Litigation

Approaching Fee Arbitration

Approaching Fee Arbitration

John P. Dacey and Kenneth Moscaret suggest ways to increase a law firm's chances of winning.

FOCUS PAGE 7

By John P. Dacey and Kenneth Moscaret

Imagine yourself sitting across from your former business client in an attorney-fee arbitration. Your former client has his brand-new litigation counsel seated next to him, in the spot you once occupied. You and your former client can hardly make eye contact across the table. This is not a nonbinding, State Bar proceeding. High stakes are involved. A three-person panel will be deciding how much your client must pay of your firm's $800,000 in total billings from having represented the client in a multimillion-dollar business lawsuit recently.

Your objective is to show the arbitration panel that all of your law firm's work for the client was necessary, that your firm followed the client's instructions in the underlying case and that your firm's hours billed were reasonable. At least there is no dispute about your firm's hourly rates, because those were spelled out in the retainer agreement. Your client and his new litigation counsel will try to show that your law firm was inefficient, ineffective and a poor case manager that deserves only a portion of what was billed overall.

The arbitration panel comprises retired judges and practicing attorneys. Thus, you are appealing to a highly specialized audience. Unlike a lay jury, these arbitrators understand legal billings from their own personal perspective. They may have many decades of practice experience combined. They also may come from a past career experience in which lawyers did not charge as much. So you know you're not going to be able to ingratiate yourself with these arbitrators by using clever words or folksy charm, which might work with a lay jury. In fact, you have started wondering exactly what will impress the panel and persuade them to your law firm's side.

What should your game plan be?

Try blunt honesty about your law firm's billings. As much as that might seem counterintuitive to you as a trial advocate, you have to be willing to present your case with warts and all. When you're looking to seasoned professionals to decide your fate in a fee arbitration, the last thing you want to do is insult their intelligence by trying to fool them with a trial presentation that does not ring true. You want to make sure that the panel views you as candid and realistic about your firm's billings, because that will signal to them that your law firm is trustworthy and probably deserves its fees.

Don't try to fool the arbitrators when trying to justify your fees. Because law firms take fee disputes more personally and because fee disputes can hit firms hard in their own bank accounts, firms naturally tend to be extra-zealous advocates for their own fees.

Law firms make a mistake if they act like their billings are perfect. They never are. That kind of added zeal can translate into strained arguments about why the fees are justified, the kinds of arguments that might make the arbitration panel collectively roll its eyes or feel embarrassed for the law firm. Law firms should realize that being willing to give ground on more-minor billing problems can make it easier for the panel to find for the law firm on the bigger, more-substantive billing issues that affect the majority of the fees.

A law firm seeking its fees should resist making "paper bag" arguments to the panel, the kind where someone should wear a paper bag over his or her head when arguing to hide the shame. Consider, for example, a law firm that tries to convince the panel that it didn't want to show weakness by mediating six months before trial, where the lawsuit eventually settled right before trial. Now imagine the panel's reaction if the evidence at the fee arbitration shows that the case could have settled at mediation for the same amount of money, before the law firm spent another $200,000 of the client's money on trial preparation. How much respect will the arbitrators have for a law firm that tries to gloss over that evidence at fee arbitration, instead of squarely confronting it?

Or take the example of a law firm that keeps encouraging a homeowner-client to litigate a $20,000 boundary-line dispute with her neighbor, and ends up billing the client $350,000 in fees (similar to a recently reported California appellate decision). If the firm goes to fee arbitration against the client to try to collect all of its fees, how much sympathy can the firm expect? With such a disparity between the value of the case compared with the total fees expended, can the law firm seek all its fees with a straight face?

Likewise, litigation counsel for the client in a fee arbitration has to avoid stooping to ridiculous positions in their zeal to reduce the total fee bill that the client has to pay. Some litigation counsel for clients get too dramatic at arbitration about easy-to-spot billing mistakes or isolated problems in the billings, when they could score more points with the arbitrators by highlighting broader objectionable patterns in the billings. However, unearthing those more-pervasive billing patterns for the panel means more tedious digging through the disputed legal bills to identify them.

Don't forget that arbitrators, like courtroom judges, don't like to have to plow through disputed legal bills themselves to try to find problems. They want the party challenging the fees to do the dirty work for them. Hence, the client's litigation counsel may want to retain a fee expert to create a computer database of the disputed billings to use at fee arbitration to identify those larger billing patterns for the arbitrators. Those patterns can be hard to detect by manual review of the billings alone. A computer data base automates the detection process and allows the client's counsel to slice and dice the billings for the panel. Do not underestimate the rewards that such work can bring. Help the arbitrators help you.

Litigation counsel for the client also may be operating under the widely held assumption that arbitrators always "divide the baby." Therefore, the client's litigation counsel may be tempted to argue for absurdly large reductions, for example, well over half the law firm's billings, hoping that the panel will award a 25 percent reduction. Don't expect to fool experienced arbitrators with that ploy. The client's litigation counsel will look like they are overreaching.

Also, litigation counsel for the client may resort to arguing that certain law-firm activities are not billable, although that flies in the face of real-world practice. For example, overzealous litigation counsel for clients have been known to argue that all in-office attorney conferences are part of nonbillable law-firm overhead. What practicing litigators would buy that argument if they were acting as fee arbitrators themselves? The client's litigation counsel will lose credibility if they ignore the realities of litigation.

Finally, if the client is alleging legal malpractice at the fee arbitration, the panel will treat it like an affirmative defense to the law firm's fee claim and as a possible dollar set-off against any fee award in favor of the law firm. Fee arbitrators do not adjudicate legal-malpractice claims by themselves.

Don't be seduced by the more-informal surroundings of arbitration. Don't let the more-informal environment and looser rules of evidence in a fee arbitration cause you to become less disciplined in your own trial presentation. When you step into the conference room at an attorney-fee arbitration, it isn't just the physical surroundings that remind you that you are a long way from the courthouse.

First, it's more expensive to go to binding, high-stakes fee arbitration, because the parties may be paying from $400 to $600 per hour for the services of each arbitrator. Although a "loser-pays" cost-shifting provision may be in effect (for example, in the arbitration administrator's own internal rules or by mutual stipulation of the parties), start out by expecting to have to pay one-half of the total arbitrators' charges yourself.

The lone arbitrator, or all three arbitrators on a panel, may be acting as true neutrals, which means they are legally and ethically not supposed to favor either side, even if one side nominated them. Conversely, on a three-person panel, the chairperson-arbitrator might be designated as the only true neutral. The other two arbitrators may be "party-appointed non-neutrals," who are free to advocate on the panel for the party that selected them and be predisposed to rule for that party. However, remain just as disciplined about your approach to presenting your fee case as you would be in a trial before a courthouse judge, to earn the entire panel's respect. Don't let the relaxed standards of evidence make you become sloppy. Try to govern your behavior by the ordinary courtroom rules of evidence.

Attorney-fee arbitrations demand a different approach from a courtroom jury trial. Theatrics are out. A businesslike presentation is in. Don't be alarmed if the arbitrators' facial expressions remain passive as you are giving your most honest, forthright explanation of why your law firm is entitled to its fees. That doesn't mean they aren't tracking and absorbing your arguments. Only when a law firm's disingenuous arguments for its fees cause the panel members to roll their eyes or grimace from discomfort with those arguments should you begin to worry.

John P. Dacey is a partner at Bergman & Dacey, a litigation firm in Los Angeles with a specialty in attorney-fee litigation. **Kenneth Moscaret** is an attorney-fee expert witness in Pasadena who has trained retired judges.