

DAILY BUSINESS REVIEW

BUSINESS OF LAW More alternatives like mediation considered

CLIENTS SEEK MORE PREDICTABILITY IN OUTCOME OF LITIGATION COSTS

by Alana Roberts

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Stuart Shaw, director of litigation and claims at a global engineering, consulting and construction company, is evaluating the costs and benefits of potential litigation earlier than usual.

“We take a closer look at disputes and possible outcomes at an earlier stage,” the attorney with Overland Park, Kan.-based Black & Veatch said in a phone interview. “We’ll make a determination whether this is truly worth pursuing or something that ought to be settled.”

Shaw spoke at a recent Miami International Arbitration Conference organized by the American Arbitration Association’s International Centre for Dispute Resolution.

As the economy squeezed many companies, they became more cost conscious, and legal bills got closer scrutiny. Clients of all sizes are demanding things like more detailed assessments of the costs for services and alternative billing methods to save money.

Clients also are taking a closer look at the cost-alternative dispute

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MELANIE BELL

resolution such as arbitration and mediation, said Miami litigator Jose Astigarraga, chairman of Miami-based Astigarraga Davis and co-chair of the event.

“On a short-term basis, companies are being much more judicious in their approach to litigation and arbitration expenses,” he said. “The in-house lawyers are saying, ‘Do you really need to do this petition or to research that point?’ They’re being much more analytical up front.”

Litigator Stuart Singer, administrative partner in the Fort Lauderdale office of Boies Schiller & Flexner, said he sees more clients pushing for ways to trim their legal bills and increase the predictability of those bills.

“We’re seeing a lot of our clients concerned about getting value for money they spend on litigation,” he said. “Litigation is very unpredictable. It’s harder for clients to budget.”

The uncertainty combined with the recession means clients are seeking more fixed-fee and success-fee billing arrangements that offer more predictability.

“There will be renewed interest in compensation that is not tied to billable hours and more tied to results,” Singer said. “A lot of our engagements are, in one form or another, performance- and results-driven rather than hours-driven. This is a continuation of a trend that the billable hour is not an ideal mechanism. It rewards effort rather than results.”

The movement to results-oriented billing doesn’t only favor clients. They can benefit experienced lawyers who can handle matters more efficiently than associates.

Law firms can come out ahead “if a client wins a case, and the law firm is efficient and receives a fee that is

more than it would have in terms of hourly billing,” Singer said. “That’s not always going to happen. But over the course of a lot of cases, if you do your job well and pick cases well, there’s the prospect of having a model that is more advantageous than an hourly fee model.”

But litigator Marty Steinberg, managing partner of Hunton & Williams’ Miami office, said alternatives to the billable hour model haven’t caught on.

“There are all kinds of arrangements that have been tried; none of them have replaced the hourly rate,” he said. “I generally think clients that are satisfied with the service at the end of the day are fairly satisfied with the fees.”

Steinberg said he sees more clients pushing for budgets that offer detailed estimates of potential costs of litigation and are basing their decisions on those estimates.

“Clients now are insisting on budgets that identify each of the steps and estimate the cost of each step,” he said.

High-stakes commercial litigation can easily have a built-in discovery expense of \$1 million or more.

Litigator Harvey Gurland, administrative partner of Duane Morris’ Miami office, said detailed budgets aren’t new.

“Smaller companies and individuals are also asking questions of, ‘If we follow a specific approach or strategy, what do we think that might cost, and what tasks will that entail?’” Gurland said.

Steinberg said clients want to stem ancillary costs including expert witnesses and graphic presentations. But he said cost-cutting could potentially hamper the results.

“All of those kinds of things are being cut down,” he said. “That has an impact on what you can present to a judge or jury.”

Given the expense of trials, Richard Milstein, a family law shareholder at Akerman Senterfitt, said, “I have clients when they call me they want to know what can be done short of litigation.”

Astigarraga, who focuses on international disputes, said, “With respect to current pending disputes and arbitrations, I’m seeing more than I’ve ever had.”

Fort Lauderdale mediator and lawyer Cindy Niad-Hannah said her book of business has multiplied in the recession. The owner of 5-year-old ATD Mediation said cases triggered by the downturn such as foreclosures have clogged the courts and pushed litigants to more seriously consider mediation.

“My practice is booming,” she said. “The foreclosures have backed up the courts. They’re agreeing to mediate before the court orders them to. My company is growing at a pace of over 30 percent a year” in revenue.

Shaw said leaders at his company often look to alternatives to help resolve disputes.

In a minitrial, both parties agree on a panel made up of members of management and a neutral adviser to help resolve a dispute. The panel also can advise on the strengths and risks of a case.

“In a time when management is scrutinizing what is being spent in litigation, things like minitrials certainly make more sense,” he said. “If you can get it settled early on, typically you’re going to save money in the long run.”