

Opinion

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Litigation prenups: Big savings beckon

The quickest way to increase profit in a difficult economy is to reduce the cost of civil litigation. Every dollar saved from litigation is an extra dollar of profit. So why aren't American corporations doing everything in their power to embrace innovation in civil case cost control and improve the bottom line? The largest companies in the nation spend hundreds of millions of dollars each year on civil litigation costs, not including money paid for settlements or verdicts. Litigation costs too often are regarded as a necessary and burdensome price of doing business. It does not need to be so.

Innovations in civil litigation management are unread pages of the corporate competitive playbook that can save up to 40 percent off the cost of business-to-business disputes.

Arbitration became the darling of corporate America in the 1980s and 1990s. Where the court system was seen as a poorly managed black hole of ineffectiveness, arbitration was seen as prompt, affordable, certain, and fair. That perception of arbitration has darkened in the past decade. As the number of civil trials dropped, more and more trial lawyers gravitated to arbitration as the forum of choice. With them came all the legal culture and bad habits of civil litigation: delay, discovery spats, disproportionate costs, and lots and lots of paper.

Maybe it's time to improve civil litigation rather than ignore it. The Federal Rules of Civil Procedure (and most states' rules, which follow the federal rules) include a number of rarely-used provisions that would significantly reduce the costs and delays of civil litigation.

Discovery and pretrial motion practice are among the most expensive aspects of civil litigation. Rule 29 provides that parties can agree to any pre-trial discovery methods that meet their needs and manage electronic discovery issues. For example, Rule 53 allows parties to select a person — a "Special Master" — who can oversee the customized management of the case and deal quickly with discovery or procedural disputes to avoid wasting time and money.

Rules 16, 26, 36, and 37 allow the costs of discovery and experts, including the costs of attorneys fees, to be shifted from one party to another in civil litigation.

Once joined in battle in civil disputes, it is difficult for parties to agree to customized procedures or cost-shifting. But nothing would prevent companies from including these Economical Litigation Alternative agreements, or "ELA," rather than arbitration clauses in their contracts before litigation.

ELA agreements could draw upon the best practices of civil case management to reduce costs and delays of litigation.

The conventional rules apply a "one-size-fits-all" approach to litigation, so that all cases whether large or small are subject to the same scope of civil discovery and litigation. ELA agreements would customize pretrial procedures to fit the amount in controversy.

Without giving up their rights of appeal, corporations can include ELA agreements in their contracts requiring early mediation efforts and direct negotiation by corporate executives before money is burned on litigation, limiting the number and length of depositions and other discovery, appointing a Special Master to oversee discovery issues and promptly resolve all disagreements as they arise, including imposing page and staffing limits on motions and pretrial practices, and specifying forums and venues to business litigation sessions of court systems that have a commitment

to prompt and affordable case resolution.

Companies can draft and negotiate ELA agreements directly, but the better practice would be for industry organizations to prepare model agreements for use or incorporation in business contracts. Harvard Business School's Michael Porter has observed that "innovation is the central issue in economic prosperity." The innovation of Economical Litigation Alternative contracts is a certain path to greater profit.

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