By Jeffrey B. Valle

THE CONTINGENT-FEE STRATEGY

For many executives, particularly those with a leadership role here in California, it is crucial to have a comprehensive and effective legal strategy. Structuring that arrangement, and also satisfying the expectations of shareholders, is an undeniable challenge. Put another way: How can a CEO or general counsel implement a legal strategy that is both economical and highly effective? In the right case, the contingent-fee approach is the best way to achieve these otherwise divergent goals. Under contingent-fee arrangements, the attorney receives a percentage of any recovery obtained in the case. In this way, the client pays a fee only if the case is successful. There's also a hybrid approach, referred to as a blended contingent fee, where the attorney is paid a substantially reduced hourly rate and also a reduced percentage of any recovery. Both of these tactics, which are popular tools in securities class actions, consumer class actions and personal injury cases, have only recently become a viable option for complex business cases. Supply, demand and tradition all play a role in this phenomenon.

Breaking Down Comfort Levels

Traditionally, highly accomplished litigators have gravitated to the elite corporate law firms. These firms are usually conservative and rarely take cases on a contingent fee basis. As a result, a "bright line" has developed between hourly attorneys and firms, and the plaintiffs' contingency bar, the infamous trial lawyers so many people love to hate. The challenge for a CEO or general counsel does not change, however. He or she must select the best attorney without compromising on ability or breaking the bank.

Businesses — including many companies in California — have historically been most comfortable hiring large corporate law firms, a cost shareholders and board members increasingly scrutinize. This attitude is part of a false (and expensive) belief that the best lawyers and most prestigious law firms work on an hourly basis, not a contingent fee model. Other companies may simply have a hard time accepting this new framework because, in the past, contingency lawyers almost exclusively represented plaintiffs who were suing large corporations.

Traditions die hard, and it's long been customary for companies to hire business litigators on an hourly, not a contingent fee, basis. As someone who was a partner at a large corporate law firm, I fully recognize this mindset.

Contingent Fee Benefits

Hourly fee arrangements have created a huge market failure because a prudent company may forego bringing a potentially meritorious claim because of the expense of bringing the lawsuit on an hourly basis. However, it's a problem that can be fixed.

For example, a company may identify a potential lawsuit that, if successful, could result in a recovery of between $2 million and $10 million. But the case is complex and the outcome uncertain, and it will require a lot of time and effort. The company's CEO and corporate counsel must confront a difficult question: Should the company invest $500,000 to $1 million or more in legal fees to pursue such a case? The company could conceivably spend a small fortune litigating this case, and then lose everything on summary judgment or at trial (or recover less than the costs of prosecuting the case). The risk often persuades companies not to pursue such cases.

The contingent-fee approach solves this problem. It provides a way for the company's general counsel and management team to maximize potential recovery and minimize risk. At the same time, management should ask, "Would I hire this lawyer or firm if I had to pay by the hour?" Otherwise, the outcome will most assuredly be disappointing, time consuming, expensive and ultimately unsuccessful. More to the point, a company should prepare itself for a critical review of its case by counsel. A good lawyer, just like a highly qualified CEO, will quickly know whether a case justifies his or her commitment, both personally and professionally.

Taking this approach necessitates a high degree of candor at the outset. However, at a time when shareholders, board members and individual journalists aggressively examine a variety of corporate decisions, the contingent fee model provides an alternative that should be in every company's arsenal. Properly applied, this option can be the perfect solution in the right case.

Hiring legal council on an hourly basis may not always be the best option, yet hiring on a contingent-fee basis is often overlooked

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