Techniques to Control Legal Fees

In This Litigation Happy Era a Wall and Ceiling Contractor Needs Legal Advice, But It’s a Budget Item That Still Needs to be Controlled.

By Joseph A. McManus, Jr.

There is an assumption that legal services are essential to the construction business. The complexity of business relations and regulations alone justifies the assumption. Consulting an attorney for perspective on important business decisions is sound business. Defending a major lawsuit without a lawyer is impossible. But do attorneys have a business role over and above their traditional litigation role?

Abraham Lincoln thought so—"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be enough."

Lawyers can litigate, but increasingly they are advising clients how to resolve disputes peacefully. In either role, attorneys will continue to play an important part in your business.
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LEGAL FEES
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Recognizing this role, this article seeks to transmit an understanding of how to spend your legal budget most efficiently and economically.

Going in-house. The growth of corporate law departments in the last decade has been staggering. The directorate of corporate counsel now lists more than 24,000 in-house lawyers in over 5,000 companies. The principal impetus to the development of the in-house effort has been costs of legal services. When used effectively, in-house counsel can help prevent problems from becoming legal problems and keep down the costs of legal services when outside services are required.

The first alternative you must consider is whether to develop an in-house capacity and, having done so, when to rely upon that capacity to solve your legal problems. The answer is dictated by simple finances. If your audit leads you to conclude you are spending too much on outside counsel fees and can afford a legal department, then you should organize one. As a rough rule of thumb, an attorney with the proper specialty plus staff and equipment will cost at least $200,000 (general counsel’s salaries range from $50,000 to $500,000). With a realistic goal that your in-house counsel will reduce your outside fees by half, you should not hire in-house counsel unless your fees exceed $400,000 per year. Also remember certain matters cannot or should not be done in-house, so hiring in-house will not end outside fees. You always need outside counsel.

Inside counsel strengths include an intimate knowledge of the company and proximity to management which allows early access to legal advice thereby preventing disputes.

However, staff constraints, specialized areas of law and potential objectivity problems caused by the employer/employee relationship dictate that certain matters go outside. The company which successfully meshes the inside and outside resources is the company which is getting the best and most economical legal advice.

In order for an in-house department to be effective in reducing legal fees, there must be successful communication with outside counsel and a sensitivity to everyone’s proper role. The American Bar Association’s report on billing practices survey has concluded:

The clearest message from the respondents both inside and outside counsel, was that good communication between the two groups enhances the efficiency of the relationship and helps create the proper atmosphere for controlling costs. Finally, it is advisable to make the legal department a profit center like the rest of your departments. It is easier to integrate the departments within the company and in return it gives its in-
"By strategic planning and using the tools available, you can reduce your fees and improve the quality of the work.”

...an opportunity to compete with other business executives. **Going outside.** Even with an experienced and well-staffed legal department, outside counsel is advised for many circumstances. Circumstances suggested from a recent article¹ include:

- Where litigation has commenced or is contemplated.
- Where, on an occasional basis there is a need for specialized expertise in a field which is not possessed by anyone in-house.
- Where foreign law is involved.
- Where counsel desires to have an opinion of outside counsel as a check on the advice being given to the client. This is particularly appropriate where counsel feels personally involved in a management plan, program or as to a decision where he or she is called upon to give advice.
- Where an operating component not employing staff counsel is removed from headquarters and distant from the regional legal office and only occasionally requires legal services such as the preparation of a lease or contract.
- Where demand for legal services is beyond the capacity of the in-house group to provide on a timely basis.

You should go “outside” to your regular outside counsel frequently. That person should be the one to provide continuity, perspective, and loyalty to you alone. Once you have found that lawyer you trust never let him or her go, regardless of the “firm” in which he or she “lives.”

Where a choice of firms is concerned, wise consuming of Legal service also suggests the possibility of using more than one firm. No general practice firm (regardless of size) can effectively handle all your legal needs. No specialty firm would be called upon to handle all your ‘legal needs. Smaller firms are generally more responsive than large firms in part because of the flexibility they have. They also tend to spend less per dollar on overhead and thus are usually more reasonable in their fees.

Under any circumstances, make sure you have hired a firm which is familiar with the business of construction. Knowledge of your business, your problems and concerns is absolutely necessary if a lawyer is going to effectively fill his counseling role.

The growth of in-house departments, and loss of fees, has forced some introspection by outside attorneys on how to handle a case for their clients more cost-effectively. Surveyed outside counselors concur that they themselves should:

- Submit litigation budgets to the client.
- Focus the case earlier.
- Limit discovery and avoid excessive motion practice.
- Maintain continuity of personnel and control associates’ time.
- Avoid the “gravy train” mindset and make a concerted effort to be efficient and hold down expenses.
- Present cost benefit alternatives to the client and be open to innovative methods of settlement.

¹Source: AIBEL, “Successful teaming . . . op.cit.
You should have every reasonable expectation that you can raise these issues with outside counsel and that they will be responsive.

Further, your concerns about the retention of outside counsel should be outlined in a formal written policy which should be communicated clearly to outside counsel. The major thrust of the policy should concern billings and fees (discussed below) and can address areas which can lead to excessive fees, including filing recovery requests and motions and effective use of inside counsel to handle routine items.

Tools to reduce fees. Having approached legal fees from a strategic perspective it is now appropriate to consider some tools which will control the costs of outside services. The major tools are:

- **The Billing Policy**
- **Budgeting**
- **A "Scoreboard"**
- **Contingencies**

While the first two are highly recommended by lawyers, they are also frequently resisted. Over two-thirds of surveyed outside counsel had resisted some aspect of a client’s billing policy during the past year. Ninety-three percent of corporate lawyers and 81 percent of outside counsel believe budgets are worthwhile in certain instances. However, most outside counsel who had prepared a budget during the year did so for 10 percent or fewer of the matters they handled for the same period. An attorney who refuses to follow your policy or submit a budget when requested to do so should be discharged.

The billing policy. There should be a full discussion with the outside attorney about billing procedures at the inception of legal services. The billing policy provides the framework for those discussions. The policy should cover:

- **Staffing.** You want to meet the attorney face-to-face who will be working on the case. You want to insure that lawyers are not being used when non-lawyers can be used. You want the attorney to see that your in-house services will be made available to reduce fees.

- **Hourly rates.** Attorneys have standard billing rates and they should send you a statement of theirs. Be thankful that an experienced specialist is giving you a comparatively lower hourly rate to attract your business. If a firm wants to charge a premium for a favorable result done, how will they handle a job badly done?

- **Disbursements.** If you are going to pay for overtime, word processing or computerized legal research, you should consent to it before it is incurred.

Approval of project. A lawyer has to be thorough; otherwise he is useless (or more still, dangerous), but some lawyers tend to overwork a case. They should not undertake major research or major discovery efforts on projects
“Moreover, finding the right lawyer, inside or out, is a proven way to keep the cost of these services down.”

without first explaining why it is called for and obtaining your approval.

Billing. Monthly billing is favored by both inside and outside counsel. The bills should contain a detailed description of the work done, on the date done and by whom. Since in our personal lives we always question bills when they are not clear or seem too high, you should have the necessary experience to question legal bills.

Budgeting. If a firm’s partner tells you we do not provide budgets, it is “improper/unprofessional/unreliable,” quit using the firm. He is removed from today’s reality. Each of us budgets our financial life. Lawyers should not be immune from this phenomena and an initial budget allows you to identify to the lawyer what your goals are and how you expect him to achieve them. Budgets seek to predict future events; one must know and communicate to outside counsel what future event is the desired event.

Litigation Budget. Budgeting for litigation comes easier to outside firms than general case budgeting. Perhaps it is because the litigators are goal-oriented or because the litigation can be made so obviously expensive. You should identify your goal, and, mindful that most cases settle rather than go to trial, consider how best to reach an early settlement of the case. Your budget should consider use of in-house support, the relative value of extensive depositions and interrogatories, and staffing the litigation team. Since disbursement (deposition costs, witness fees, experts, in-house costs) are a significant factor in litigation, they should also be a part of the detailed budget.

General Case Management Budgets are also helpful in those issues not in litigation, for example, research.

Scoreboard. Unlike most legal work, litigation has some finality. You are held to pay or receive dollars and cents. While it must be put into the framework of your goals, an objective tool to measure the quality of legal services in litigation is the scoreboard. As a tool to control and assess both inside and outside counsel it measures the outcome of the litigation in dollars. Appendix I and II are examples of the scoreboard.

You should keep score to measure the rate of return on legal dollars spent for the average and individual case, compare rates of return for individual law firms, and determine how each firm handles cases in various ranges.

However, never forget more subjective factors. Just like a batting average doesn’t tell you everything about a baseball player, the scoreboard should not be your only measure of a lawyer’s value. No matter what the result, if subjectively you are pleased with a lawyer’s performance and feel that your fee was fair, then keep using that lawyer. Loyalty and competence are not subject to precise objective measurement; often you will have to let your instincts tell you whether your lawyer is the right one for your needs.

Contingencies. In many instances because of the dollar value and odds of recovery, a case does not justify hourly fees. After being thoroughly briefed as to the legal steps necessary to obtain a desired result, you should initiate the question of handling or converting the appropriate case to a contingency basis. Also consider sliding contingencies which will vary depending upon when a case is resolved and reduced hourly/contingency arrangements which provide you more flexibility in controlling your lawyer.

Conclusion. The legal industry is presently in a state of change caused by the high cost of legal services. The growth of inside law departments has taken business away from outside law firms, and clients are looking hard at to whom they are giving their business and why they are spending their money.
### APPENDIX I

**LAWSUITS/ARBITRATIONS INITIATED BY CONSTRUCTION CONTRACTORS, INC. AND RESOLVED**  
January 1980-December 1983

<table>
<thead>
<tr>
<th>Project</th>
<th>CC's Claim</th>
<th>CC's Recovery</th>
<th>Legal Fees</th>
<th>Attorney</th>
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</thead>
<tbody>
<tr>
<td>Municipal Mall</td>
<td>$700,000 (A)</td>
<td>$450,000</td>
<td>$50,000</td>
<td>“A” Law Firm</td>
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<tr>
<td>Metro Station</td>
<td>120,000</td>
<td>75,000 (B)</td>
<td>10,000</td>
<td>“B” Law Firm</td>
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<tr>
<td>Omaha Airport</td>
<td>77,000</td>
<td>77,000</td>
<td>7,000</td>
<td>“C” Law Firm</td>
</tr>
<tr>
<td>Hancock Hotel</td>
<td>11,000</td>
<td>5,000 (C)</td>
<td>(D)</td>
<td>General Counsel</td>
</tr>
<tr>
<td>Lincoln Library</td>
<td>8,000</td>
<td>8,000</td>
<td>0-</td>
<td>General Counsel</td>
</tr>
<tr>
<td><strong>SUMMARY</strong></td>
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<td><strong>615,000</strong></td>
<td><strong>$67,000</strong></td>
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TRUE RECOVERY: $548,000 (60%)

*(A) Includes contract balance and retainage.*

*(B) Amount being paid over 6 month period.*

**EXCLUDED:** Support Fees

### APPENDIX II

**LAWSUITS/ARBITRATIONS INITIATED AGAINST CONSTRUCTION CONTRACTORS, INC. AND RESOLVED**  
January 1980-December 1983

<table>
<thead>
<tr>
<th>Project</th>
<th>Claimed</th>
<th>Paid Out</th>
<th>Legal Fees</th>
<th>Attorney</th>
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<tbody>
<tr>
<td>City Mall</td>
<td>$900,000</td>
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<tr>
<td>Subway Station</td>
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<td>15,000 (B)</td>
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<td>Little Rock Airport</td>
<td>15,000</td>
<td>-</td>
<td>15,000</td>
<td>General Counsel</td>
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<tr>
<td>Omaha Airport</td>
<td>4,000</td>
<td>800</td>
<td>1,000</td>
<td>“C” Law Firm</td>
</tr>
<tr>
<td>Greasy Spoon Diner</td>
<td>500</td>
<td>300</td>
<td>0-</td>
<td>General Counsel</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$989,500</strong></td>
<td><strong>$216,100</strong></td>
<td><strong>$51,000</strong></td>
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TOTAL PAYOUT: $265,100 (27%)

By strategic planning and using the tools available, you can reduce your fees and improve the quality of the work. Moreover, finding the right lawyer, inside or out, is a proven way to keep the costs of these services down. When selecting your lawyer, look to someone competent and loyal and dedicated to promoting your business and avoiding disputes, so that you can tend to the business at hand.

Competent and loyal lawyers are an asset; find them, keep them, and your business will be better and more profitable!.

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