

**EXPERTS' FORUM** | Legal

## Litigation in Difficult Economic Times

The pressure to reduce outside legal expenses becomes even more pronounced in tough economic times, but the solution is not as simple as spending less. Below are some strategies for doing more with less in litigation.

**Fight the good fight:**

Litigating efficiently means strategically choosing one's battles, and wise litigation counsel can distinguish between the battles worth fighting and those that aren't. Failure to agree with an adversary on even the most mundane procedural issues, such as scheduling, not only unnecessarily raises the cost of litigation but risks irritating the judge.

**Face the (bad) facts:**

Every lawsuit has bad facts on both sides. It is never a good strategy to assume that your bad facts won't come out and it is far better to face the bad facts early in the case rather than spend thousands of dollars on discovery and motion practice. Skilled litigation counsel will both vigorously advocate for the client's cause and candidly advise the client regarding the potential shortcomings of the client's position.

**Consider early mediation:**

Most cases settle; unfortunately, it is too often true that a case settles for very nearly the same amount it could have settled for months earlier, if the parties had only given their serious attention to settlement discussions. A third-party neutral acting as mediator can help reinvigorate stalled negotiations.

**Consider arbitration:**

Even in cases where there is no contractual obligation to arbitrate, the parties remain free to agree to submit their dispute to arbitration. A case will often progress more quickly and, therefore, less expensively, in arbitration than in a traditional judicial forum. Arbitration also allows the parties more control over who will decide their case. Cases that are more factual than legal in nature

and where the amount in controversy does not give rise to motion practice and appeals may be particularly well-suited to arbitration.

**Make effective use of technology:**

Technological issues arise in the context of both discovery and the efficient management of the massive amounts of information that a lawsuit produces. First, an adequate document retention policy must include policies relating to the retention of electronic data. Failure to implement a litigation hold designed to preserve relevant electronic data when a party becomes aware of the potential for litigation may lead to disastrous consequences, including sanctions for spoliation of evidence. Second, a working knowledge of IT issues is necessary to be able to thoroughly exploit electronically stored data that may be in the possession of the opposing party. Finally, litigation support software can greatly increase efficiency and reduce costs by allowing large amounts of data to be quickly and easily searched, sorted, and accessed.

**Manage the "hidden costs":** Litigation diverts resources from the company's mission. Time spent gathering information necessary to respond to discovery, attending depositions, and meeting with attorneys is time that cannot be spent performing regular job functions. At the same time, settlement may set bad precedent or make your employees feel unsupported. An effective litigation strategy must weigh all of the costs of litigating against all of the costs of not litigating.

**Consider alternative fee arrangements:**

Companies are increasingly seeking alternatives to the standard hourly fee approach to charging for legal services, such as volume discounts, tiered discounts, capped fees, flat-fee billing, and various combinations of those approaches. Although not every case is well-suited to an alternative fee arrangement, in appropriate cases, such arrangements can give incentives to both the attorney and the client to handle the case more efficiently.



**KATIE BERGSTROM**  
Co Chair Litigation  
Gray Plant Mooty  
<http://www.gpmlaw.com>