trial proceedings.

The problem with mock juries is that their utility is directly proportional to their cost. A mock jury whose composition is similar to that of your jury pool will give you better guidance than a mock jury selected at random, but it costs much more to recruit. Similarly, presenting your case to two mock juries sequentially will tell you if your adjustments are effective, but that obviously costs more than using a single panel. Accordingly, unless your case justifies the use of two or more mock juries selected to reflect the composition of your actual jury pool, you may be better off not using a mock jury at all.

This problem is exacerbated with jury consultants. In most cases, you should be able to identify on your own the three or four people you absolutely need to keep out of the jury box. Local counsel familiar with local demographics and

prejudices are of more assistance than a jury consultant who knows little about your case or your jury pool. Educating a consultant in those areas can be an expensive proposition.

Daily trial transcripts are the final luxury you usually can do without. They are expensive, often running to \$1,500 a day. And they are distracting: If they are available, it is hard to resist the temptation to read them, even though that time is often better spent elsewhere. The contemporaneous notes of a witness's testimony scribbled by you or another member of your team almost always will reflect the salient points of the testimony. If these points were made so subtly that you missed them, chances are the jury missed them too.

Conclusion

A corporation can reduce its costs of litigation significantly if it is willing to accept a small reduction in its chances of winning. Brush fires that do not threaten the company need only be contained—they do not need to be fought with scorched-earth firebreaks. The scaled-back approach may not be appropriate for cases involving large damages or unique facts. It will, however, result in overall savings if applied in smaller cases or those involving repetitious fact patterns. ■

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