**Rethinking Legal Fees In Lean Times. Practical Tips for General Counsel Managing Litigation In An Economic Recession.**

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# Rethinking Legal Fees In Lean Times

## Practical Tips for General Counsel Managing Litigation In An Economic Recession.

By
**John S. ["Jack"] Pierce**
**Barger & Wolen, LLP**
650 California Street, 9th floor
San Francisco, Ca. 94108
jpierce@bargerwolen.com
**(415) 743-3702**

*Introduction:*

Steep declines in corporate revenue have shareholders and CFO's knocking at the doors of their company's general counsel demanding drastic reductions in legal budgets. Despite the decline in revenue, litigation has not seen a similar recession. Fees and costs associated with major and systemic litigation continue to grow, and so do the pressures on in-house counsel to manage and contain these expenses. Faced with mandatory 35% reductions in legal budgets, general counsel continue to search for ways to accomplish those reductions while still meeting the challenges of successfully handling big stakes litigation.

Ensuring that legal fees and costs bear some reasonable relation to the inherent risks and litigation objectives of the company is among the more difficult tasks which now confront general counsel. In the past, when cost may not have been a major factor, many clients continued to retain "blue chip" law firms and allow their retained counsel to employ "scorched earth" tactics and leave no stone unturned.

Today, legal fee expense and associated litigation costs are a paramount issue and containment of those litigation expenses requires a strategic, focused and disciplined effort. Because of this, many of the mega law firms, whose hourly rates and litigation staffing practices have not been cost-efficient, are seeing new litigation assignments go to medium-sized law firms whose hourly rates and trial-focused litigation practices are better tailored to the economic demands in the current financial pinch.

A recent article in the National Law Journal corroborates this. It indicates that many general counsel have reported that their legal budgets are being constrained and they have to be more judicious about which law firms they chose. Partners at big law firms, eager to hang on to cash-strapped clients and attract more clients in this belt-tightening environment, are jumping to smaller firms where they can lower their billing rates and encounter fewer conflicts of

interest. [See *Big-Firm Partners Finding More Work At Smaller Firms*, Lynne Marik, National Law Journal, March 18, 2009].

Medium sized law firms, with seasoned "trial" lawyers are seeing a revival as they realize a cost advantage over larger rivals struggling in the downturn to pay the higher expenses of a big law firm. So too, litigation tactics in these cases are changing. "Scorched earth" discovery and tactics often employed by the mega firms, are being replaced by focused tactical surgical strikes of the mid-size firms whose seasoned trial counsel know what evidence will be needed and admissible in the trial of the case. This has resulted in more cost-effective results for corporate clients in litigation.

Focused strategies for cost containment may also have its inherent risks. By focusing on certain perceived high-yield litigation activities, other potentially productive areas of litigation can be ignored or inadequately developed. Tough choices have tough consequences in difficult times. This is a reality that must be acknowledged and embraced by both the client and its retained counsel. Success in managing cost-effective litigation requires good communication, collaboration and discipline between the client and the litigation team.

Developing that communication, collaboration and discipline to manage cost effective litigation requires that the client and the trial team keep their eye on the ball and not lose sight of their established litigation objectives.

A few tips may be useful to illustrate how corporate counsel and the trial team can stay focused and cost-effectively manage ongoing litigation:

· *Define Your Objectives Early And Often.*

General counsel and the company must clearly define their litigation objectives and communicate them to trial counsel at the outset of the case. Input and independent evaluation from trial counsel is essential to help the client to re-shape those objectives at the outset of the case. It is important that the objectives are detailed and that there is a common understanding at the outset.

Developments during the litigation frequently change the course of the case and require a fresh re-evaluation of the client's objectives. Again, these should be re-evaluated with trial counsel and a common understanding of those re-defined objectives must be developed and communicated if there is a change in the course of the case.

· *Select Your Legal Team Starting With The Lead Trial Attorney.*

Select "trial lawyers," not "litigators," to be your lead counsel. Surprisingly many litigators from the larger law firms have little or no actual trial experience. They may have extensive experience in motion practice, summary judgments, depositions and complex discovery, but haven't tried a sufficient number of cases to develop the court room "street smarts" to know what evidence ultimately will be most persuasive to the triers of fact. The goal is to accomplish your litigation objectives as directly and cost-effectively as possible. Seasoned

trial lawyers who have traveled this road often tend to waste little time on irrelevant litigation activities.

In many firms, the trial lawyer is not selected until it is determined that the case will ultimately go to trial. This practice is very inefficient and costly and leads to duplication of effort and fees. Mapping out strategy with a seasoned trial lawyer at the outset of the case will eliminate unnecessary and wasteful discovery and motion practice.

- *Build a Solid Trusting Relationship With Your Trial Counsel On The Basis Of Candid, Direct And Honest Communications.*

At its core, a good working relationship between counsel and client is built on honest, direct, and candid communications that are free from distracting baggage such as overbearing egos, unexpressed expectations and hidden agendas. Check all egos at the door. Be direct and candid with your lawyers on all issues, including the economics of litigation, and expect them to be candid with you.

- *Participate In Staffing The Trial Team For The Case*.

Make certain that your retained law firm has a streamlined legal team selected to meet the needs of your case, but without overstaffing. Participate in those staffing decisions with your trial counsel. Pay attention to the qualifications of the mid-level and junior associates on the litigation team. Insist that you be consulted and have the opportunity to express approval before any new members are added to the legal team.

Make sure that tasks are being delegated to the appropriate levels within the litigation team. For example, associates should be performing basic legal research, not partners. In difficult economic times, larger firms frequently push work that should be performed by mid-level or junior associates up to senior partners who bill this work at much higher hourly rates. While it may serve to provide work for otherwise idle partners, it is directly adverse to the clients' economic interests.

- *Use Clear, Concise And Easily Applied Billing And Litigation Management Guidelines.*

Put into place clear, concise and direct billing guidelines that govern your lawyers' billing practices. Insist that your trial counsel and every member of his or her team read them and sign an acknowledgment that they will abide by them. Discuss openly and directly billing inflationary practices that you want to eliminate at the outset of the case. Block billing, vague billing descriptions and excessive internal conferencing are practices which are recognized to inflate legal fees. [See California State Bar Arbitration Advisory Opinion (03-01) which concluded that block billing "*may increase time by 10% to 30%.*"] Many old billing habits are hard to break. Don't let your lawyers pay mere lip service to efforts to eliminate these practices. Discuss these up front with your counsel, conduct an early and detailed review of their

invoices and get their genuine participation in eliminating these practices and training their associates on proper billing practices.

- *Retain And Involve Consulting Experts Early In The Case.*

Early consultation with key experts will greatly assist a focused and strategic litigation strategy. An expert's opinion may change the course of the litigation dramatically. Early consultation with key experts will assist trial lawyers in prioritizing key litigation activities which may yield more productive results. Too often key experts are not consulted until the end of the case after much unnecessary discovery and motion practice has resulted in an unnecessary expenditure of legal fees. Use experts early to help you focus on essential facts which need to be developed at the outset.

- *Develop A Clear, Concise And Jury-Friendly Theory Of The Case In the Early Stages.*

Seasoned trial lawyers know that this is an approach which will require the trial team to stay focused and on point throughout the litigation. Counsel should ensure that all litigation activities of his or her team are focused and further develop facts to support this theory. As circumstances change, the trial theory may need to be modified and some planned litigation activities which no longer fit into the trial plan should be abandoned.

- *Insist On Professional Communications With Opposing Counsel*.

Confident trial counsel don't engage in wasteful "personality" contests with opposing counsel which can provoke excessive, costly, and vindictive litigation tactics. Stop your counsel from demonizing your opponent or opposing counsel. While the bravado may sound good, it results too often in the unnecessary expenditure of energy, time and attorney fees. Insist upon civility and a respectful attitude by your counsel toward opposing counsel. You should also discourage acrimonious letter writing campaigns.

Developing a professional and courteous relationship with opposing counsel will pay dividends in the long run. By building these relationships, opposing counsel can cooperate in ways to streamline discovery and document exchange that will avoid costly and wasteful discovery "wars." Acrimony between opposing lawyers not only increases unnecessary motion practice, it also infuriates judges and has an adverse effect on opportunities for settlement at the early stages. In sum, it will increase the costs of your case.

- *Identify The Risks Inherent In The Trial Strategy Adopted And Thoroughly Vet It With Your Trial Counsel.*

If a limited trial theory has been adopted, there may be risks associated with reliance on that limited theory. Trial counsel must clearly define and evaluate those risks with the client before proceeding. The client and counsel must be in full agreement as to the acknowledged risks and the cost-effectiveness of pursuing a more narrow trial strategy. Again, this is an area where client-counsel collaboration is key to cost-efficiency and success.

- *Consider Alternative Fee Arrangements With Your Counsel For Repetitive or Routine Cases.*

While legal services for the more complex cases tend to be billed on an hourly basis, some companies continue to explore new billing protocols to make overall costs of litigation more predictable. For certain repetitive, routine cases, "fixed fee" or "flat rate" economic arrangements may work to the advantage of the client and the law firm. In more complex, non-routine matters, some form of success premium may be appropriate to incentivize law firms to dispose or settle the cases early. In today's economy, law firms are becoming more flexible in their consideration of alternative forms of compensation.

- *Obtain Cost Estimates For Proposed Substantive Motions.*

Motion practice can be expensive. Have counsel provide you with a cost estimate for every motion she or he suggests be brought, an assessment of the overall "value" to be obtained from that motion, and the percentage chance of success. You will he surprised how many times this requirement will keep the trial team on course and will dissuade counsel from taking expensive and unproductive legal detours.

- *Discourage Efforts To Secure Small Procedural Advantages Or Perceived Psychological Edges Through Motion Practice.*

Be wary when trial counsel suggests that motions be filed to obtain "tactical" or "procedural" advantages. The advantages may be outweighed by the costs. Select your procedural tools carefully. More often than not, the proposed motions may have more to do with ego of the lawyers in battle than with any tangible benefit to the client or the case.

- *Use Persons Most Knowledgeable Depositions To Identify Critical Systems And Witnesses.*

Lots oftime and energycontinue to be put into preparing unnecessary and duplicative written discovery responses and related motion practice. If you need information about potential witnesses, files or electronic systems, it is usually faster and less expensive to pursue this information through depositions of "Persons Most Knowledgeable" provisions of Fed. R. Civ. P. 30(b)(6), or similar state statutes. Interrogatory responses are often so full of objections and qualifications as to be without much substantive value. Witnesses' answers tend to be more direct in their response to the same questions asked in interrogatories.

- *Ask For The Underlying Documents As Early And Specifically As Possible.*

Documents tend to define cases. Before starting any depositions, make sure you have all the key documents central to the case. Documents will also define your key witness list. Avoid asking for broad, vague, difficult to pin down categories of documents or information. Strategic and focused requests for categories of documents will be more cost-effective and will produce documents to which you are entitled and which you need for trial.

· *Identify Key Witnesses And Develop Written Goals And Strategies For Their Depositions.*

Don't allow your counsel to depose everyone. This is not cost-effective. Key witnesses should be identified and their anticipated role in the trial of the case defined. Once identified, goals and strategies should be developed by trial counsel for each key witness. Be selective about who should be deposed and who should conduct the examination. Take key depositions with partners. Where appropriate, it is more cost-effective to have associates defend depositions of your own witnesses.

· *Engaging In Settlement Discussions Is Not A Sign Of Weakness.*

Don't let anyone try to convince that settlement discussions are a sign of weakness. The overwhelming majority of cases settle before trial. Revisiting the subject of settlement frequently during logical intervals in a case just makes good business sense. You can always walk away from settlement discussions if they break down.

Two-track your litigation and settlement discussions. Continue with your trial and litigation strategy even while settlement discussions are ongoing. Settlement discussion can be a distraction and may interfere with the orderly development of your trial themes and facts to support them. Stick with your trial strategy and don't let settlement discussions interfere with the progress of your case preparation. Also, make sure you protect all settlement discussions as inadmissible and confidential so they do not become the source of comment later at trial.

· *Don't Over-Prepare for Mediation. It Is Not a Trial.*

Some lawyers prepare for mediations as if they were preparing for trial. They marshal the evidence, write argumentative summaries, and prepare and practice opening and closing arguments as if the mediator will be a juror who will decide the case. While mediation sometimes serves as a surrogate to unsophisticated plaintiffs as their "day in Court," more sophisticated parties should treat it merely as mediation. Over-preparing for mediation can be a waste of valuable time and expense and a distraction from the important task of determining whether there is a business basis upon which the parties can resolve their differences.

· *Limit Excessive Internal Team Meetings And Conferencing.*

Internal conferencing can be an important tool for lawyers and, when used properly, may result in significant value to the client. For example, conferencing may enable a junior level associate to work efficiently under the direction and supervision of a senior attorney who can identify the legal research needed on a case of narrow the scope of further investigation but not cost-effectively perform those tasks at a higher rate.

Conferencing, however, can also be an activity that is abused. Courts, in reviewing fee cases have stated that "*Attorneys should work independently, without incessant 'conferring' that so often forms a major part of the [bill] in all but the tiniest cases.*"

The greater the number of lawyers and paralegals on the "staff" of the case, the more expensive your "conferencing" fees will be. Keep your lawyer's trial team small and limited. Encourage transmission of case information to those on the trial team who "need to know" by e-mail. By keeping your trial team trim, you will keep your potential conferencing costs limited.

*Conclusion:*

Lean times require proactive vigilance by general counsel in the management of active litigation. Choose your law firms and your lawyers well. Define your objectives early. Place an emphasis on putting your litigation objectives in the hands of experienced trial lawyers who may be more likely to find a more direct cost-effective approach to getting those objectives accomplished.

**Editor's Note**: *Jack Pierce is a senior trial lawyer and the former managing partner of the San Francisco Office of Barger & Wolen LLP, a mid-sized national law firm. He has been trying cases since 1977 and is a nationally recognized expert on legal fee cost containment, litigation management and the evaluation of legal fees and costs.*