Litigation

Suits Over Legal Fees

By Gregory Bergman and Kenneth Moscaret

Imagine this current-day courtroom scenario for a moment. A client is litigating a claim of overbilling against its former law firm. The case is being tried to a jury. The client, who received a decent result in the underlying case (although well short of the client's own expectations), was unhappy with the firm's bill — well into six figures when the case was over.

The law firm must make a prima facie showing that its billings were reasonable. The firm's trial team has decided that the best tactic is for the billing partner and day-to-day supervising partner in the underlying case to testify about the billings. The trial team feels confident that the billings are reasonable and that the jury will agree.

The partners take the witness stand in turn, explaining to the jury how qualified their law firm is and justifying their billings. One partner summarizes: "This is just a case of sour grapes by a client who didn't get the result that they wanted, so now they don't want to pay us in full. Our law firm did all of the work. We got a decent result for our client. We did nothing wrong. We deserve to get paid in full." All heads nod on the law firm's side of the courtroom. They have no doubt that the jury will concur.

No doubt, that is, until the jury later comes back with its verdict and whacks the law firm with a surprising reduction in its billings. The usual explanations ensue: "The jury didn't understand our case" (possibly) or "Juries don't like law firms" (possibly). However, one explanation that no one mentions is that the firm's own perceived arrogance might have sealed its fate.

Law firms are getting sued for overbilling today more than ever before (often in conjunction with legal-malpractice claims). Many think they know how to defend themselves effectively in court. They may not, or they may be too emotional about it. There is a fine line, in perception, between confidence and arrogance when a firm is trying to justify its billings in court. A law firm needs to know where that line is and to make sure it doesn't inadvertently cross it at trial. Otherwise, the firm might not find out it has overstepped until it's too late.

Most attorneys equate challenges to their billings to a personal attack on their own integrity. More important, in attorney fee litigation, the law firm's own money is at stake. Emotion can easily take over.

It is a huge mistake for a law firm to adopt a self-righteous tone about the reasonableness of its billings. A jury is going to listen not only to what the firm says but also to how its says it. Remember that juries are not predisposed to sympathize with law firms. The courtroom is no place for a law firm to sermonize.

The smart firm must direct its emotions into objective strategies and tactics. The first place to start is to imagine how a jury is likely to view the bills. No set of billings is ever going to be perfect, so the firm should not even pretend as much. Instead, analyze billings so that strengths can be highlighted and problems anticipated and addressed beforehand.

Someone on the firm's trial team should be assigned the role of devil's advocate. This person should study all possible outcomes in the litigation after examining the law firm's evidence to support its billings. For instance, a court is more likely to approve fees when an attorney has sent the client a detailed explanation of the charges in dispute, relying on well-documented bills, enumerating each attorney's work and explaining why the time spent was appropriate. Attorneys likely will lose if their billing records are confusing or lack detail. Having a devil's advocate spot these potential hurdles in advance is critical.

Communicate to Jury

Even when fees exceed six figures, a jury will be impressed with a law firm that sounds humble and conservative about how it spent the client's money. But it's not enough for the law firm to simply say it was prudent.

A firm should show why the underlying case turned out to be more difficult or complex than first imagined. Perhaps it was because, like with an iceberg, it learned only through discovery that most of the issues and evidence in the underlying case were hidden beneath the surface. This isn't the law firm's fault, but it had to deal with it, and billing increased as a result. The iceberg example is one that any jury can visualize.

Also, if possible, the law firm should not hesitate to blame the opposing party or its counsel in the underlying case for running up the bills with delays, continuances or uncooperative behavior. Again, the jury will want to hear examples, some of which may pique the interest of jurors accustomed to being entertained by nasty behavior among fictional attorneys on TV. Play into this by entertaining jurors with stories that portray the firm as the good guy.

Additionally, explain the firm's steps to reduce the fees in the underlying case. A jury will punish a firm that appears too self-important to look for every possible way to save a client money. For example, avoid filing motions that have little chance of success. Allow a less-expensive but competent associate to handle the bulk of the matter, instead of a partner. Finally, deploy paralegals for the less-demanding legal work.

Show Willingness to Sacrifice

Any law firm that appears to a jury to have been on a bill-fest while the client was risking large sums of its own money is going to be viewed as a pig. And any firm that appears to have been sharing the client's financial pain will get more respect. Avoid temptations to bill the client for duplicative efforts. Also, don't fall into the trap of being a law firm that proclaims a specialty in a given field of law, then bills the client as though it had never handled that type of matter before.

A firm should show that it voluntarily wrote off some time, reduced time or gave courtesy discounts to the client. Reductions, even modest ones, should be reflected in writing on a law firm's invoices to the client as evidence that the firm tried to save the client money. Even small cuts — symbolic of goodwill — can make a firm look less like a pig and more like a partner. If a firm sends two attorneys to important hearings, occasionally bill the client for only one attorney's time. Small cuts make big differences.

Show Client Responsibility

Most law firms think it exonerates them to say, "The client saw our invoices, knew our fees, and if they were too high, they should have said something." This isn't necessarily so. In the real world, even business clients can be reluctant to question their law firms too hard about billing. Clients have the realistic fear of alienating their law firms or giving them an impression of distrust. Firms know this, even though the client is supposed to be the one in control of the relationship.

Clients have egos, too. They may seem vindictive in attorney fee litigation because they didn't like feeling afraid to speak up about the fees before. The fee litigation becomes their way to even the score against their former firm.

There are a few ways to demonstrate that the client bears some responsibility for the amount of the legal bills. Show that the law firm communicated at least twice a year with the client, by letter or e-mail, to discuss legal fees. Clients are busy and don't always pay attention to their legal bills. Besides, if a firm acts like it has nothing to hide, the jury will find it more trustworthy.

Also, show that the client was personally involved in directing strategy and tactics in the underlying case. Some clients are control freaks who operate that way, anyway. It becomes more difficult for them to disavow knowledge of sky-high legal bills when it is clear they were calling the shots. If a law firm can produce a few letters or e-mails sent to the client reminding them of how much the client's own objectives in the case were adding to the fees, it will help demonstrate that the client chose to keep investing in the case. That's not the law firm's fault.

A law firm's biggest opponent in attorney fee litigation is itself. A firm that appears humble, careful and candid before a jury is one that they will feel comfortable with. The amount of the fees in dispute is not as important as the attitude a law firm projects. A firm needs to guard against perceived arrogance, which is often equated with a we-can-do-whatever-we-want attitude toward billing. That perception is a prescription for losing at trial.

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