Avoid the 'Budget Blowout' Conversation: Minimising Legal Costs in Dispute Resolution and Litigation

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Overview

Unfortunately, in many cases, despite best intentions on both sides, litigation is often associated with budget 'blowout'. Here are five upfront tactics to help you to proactively manage the process right from the start and effectively minimise your overall costs.

For any in house counsel, litigation can be an expensive and daunting process. Your lawyer will (hopefully) keep you up to date on costs and why they are varying from the initial/previous estimate. Despite this, facing internal stakeholders, including the Board, the CEO, or the GC, to explain why you will need to exceed budget is unlikely to be an enjoyable task, even for those with very good reasons.

There are a number of questions you can put in place to help ensure your matter will run efficiently and any 'unnecessary expenses' are avoided before you incur them.

Be clear on the outcome you're seeking

Generally speaking, there is a myriad of paths a dispute resolution and litigation matter can take and the costs associated with each are likely to vary.

You should play an active role in asking about costs associated with your desired outcome, both at the outset of a matter and during it. Sometimes you may want a judgment by a Court to not only achieve the outcome in your particular matter, but to act as a deterrent for other parties in future litigation against your organisation. In other matters, the best outcome may be a favourable settlement which is not in the public domain.
Question your fee estimates

Review your lawyer’s fee estimates very carefully and be clear what is and isn’t included and ensure you are aware of costs outside of your lawyer's estimated professional fees.

Costs to look for include:

- Court fees such as filing, hearing and transcript fees.
- Court ordered mediation – the cost of the independent mediator’s fees.
- Any expert fees.
- Photocopying fees.
- Barrister’s fees.

For example, if you are the Plaintiff in the Federal Court, hearing and transcript fees can be $1,500 - $3,000 per day in excess of the initial filing fee (depending on the type of matter). This cost is in addition to your barrister and lawyer's fees and is often not taken into account in the initial fee estimate.

Beware the discounted hourly rates

Many firms will discount or even halve their hourly rates to provide comfort that you will receive the best price and estimate for your brief. Unfortunately, in many cases, this doesn't necessarily equate to cost savings.

Although hourly rates are important, the following factors are key things you should know upfront.

- How many lawyers will be working on the matter? Even if hourly rates are low, the more lawyers you have working on your matter, the more fees will be incurred to maintain the team. For example, there may be costs for multiple lawyers reviewing the same document and for your lawyers to keep each other appraised on their progress. While this may be warranted in your matter, ensure you are aware of the resourcing planned, how it will impact your costs and you are comfortable with it.
- How many lawyers will be attending Court or Mediations? Unless it is a very large matter, often one lawyer will be performing the vital work and the rest will be taking notes. If there is more than one lawyer, ensure you know why. You do not need to be paying lawyers rates for note taking (which is a task the main lawyer should arguably be performing). You are paying good fees – let them multi task.
- Who do you want to deal with? Do you mind? Often lawyers may assume that you only want to deal with a lawyer of a particular seniority or area of the firm, either because of an existing relationship, the type of matter or both. This might mean you are being charged Partner rates when you would have been more than happy dealing directly with a capable lawyer or senior associate on a particular matter.

Use Partners carefully and QC/SC strategically

Some in house counsel prefer Partners be involved in everything to do with their matter.
Partners offer significant value in crafting strategies and reviewing a more junior lawyer’s work. However, for day-to-day tasks such as timetabling of the matter and general correspondence with you, your barrister and the other parties in the case, a capable senior associate or lawyer is far more cost effective.

Similarly, not all cases require a Queens Counsel (QC) or Senior Counsel (SC). In addition to their trial experience, QCs and SCs can be used for very difficult, technical legal points, and for impact in mediation. They can also be used to show the Court and the other parties that you are serious.

In many cases it is not cost effective for a QC or SC to settle every letter (except for very important ones), attend every minor directions hearing or to review all discovery from both parties. A very capable junior barrister or lawyer can attend to these tasks at a much lower rate.

**Listing and document management**

While your lawyer needs to review discovery and identify the relevant documents to be included in a matter, they should not be spending substantial time on listing documents. You should not be charged at a lawyer’s rate for sorting, listing and collating these documents – a secretary or law clerk can do these time consuming tasks at a much lower charge out rate and then have their work reviewed by the relevant lawyer once complete.

**Conclusion**

It is a good idea, particularly when using new lawyers, to review your bills and ensure you are comfortable with the matters listed above. If not, raise this with your lawyer promptly and ensure they can explain to you why, or adjust their resourcing to reflect your expectations.

A good working relationship with any lawyer will involve being open about costs throughout a brief. To avoid 'bill shock', it is worthwhile openly discussing the following at the start of the matter:

1. Your desired outcome - and advise of any changes as early as possible;
2. Your fee estimates and any additional costs likely to be incurred (especially disbursements such as Court fees);
3. Questions about any 'grey areas' such as resourcing;
4. The intended use of higher level resources such as Partners, QCs and/SCs; and
5. Minimising document management costs.

Most importantly, if you don't ask… you'll never know. If you raise these issues at the start of the litigation process, there should be less surprise when it comes to costs, from your first bill to your final legal spend.

**Other resources**
Top Ten Tips to Combat the Hidden Costs of Discovery
eDiscovery for the Middle Market
Document Productivity and the Second Wave of Legal Cost Containment
Low Cost of Going High-Tech: How to Use Technology to Improve the Productivity of Your Law Department
Handbook for Value-Based Billing Engagements