

For Measurably Better Litigation Results, Ask Your Law Firm Two Questions

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When handling litigation matters for their companies, corporate counsel often rely on the experience and expertise of outside counsel. Even with this support, a general counsel's most common work-related nightmares still include adverse rulings, sanctions and ever-increasing litigation costs. No doubt, in litigation a general counsel's most important consideration when hiring a law firm is experience and expertise. However, there are many law firms with the impressive qualifications necessary to handle almost any type of litigation. So, if qualifications are a given, what should general counsel look for when trying to find a law firm to manage their litigation needs?

As litigation has become more sophisticated, so must the demands of corporate counsel. To achieve a measurably better litigation result, the corporate counsel should ask two critical questions:

1. Do you use documented work processes and procedures to ensure that you and your law firm are efficient and effective, and nothing is done late or forgotten?
2. Do you have a quality control program to ensure that you and your law firm produce the best possible work product and avoid the time and cost of having to correct mistakes?

The lawyer who answers yes will provide a measurably better work product, faster and less

expensively than the lawyer who does not. They will also increase the probability of a favorable result because they will understand the matter better and have more time to focus on strategically important issues rather than spending time coordinating the day-to-day preparation of the work product.

Although these questions are applicable to any legal process, the following discussion will focus on the process of preparing documents for use in litigation (e.g., document preservation, collection, review and production, and the preparation of the trial notebook, including witness and key issue files, deposition transcripts, etc.), since it is far and away the most expensive portion of the litigation process and the single largest legal operating expense for most corporations.

Work Processes Maximize Efficiency

The first question that must be asked involves the use of a documented work process because it ensures that nothing is forgotten, steps are completed in the right order, each step is done by the person most qualified to do it and redundant work is eliminated. It ensures that the preparation of the work product is done efficiently and at the lowest possible cost. A process is also a prerequisite for project management and the creation and application of best practices, guidelines and procedures.

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A work process begins with a checklist. Checklists help people remember things that need to get done. For example, an appointment calendar is a checklist and so is a grocery list. Appointment calendars help us remember our meetings, and grocery lists help us remember what we need to buy at the store. As the number of appointments we have or groceries we need to buy increases, our ability to remember each item decreases, which is why we use checklists.

Engineers use checklists to design structures, pilots use them to fly planes, and doctors use them to perform surgery, because these are all complex processes with too many things for any professional to remember. Without checklists, these professionals might forget important things that need to be done, which would have devastating results. Buildings would collapse, planes would crash, and people would not survive surgery. In general, as work becomes more complex, whether it is an increase in the number of things that need to get done or how they fit together, it is more difficult to remember everything, so checklists become more important. Not surprisingly, the American Bar Association's Litigation Section recommends that all attorneys use checklists. Even though the work is complex, the checklists don't have to be. In fact, they should not be complicated, but rather simple and straightforward.

A checklist should include all of the activities, decisions and work product deliverables (collectively "steps") that need to be done, made or accomplished to fully prepare documents for litigation. Sometimes, a checklist is enough, especially when there are few steps, the number of parties involved is small and the order in which the steps are performed is obvious. This is not true in litigation, however, when there are hundreds of things to do and thousands of decisions that need to be made for every matter. Thus, the checklist needs to be organized into a process.

Turning a checklist into a process requires organizing the steps into logical and chronological order and connecting each step to other steps so

the work that precedes and follows each step is known. This ensures that work is done in the proper sequence, which prevents back-tracking and having to do work over again, and it makes the process more efficient. It also requires assigning each step to a specific person so there is no confusion about who is responsible for each step and nothing is left undone or forgotten. The ability to transform a checklist into a process is a critical component that corporate counsel should consider when selecting a firm to manage a significant litigation matter.

By identifying all of the steps, organizing them chronologically and assigning them to specific people, less time will be spent supervising the day-to-day preparation of the work product since everyone knows what they are supposed to do and when they are supposed to do it. Thus, more time can be spent on strategically important work, which increases the probability of a favorable outcome.

After working with a process over time and carefully considering each step, it usually becomes apparent that some steps are wasteful because they are redundant with other steps or do not add value to the overall work product. Thus, it is possible to reengineer a process to make it more efficient by eliminating steps. For example, the traditional second-level review is wasteful because it is redundant with first-level review and reduces the quality of the overall work product because mistakes and errors compound with each successive step in a process. Thus, when using effective and proven processes, second-level review can be eliminated, and the work product will be better while the time and cost to prepare it will be less.

A process is also important because it is a prerequisite for project management. Project management ensures that a project will be completed in accordance with a schedule and budget. Without a process, there is little chance that project management can occur since there is no enumeration of the steps or other bases for monitoring and measuring the preparation of the work product. Thus, process is becoming increasingly important for law firms as alternative

fee arrangements are becoming more commonplace.

Preparing a project management plan requires identifying the time and costs associated with each step in the process and then adding them up to determine an overall schedule and budget for a project. Time is based on the amount of time that will pass to complete a step, i.e., hours, days or months, and not the amount of effort, i.e., billable-hours, that will be used to complete a step since the purpose of a schedule is to ensure completion of a project by a particular moment in time. Costs can be based on the fee the client pays for services, the costs incurred by the law firm to provide services, or both.

Managing a project requires monitoring, measuring and reporting on the progress of the work to determine how many steps have been completed successfully and how much time and money has been spent completing them. When the project is running late or over budget, corrective action can be taken to adjust the effort to match the schedule and budget or readjust the schedule and budget to match the effort. Thus, monitoring the project management plan more frequently will increase the probability of delivering a project in accordance with a budget and schedule because corrective actions can be taken more frequently.

Process also helps organize the creation and use of best practices, guidelines and procedures, so work can be done consistently and in accordance with expected standards of care. For each step or set of steps (sometimes called a sub-process), a best practice, guideline or procedure is prepared that ensures a measurable standard of care can be met. This helps ensure consistency in the preparation of the work product, which is especially important in the preparation of documents for use in litigation. This is also critical when individual supervision is difficult because there are a large number of lawyers involved in preparing the work product.

Quality Control Programs Ensure Accuracy

The second question corporate counsel must consider is the role of quality control programs. These programs are important because they ensure that the work product is prepared pursuant to specifications, thus avoiding the need to correct work that should have been done properly in the first place, adverse rulings or sanctions, and the additional legal fees associated with each of the foregoing.

Quality is best defined as conformance to specifications. If the work product falls short of specifications it is of poor quality. By the same token, if the work product exceeds specifications it is also of "poor quality." Because it is natural to always want to do the best job possible, and exceeding expectations is often viewed as increasing quality, this may seem counterintuitive. An example of a work product that exceeds specifications and is of poor quality is a privilege log that contains more information than is necessary or desirable to provide to an opposing party. Thus, quality is measured as the variance of the work product from specifications. These specifications provide a baseline for measuring under-performance or over-performance that typically occurs in an effort to exceed expectations.

Specifications include the needs and expectations of the court, client, trial team, opposing party and any other party with an interest in the work product. Some specifications are standard, others are specific to a matter and some are unique to individual interests. For example, applicable rules of civil procedure are standard specifications, particular search terms are specific to a matter, and the identification of documents based on subjective criteria are unique to individual interests. Specifications must include standard, matter-specific and individual needs and expectations.

Determining quality requires measuring and analyzing the work product to determine if it conforms to specifications. Experience has shown that poor quality is usually the result of ambiguities

or omissions in the specifications. These are often the result of information or fact patterns found in the documents that were unknown at the time the specifications were prepared. Thus, a significant reason to measure the quality of the work product is to uncover issues unknown to the trial team. Identifying those previously unknown issues may alter strategy, result in an early dismissal or settlement of the matter, or otherwise increase the probability of a favorable outcome. The role of specifications in quality control also underscores the importance of in-house attorneys and outside counsel working closely together to set clear guidelines and goals.

Measurement and analysis also determines if the specifications (or instructions) are understood, used correctly and applied consistently by the lawyers doing the work. If they are not, it can be the result of lawyers who are fatigued, bored or distracted, or poorly trained and unprepared for the project. Experience has shown that only a small portion of the reviewed documents that do not conform to the specifications are the result of these factors.

The effect of fatigue and boredom can be managed by limiting the amount of time spent each day on any one activity—usually seven and one-half hours. If more time is required, it is usually best to have two or more shifts of lawyers working on a project since experience has shown a significant relationship between overly long days and poor quality. The effect of distractions can be managed by eliminating telephones, e-mail, music, unfettered access to the Internet, and all other forms of interruptions and multi-tasking. Experience and research have shown a significant relationship between interruptions, multi-tasking and poor quality. The effect of poor training and preparation can be managed by law firms and their clients by providing detailed information about the relevant body of law, the parties involved, pleadings, specifications and technology that will be used to prepare the work product to the lawyers who will do the work and testing them on the information before they begin their work. Experience and research have also shown a significant relationship

between testing and the preparation of a high quality work product.

It is also important to measure and analyze work product frequently so that feedback about poor quality work can be provided to the lawyers who are doing the work before problems become systemic. For example, if a lawyer misapplies the specifications at the beginning of a project, it is likely that he or she will continue to misapply them throughout the project unless that person receives feedback about how to apply them correctly. Thus, with frequent measurement, analysis and feedback, problems do not become systemic, expensive and time consuming to correct.

Measurements can be based on non-probability and probability samples. Non-probability samples are used because they are fast, inexpensive, and useful in identifying and correcting problems before they become systemic. However, nothing about the quality of the overall work product can be inferred from non-probability samples because they are not based on the science of statistics, unlike probability samples. Probability samples are based on the science of statistics. They can and should be used to make inferences about the quality of the overall work product when managing large-scale litigation.

Convenience and judgmental samples are two types of non-probability samples that are useful in measuring quality and should be considered by corporate counsel when managing litigation matters. A convenience sample is chosen based on ease of access to information. Looking over the shoulder of a lawyer while they are working or randomly checking a few examples of the overall work product are examples of convenience samples. Judgmental samples are chosen based on opinion. Focusing on documents from a particular witness or about a particular topic where it is believed more errors may occur are examples of judgmental samples. Experience has shown that measuring, analyzing and providing feedback daily based on convenience and judgmental samples increases the quality of the overall work product.

Probability sampling is based on a statistically valid and randomly chosen sample of the work product from which a statistical inference can be made about the quality of the overall work product. Probability sampling is a scientifically-based approach to measuring quality. Based on a probability sample, it is possible to know the specific accuracy of the work product (e.g., the work product is 99.93 percent accurate with a margin of error of 1 percent). Even though determining this type of accuracy would entail measuring 9,573 documents if a collection included three million documents, it is a far more accurate, faster and less expensive method of measuring accuracy than the more traditional second-level review from which no statistical inference about the quality of the overall work product can be made.

When there are so many excellent lawyers who have the experience and expertise necessary to represent a client on almost any type of litigation, how does a corporate counsel decide? They must choose those lawyers who use a documented work process and have a quality control program to ensure they are efficient and effective, and produce the best possible work product. Processes like the ones described in this article are critical to the effective management of litigation matters and should be considered by corporate counsel because lawyers that use these tools will outperform those who do not.

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