

MANAGING LITIGATION AS A BUSINESS (Aligning Value and Costs of Litigation Services)

PROGRAM ORIENTATION

Law Department Collaboration – Unique Resource

The “Managing Litigation as a Business” (Managing Litigation) initiative was originally developed in 2008–2009 under the auspices of the Law Department Consortium, a former organization of corporate counsel committed to helping law departments improve efficiencies, lower costs and gain more value for their legal spend through strategic partnering efforts with preferred outside counsel and suppliers.

Today, this groundbreaking effort is being operated as a standalone venture supported by a core group of Managing Litigation “Project Directors.” Project Directors include thought-leading law firms and legal-related services providers collectively committed to marshaling and sharing proven strategies, tools and resources and developing new solutions for managing litigation more efficiently and effectively.

The mission of “Managing Litigation as a Business” is to help corporate in-house legal teams provide greater value to their clients by managing risks, disputes and litigation more efficiently and effectively to achieve better results at lower costs. Importantly, our focus includes making the jobs of corporate in-house legal teams easier – saving time, effort and dollars – while concurrently achieving better alignment between the value and cost of the services purchased from law firms and suppliers.

As a participating law department leader, it is important to understand the background and structure of this innovative collaborative project.

Factors Critical to Success

We started with the recognition that formal legal education does not include training in litigation management or business process engineering. As a result, in-house legal teams are essentially “winging it” when it comes to managing litigation handled internally or farmed out to their outside counsel. Granted, after years of wrestling the litigation tiger, some corporate legal teams have gotten “pretty good” at the task. However, with steadily escalating lawsuits and upward spiraling litigation and discovery costs; being “pretty good” at managing litigation today is simply not good enough.

While there is a crying need for quality education and training on how to manage litigation most efficiently, we recognized also that education and training alone would not produce the outcomes we want. Law department leaders face a big problem when it comes to implementing new ideas and practices. Most in-house legal teams simply don’t have the time, dollars or human resources to put new systems in place and/or to experiment with different ways of doing things better. As a consequence, nearly all litigation management processes that exist in law departments today – necessary or unnecessary – efficient or inefficient – tend to perpetuate. We need to overcome these barriers to improvement.

We recognized too the importance of including outside counsel in this initiative from the outset. Obviously, the firms you engage to prosecute or defend cases for your company have a huge impact on the success of efforts to manage litigation in a businesslike manner. However, law firms wedded to “business as usual” and the hourly billing cost-plus economic model threaten to undermine success. In contrast, we need to attract and involve seasoned partnering-savvy trial lawyers who “get it” – that is, outside counsel who are genuinely concerned about how they spend their clients’ money and are willing to contribute meaningfully to helping clients improve the risk, dispute and litigation management process.

Primary Objectives

These conclusions led to the idea of establishing a program where participating law departments committed to improving their litigation management capabilities and track record can collaborate with each other, and select outside counsel and suppliers, on an ongoing basis for their mutual benefit, with these primary objectives:

- Learning about the litigation management best practices, systems and tools that are working well for other law departments;
- Acquiring the necessary knowledge and skill sets to establish internal processes that drive continuous improvement in each company's approach to litigation management;
- Marshaling the diverse resources necessary to achieve these goals; and
- Forming "success teams" to assist each law department in implementing litigation management improvements; as well as the means to measure gains in efficiency and cost savings internally and by benchmarking progress with other participating companies.

To these ends, it was clear we would need a means to keep participating law departments, firms and suppliers talking and working with each other, and a centralized way to collect and share litigation management best practices and resources. A flexible and scalable online "Managing Litigation Portal" where we can build a central repository and collaborate in a variety of ways was the obvious solution.

Organizing Content and Guidelines

With the broad goals of helping in-house legal teams (a) improve how they manage their companies' litigation and (b) implement a continuous improvement process for achieving better results and lowering costs, we next recognized the need for a structure to organize pertinent information and resources and tackling the project. It was obvious that we had to break down the diverse tasks involved in achieving these goals into bite-size pieces.

For this, we turned to the in-house counsel, experienced trial lawyers and service providers invited to participate as faculty for the launch of this groundbreaking initiative in Chicago on October 29, 2008. We asked everyone to "put on a litigation management hat" and collaborate to develop a list – soup to nuts – of all relevant issues that go into managing litigation in a business-like manner, including continuous improvement. They came up with 21 Key Elements for "Managing Litigation as a Business."

We then separated the faculty into teams based on their self-claimed expertise in each of these 21 areas. Each team was asked to flesh out their assigned Key Elements by creating (a) more detailed descriptions, (b) implementation checklists designed to steer in-house teams towards improved performance, (c) answers to FAQs and (d) references to additional resources.

The goal of the exercise was not perfection. At the outset, we simply wanted a solid substantive foundation of knowledge and organized structure for moving forward. Collectively, the Chicago faculty's work product on the 21 Key Elements, as it is, already provides a comprehensive guide for managing litigation in a business-like manner; however, it's just a start. Our vision is to expand this resource continuously through ongoing contributions from participating law departments and others, making it increasingly more valuable over time.

Kickoff Events

In designing this project, we also saw the need for an effective means to promote this program to corporate counsel nationwide and recruit law department leaders to participate. We recognized the

importance of emphasizing that success will be achieved through ongoing collaborative efforts among participating companies, law firms and legal suppliers.

Attending a “Managing Litigation as a Business” kickoff event is the first step for a law department joining this groundbreaking initiative. To ensure the company’s commitment to participating in a collaborative effort to improve litigation management processes, attendance at these one-day programs in major metropolitan areas is restricted to General Counsel, Chief Legal Officers and senior corporate litigation management decision-makers. There is no fee for law department leaders to attend. However, the number of new participants at kickoff events is intentionally limited to accomplish very specific goals.

Pre-Event Preparation

All in-house counsel faculty and law department registrants are asked to complete a questionnaire prior to attending the kickoff event. The questionnaire includes descriptions of the Key Elements to Managing Litigation as a Business and requests each participant to evaluate how his or her law department is performing in each of these areas. Participants are also asked to identify what they feel their in-house legal team is doing particularly well in managing litigation and where improvement is desired.

Although we did not do this in our first kickoff events in Chicago and Washington, DC, in our efforts to drive better alignment between the value and costs of litigation services, we are now also asking in-house counsel to (a) describe the criteria they use in judging the “value” of the legal services they purchase from their law firms, and (b) list two things that their law firms could do to increase the value of their services for the corporate client. We summarize the responses without attribution in the participant materials.

Completing the questionnaires better prepares participants to talk about their law department’s accomplishments and needs. Responses to the questions relating to the value of legal services are often eye-opening for both in-house and outside counsel. The pre-event questionnaire facilitates more meaningful discussions in small group sessions. Moreover, the questionnaires provide a rich source of information to help corporate counsel benchmark and improve their approach to litigation management.

In addition, we assign law firm and legal supplier faculty members to work with select in-house counsel prior to the kickoff event to develop “Litigation Management Case Studies.” Guided by a Case Study Template, the teams develop a litigation profile of the company highlighting what the law department feels is its best or greatest litigation management practice or achievement.

Through the questionnaires, we also poll law department registrants to find out which Key Elements are of greatest interest to them. Survey results are used to decide what subjects are addressed in dedicated small group discussions. In this way, we align our kickoff events to the specific interests of participating law department leaders.

Kickoff Agenda

The agenda for the one-day program is designed similarly. Focus is on the Key Elements of managing litigation effectively, the challenges litigation managers face, what participant law departments are doing well and where improvement is needed, and on the client’s value criteria.. There are no faculty “talking heads.” Law firm and supplier “Process Leaders” forego any podium time. They simply contribute ideas to the plenary meetings and guide the small breakout group discussions.

Sessions are planned to provide important takeaways that law department leaders can put to work immediately. For example, we gather and distribute litigation management best practices from all participants. We also prepare confidential graphs for in-house counsel that allow them to see immediately how their law departments are doing in terms of the Key Elements in comparison to the average scores of all companies participating in the kickoff session.

In addition, we schedule dedicated time for each participant to discuss his or her department's situation confidentially with a small group of peers from other companies. Plus, we devote time to brainstorming new solutions to common litigation management problems. Key insights and the most creative ideas from these sessions are recorded and shared with all participants. Also, participating law firms and legal suppliers can submit "Litigation Management / Special Contributions" to supplement handout materials.

Following this pattern, kickoff programs held in Chicago on October 29, 2008; Washington, DC, on March 31, 2009; Toronto on June 9, 2009; Phoenix on April 14, 2010; Las Vegas on June 9, 2011; and Albuquerque on September 22, 2011, were a marked success. This is what you will experience first-hand in the upcoming kickoff meeting in your area.

Aligning Value and Costs of Litigation Services / ACC Value Challenge

On an important related note, a number of senior law department leaders attending our prior Managing Litigation kickoff events observed that "Managing Litigation as a Business" complements and facilitates achieving the goals of the nationwide "ACC Value Challenge," today's top advocacy project of the Association of Corporate Counsel (ACC). We agree completely.

As we move forward in this venture, Managing Litigation Project Directors hope to gain more recognition from ACC and leaders of local ACC Chapters nationwide that our "Managing Litigation as a Business" program contributes significantly in efforts to reconnect the value and costs of high-quality litigation services. For background information and current developments regarding ACC's Value Challenge, see the Association's website at: <http://www.acc.com/valuechallenge/index.cfm>.

Growing Resources

Importantly, "Managing Litigation as a Business" kickoff events and related activities are producing an expanding assortment of very valuable, practical and useful litigation management resources, including:

- Key Elements to Managing Litigation as a Business – comprising the collective work product of our Chicago faculty, with detailed definitions, implementation checklists, answers to FAQs and lists of additional resources; and supplemented by suggestions for modification and enhancements by subsequent kickoff event participants;
- Litigation Management Best Practices – gathered from the in-house counsel faculty and law department participant questionnaires, supplemented by kickoff event discussion notes;
- Litigation Management Case Studies – providing detailed reports on what is working particularly well for diverse companies in managing their litigation portfolios;
- Greatest Litigation Management Challenges – identified by Managing Litigation in-house counsel faculty and law department participant questionnaires, supplemented by kickoff event discussion notes; and
- Criteria for Determining the Value of Litigation Services – plus suggestions as to what law firms and legal suppliers can do immediately improve the value of their litigation services to corporate clients; gathered from pre-event questionnaires as well as small group discussions and brainstorming sessions.

Without question, these materials can be used effectively right now by in-house legal teams and their preferred outside counsel and suppliers to evaluate their current proficiency in managing litigation portfolios, targeting areas for improvement, adopting proven practices that are working well for others, and marking their progress. We are marshaling these resources and making them readily accessible to

law department leaders and their preferred outside counsel and legal suppliers at the online “Managing Litigation Reference Model” website described below.

Yet, as noted previously, these collective resources are just a start. Plus, they are in their infancy. As valuable as these materials are; they can and will become significantly better, more valuable and useful as they are supplemented and refined by law departments, law firms and legal suppliers participating in this groundbreaking initiative. This is already happening.

Key Element Refinements – A New “Managing Litigation Reference Model”

Following the Chicago kickoff event, Dick Mosher, Chief Legal Officer for Loctronix and former Chair of ACC’s national Law Department Management Committee, suggested that it would be a good idea to develop recommendations as to how solo in-house counsel and leaders of small law departments can best apply the Key Elements in their practices. Dick pointed out that all of the elements were pertinent, but that small law department leaders, by definition, have fewer resources than their big law department counterparts and they would benefit from guidance on where to start. We agreed with Dick’s suggestion; and Dick is now a member of a Small Law Department Pathfinder Committee vetting the Key Elements from a small law department leader perspective.

After the Washington, DC, kickoff, Al Peters, General Litigation and Contracts Counsel with the Pennsylvania Turnpike Commission, member of ACC’s Board of Directors and former Chair of ACC’s national Small Law Department Committee, observed that the Key Elements would be more useful to him if they were grouped in categories and/or related to different phases of the litigation process. Al suggested an initial grouping, and other contributors were quick to add their ideas for refining how the Key Elements are organized.

We soon recognized that our efforts to make the Managing Litigation Key Elements more useful were leading to the development of a reference model with standards and related resources for managing litigation more efficiently and effectively. We compared what we were doing to what George Socha and Tom Gelbmann, founders of the eDiscovery Reference Model (see, www.edrm.net), had tackled several years ago and the valuable contributions they have made to the legal practice in ongoing efforts to organize and better manage the complex multi-party multi-disciplinary field of electronic discovery.

Of course, in contrast, our undertaking was significantly broader in striving for an organized approach, implementation guidelines and related resources encompassing all aspects of litigation management from A to Z. We concluded that success in our efforts to enhance the utility of the Key Elements and related resources would require a separate vehicle to attract and harness the intellectual contributions of diverse professional leaders and organizations. With this realization, a new “Managing Litigation Reference Model” (MLRM) project was launched in August 2009.

Shortly thereafter, we shared the MLRM idea and outline of Key Elements with members of the former Commercial Litigation Committee of the Council on Litigation Management. The response was both enthusiastic and unexpectedly valuable. Experienced corporate risk management professionals observed that our Model, as developed to that point in time, did not incorporate risk, dispute management or insurance considerations; and that to provide greatest value these perspectives should also be included.

To these ends, we assembled a Managing Litigation / MLRM Advisory Board comprising seasoned in-house counsel, corporate risk / litigation managers and experienced trial lawyers. A sub-group suggested the addition of several new Key Elements to capture risk and dispute management perspectives; and we have started to flesh out these new subjects to include detailed descriptions, implementation guidelines, answers to FAQs and additional resources similar to the foundational work on the original Key Elements.

Of course, we hope to sustain and build enthusiasm for this new related venture, which perfectly complements our Managing Litigation initiative. Officially now, complementing the mission of the Managing Litigation initiative –

The "Managing Litigation Reference Model" (MLRM or Model) offers a universal, practical and flexible guide and extensive resources to help in-house legal teams manage corporate risks, disputes and litigation more efficiently and effectively to achieve better results at lower costs.

New "Managing Litigation" and "Managing Litigation Reference Model" Portals

Although we advanced significantly on our "Managing Litigation as a Business" initiative in its initial years, having in hand the resource materials described above is one thing, and making them readily assessable to "Managing Litigation as a Business" participants in a format that is flexible and scalable is another.

Also, our Managing Litigation kickoff events certainly provide motivation but they are not designed to nor can they address the barriers in-house legal teams need to overcome in implementing improvements to their current litigation management practices – namely, the lack of time, dollars or human resources to put new systems in place and/or to experiment with different ways of doing things better.

However, Managing Litigation Project Directors are committed and currently working on ways to achieve the goals of this initiative to --

- Establish an effective follow-up mechanism and online facility for law department participants to network, compare notes about new approaches to managing litigation, benchmark their respective progress and drive continuous improvement; and
- Provide a means for "Success Teams" to form and collaborate in assisting law departments in setting goals for improvement and implementing new litigation practices and tools to achieve better litigation results and lower costs.

To these ends, it was clear from the outset that we would need a flexible and scalable online portal where we can build a central repository of litigation management best practices and resources and facilitate participating law departments, firms and suppliers talking and working with each other in a variety of ways.

Information that is developed for and at our Managing Litigation kickoff sessions provides the foundation for forming "Success Teams" and assisting each participating law department in moving forward in implementing more effective risk, dispute and litigation management practices and controls. We are just beginning to turn this potential for positive action into reality.

This "Managing Litigation Portal" is now online at www.managinglitigation.com and in the final stages of development. LexisNexis has offered to host a dedicated community for law departments and invited law firms and suppliers participating in this groundbreaking initiative as part of its "Martindale Connected" Web 2.0 networking facility for the legal community. We are exploring the advantages to law department leaders and outside counsel accessing our Managing Litigation Portal through the Martindale site.

We are also currently developing a dedicated "Managing Litigation Reference Model" website at <http://MLRM.net>. Complementing each other, the Managing Litigation and MLRM portals offer –

- A central library to serve as a repository for diverse resources spanning all Key Elements involved in managing litigation in a highly-efficient business-like manner with an integrated continuous improvement process;
- Online forums dedicated to each Key Element and Supporting Management Practices, with discussion leadership shared by seasoned in-house counsel, outside counsel and legal suppliers with expertise in each subject area – including, wiki functionality to encourage collective

authorship and contributions to Key Element definitions, implementation checklists, answers to FAQs and supplemental resources;

- Online virtual worksites, where “Success Team” members can communicate and collaborate in helping Managing Litigation Corporate Participants set and achieve goals for improving how they manage their companies’ risk, disputes and litigation; and
- A mechanism for participating law departments to benchmark their progress with other companies focused on steadily achieving better risk, dispute and litigation management results at lower costs.
- Detailed information about supporting and participating in these groundbreaking initiatives. The current Managing Litigation Project Directors are looking to associate with legal industry professionals who share our long-term vision and commitment to succeeding in these important ventures.

The New “High Value Legal Service” Blog

The experienced litigation counsel who founded the Managing Litigation initiative and MLRM project have committed to sponsoring and contributing regularly to a new “High Value Legal Service” blog located at <http://highvaluelegalservice.com>, which has been established to complement the MLRM project and all of these related initiatives.

As its title reflects, the blog is devoted to the subject of defining and delivering "high value" legal services to corporate clients, highlighting new developments in the field, and giving recognition to law departments, law firms and legal suppliers that contribute meaningfully by adding value and/or reducing costs in providing legal advice and services to their clients.

Thank you for taking the time to review this Managing Litigation Program Orientation. Please contact Peter Jenkins, President, LawPartnering, Inc., if you have questions about the “Managing Litigation as a Business” initiative, the related “Managing Litigation Reference Model” Project, the new “High Value Legal Service” blog, opportunities to contribute as a Project Director and/or upcoming Managing Litigation kickoff events. You can reach Peter at 928-776-4600 or email peter.jenkins@LawPartnering.com.