Litigation

Hard Money

By Gregory Bergman and Kenneth Moscaret

Ever wonder what judges and fee arbitrators look at in deciding whether attorney fees are reasonable? You want to be aware of their mind-set before you ever have to justify your law firm's fees in court or arbitration.

Judges and fee arbitrators may have a "split" perspective on law-firm billings. On one hand, they probably have practiced law and billed clients themselves in their past careers. Hence, they naturally can understand what law firms do and how much litigation can cost. On the other hand, judges and fee arbitrators are a little more sensitive to the client's perspective than practicing attorneys are. They are judging legal bills from the outside now, rather than from the inside.

A law-firm partner sitting in a courtroom or fee arbitration hearing room might say to himself, "All I have to do is show that my firm did the work reflected in the legal bills and that the client agreed to pay for that work. End of story." On one hand, that partner is right. Judges and fee arbitrators share an unspoken presumption that the law firm is entitled to be paid for its work. But the law-firm partner who stops preparation at that point runs the risk of a rude surprise later. Every judge and fee arbitrator is going to have his or her own pet peeves about law-firm billings that inevitably come into play.

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A law firm gains a tactical advantage if it can anticipate which billing issues judges and fee arbitrators deem more important. Not all deserve the same weight. Following are some of the billing issues that a law firm should pay attention to in presenting its case as well as some possible arguments on those issues.

First, judges and fee arbitrators compare the total fees billed to the novelty, complexity or monetary value of the underlying case. The law firm (or its testifying expert) should try to portray the underlying case as complex and unpredictable, with potential money damages that exceeded the legal fees by a large multiple.

Conversely, the client (or its expert) tries to portray the case as garden-variety litigation or to show that the potential money damages ended up being not much greater than the fees themselves.

A corollary of the above is that judges and fee arbitrators look at whether the law firm's initial fee estimates to the client bore some rational relationship to the fee bill. If not, the law firm could appear to be inducing the client to spend money on the litigation by deliberately low-balling the initial fee estimate. Judges and fee arbitrators additionally consider how closely the law firm adhered to any litigation budgets that it gave the client. If the firm exceeded its budget, it should be prepared to show that events beyond the law firm's control caused the overruns or that the opposition is responsible. Keep in mind that a 5 percent to 10 percent budget overrun will be forgiven by the trier of fact much more quickly than a 50 percent overrun, absent special circumstances.

Second, judges and fee arbitrators want to know whether the underlying case was staffed sparsely or excessively. Appearances can be deceiving here. This is a question that goes beyond the number of law-firm timekeepers. The law firm wants to show that the case required a team of attorneys who divided the labor among themselves and that the primary billers accounted for at least 75 percent of the hours billed. Meeting that threshold demonstrates that the legal work was concentrated in the hands of a few key people. The involvement of the remaining billers will then have to be explained, for example, used for spot projects, consulted for their time-saving specialized knowledge, departures from the firm.

The client, on the other hand, tries to show that too many billers coming on and off the case appeared to be trying to satisfy their monthly billing quotas instead of making a real contribution to the case, such that the staffing was inefficient.

Third, judges and fee arbitrators are interested in any unreasonable duplication of effort in the legal work. The operative word here is "unreasonable." The fact that two or more billers worked on the same brief, motion or project is not objectionable so long as they divided the labor in some intelligent fashion without overlapping one another's work. The law firm wants to emphasize this point.

The client, for its part, will be trying to show that two or more billers were being used to accomplish the same work that one biller could have handled all by himself or herself. For example, if the client demonstrates a pattern of senior attorneys having to redo the work of inexperienced junior attorneys, the trier of fact pays attention to that.

Fourth, judges and fee arbitrators want to see that the legal work was being delegated to less-expensive junior attorneys, instead of having more senior attorneys doing work that junior attorneys were perfectly capable of doing themselves. Generally, courts expect to see delegation of work to the least-expensive, competent billers wherever possible.

The key inquiry here is whether a more-junior attorney was truly competent. For example, a senior attorney should be allowed to bill for work which he or she can complete much faster, given experience, than a junior attorney. The law firm should be prepared to quantify for the trier of fact the dollar savings to the client from senior-attorney efficiencies.

Conversely, the client tries to show that the legal work did not always fit the biller and that less-expensive junior attorneys were capable of doing the work but were not used. Legal research, drafting ordinary court briefs and preparing ordinary written discovery are more-fertile areas that the client focuses on to illustrate that junior billers should and could have done more of the work.

Keep in mind that proper delegation of work by the law firm does not include delegating work to brand-new attorneys as training time. Applicable case law says that clients do not have to pay for training time, because it is part of law-firm overhead. If the client can show that first-year or second-year attorneys were spending too many hours researching common legal topics, such as the prima facie elements of a breach-of-contract claim, or spending dozens of hours preparing simple motions to compel discovery, the trier of fact reacts negatively to that.

Fifth, speaking of law-firm overhead, the law firm should not ask judges and fee arbitrators to award fees that relate to operating a law practice itself, as opposed to the needs of a particular client's case. For example, if attorneys attend an expensive educational seminar in order to become more knowledgeable in their field in general or to attract new business, that is not chargeable to a client, absent specific client consent. Also, in this media-driven age, media relations and press interviews that enhance the law firm's reputation in public but are not really necessary to advance the client's case, are nonbillable overhead.

Sixth, issues regarding the formatting or presentation of the law firm's billings themselves may catch judges' or fee arbitrators' attention. If the law firm has "block-billed" its time (by consistently lumping together several tasks from the same day in one large time entry with no individual breakdown of time), the client tries to show that block billing by the law firm has obscured whether the time spent was reasonable.

For example, billing a task such as "prepare memo on recoverable damages at trial" within a larger block entry does not indicate how much time was spent on the memo. Federal case law is on the client's side here.

The law firm, in turn, wants to point out that California appellate courts are split on whether block billing is improper. Also, some corporate clients appear to tolerate it from the large outside law firms that work for them, and other corporate clients prohibit block billing in their outside-counsel billing guidelines. Regardless, the law firm can defuse the issue by offering, after the fact, to break down the time on any block entries that the trier of fact is questioning, if the law firm has enough information to do that.

Seventh, and closely related, is the issue of whether the law firm's billing entries contain enough detail for judges and fee arbitrators to understand what was being done. If the billing entries are vague one-word or two-word descriptions, for example, "legal research," "conference," judges and fee arbitrators are sympathetic to the client's objections. The law firm's response should be two-fold: it can explain any vague billing entries in order to cure the defects in them; and the meaning of any vague entries often can be gleaned within the context of the other, surrounding billing entries.

Finally, judges and fee arbitrators are trying to gauge whether the law firm exercised good billing judgment overall. Billing judgment is a you-know-it-when-you-see-it quality. The trier of fact wants to be satisfied that the law firm used some common sense and restraint in its billing practices, instead of just passing along all of its inefficiencies to the client.

If the law firm is wondering what that means, a simple acid test is whether the law firm would be willing to pay the same legal fees in full if the roles were reversed, meaning if the law firm were spending its own money on the case. If the law firm privately answers "no" to that question, chances are judges and fee arbitrators are saying "no," too, when they deliberate and render their fee award.

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