

Proper Litigation Budgeting Delivers True Value to Clients

New York Law Journal (April 13, 2015) -- *The times they are a-changin'.*

Do not underestimate the power of a well-designed litigation budget to clarify thinking about a case and set client expectations about how it will be handled. A well-designed budget is more than a financial estimate; it sets priorities, reflects strategy and projects staffing. Increasingly, buyers of legal services expect well-designed budgets, and how firms create and use budgets is a factor in deciding which firms to hire.

Lawyers frequently hear from clients that they need help in controlling legal spend and that we need to better understand the pressure they feel to avoid unexpected costs. Surveys tell us that clients often do not see litigation as a cost-effective method of dispute resolution. The uncertainty of ultimate cost may be driving clients to avoid litigation altogether or to settle cases earlier in the process than they might otherwise. Reducing that uncertainty provides clients a needed service, provides options and flexibility, and promotes better decision-making.

One common reaction to a call for budgeting cites the axiom that litigation is fraught with uncertainty and the opportunity for matters to careen wildly off the expected path. While this statement may often be true, it is not an excuse for not setting out a current understanding of a case's likely path. A client

engaged in product development faces the same uncertainty, but that client budgets for the task, manages to the budget and deals with changed circumstances.

Others fear that a budget becomes a cap or a fixed price. Clear communication and a specific agreement with the client about the basis for the budget and the scope of the project at the time the budget is set resolves that issue. Clients run businesses too. They provide cost estimates for their work and they deal with changes to projections every day. Providing transparency about how a budget was derived makes the conversation about changed circumstances easier.

If we put on our consumer hats and think how we might react to a tradesman we employ, we realize that we expect a cost estimate without having to ask. We expect supposed experts in the field to be able to estimate. It rings hollow for them to then claim that the project is too complex for the tradesman to even hazard a guess as to its path and likely cost. Clients have these expectations of us.

For our part, as lawyers who have to run our businesses at a profit, it also makes sense for us to have a work plan in place that gives us insight into upcoming levels and timing of revenue, staffing needs and deadlines. Using well-designed budgets

Proper Litigation Budgeting Delivers True Value to Clients

throughout a practice helps us manage our business better so we can provide better client service.

The first step in systematically developing budgets is standardizing across several fronts: format of the budget, description of the work, identification of the tasks, etc. It takes time to craft well-thought-out standardized tools. It helps to start this process without the pressure of an impending deadline so that the templates are the product of careful reflection about long-term utility rather than reactions to the crisis of the moment.

Creating a template that is used for various types of litigation will reduce the time and effort necessary to generate the budget itself. A quick Internet search will reveal dozens of types of budgeting worksheets that can inspire a template. Standardizing how data about engagements is kept at your firm will make access easier and allow comparison of like to like. Qualitative (or keyword) data about a case (e.g., court, judge, nature of claim, etc.) will later supplement memory and make locating a precedent more efficient. It also helps if your firm designates a point person, since facility with using the process you have developed and institutional knowledge will make the system more user friendly—and used. We find that busy attorneys most commonly object to using a budgeting tool over the (often unfounded) concern that the process will be difficult and time-consuming, and that the "limited benefits" do not justify the added burdens. This is an individual and

organizational bias that must be overcome, and it is not easy.

Litigation has the benefit of many guideposts in creating a budget template: the Federal Rules of Civil Procedure and local court rules, Uniform Task-Based Management System (UTBMS) codes, case scheduling orders, docket files of past similar cases and the elements of the causes of action at issue. Each of these provides information about tasks to be undertaken, the likely duration of those tasks and the appropriate level of legal service provider to undertake them.

"Budget" in some sense is a misnomer; "monetized work plan" might be a better way of thinking about what the effort entails. A well-designed budget has several components; implicit in estimating cost, the budget sets out a plan for the work. A well-designed budget identifies the work to be accomplished (and by negative implication the work that will not be done), the people who will do the work, deadlines by which the work will be done and an estimate of the effort's monetary cost. A budget should be distinguished from a fee arrangement; the former informs the latter but is not coextensive with it.

There is no magic to any particular format or tool for the budget. A budget can be created with a pencil and paper or with sophisticated software. Important elements include a format consistent across types of matters, the ability to modify quickly and the ability to reflect incurred costs in addition to budgeted amounts. At a minimum, settle on a tool that is

comfortable to use and easily understood.

Obviously, a budgeting tool that is available electronically across the enterprise allows greater access to multiple users and can enable better access to historical information. Choose a tool that is right for your firm.

Once the format and general structure of a budget template is created, the starting point for creating any budget is defining the project's scope. It is critical to agree at the very beginning in reasonably granular terms as to what work is within the budget and what work falls outside the budget (and is thus an "add-on" or "scope change" if it occurs).

Experience teaches that lawyers and clients have differing mindsets about the level of detail for the described work (or perhaps more properly the excluded work). A "kitchen sink" or "just in case" approach is unsatisfying. A budget should take into account both the likelihood and the impact of a potential event. To avoid "sticker shock," lawyers may develop a budget that sets out the minimum work—the "best case" scenario. This is sometimes done with an eye to the client's perceived tolerance for fees. However, just as providing no budget does a disservice, providing too rosy a picture prevents the client from making an informed choice and is a very common source of later problems over unexpectedly high bills.

What clients are looking for is the "most likely" scenario. This involves exercising judgment about what is most likely to transpire in a case and

recognizing that the budget cannot sustain planning for every eventuality. It also involves clearly explaining how judgment has been exercised so the basis for those conclusions about likelihood and impact of contingencies can be discussed and agreed upon in advance. The careful client will test that basis, and lawyers are best served to have a well-reasoned basis to point to in support of their conclusions rather than a "gut feeling." There are often a number of contingencies that are very close calls as to likely probability. Here, discussing with the client whether or not to include such possibilities in the budget is important. The decision will be made jointly (and, importantly, remembered and documented) and the client will appreciate the attorney's sophistication, transparency and concern.

A well-designed budget will reflect—and tee up for discussion—strategy choices, such as deciding whether to file a motion to dismiss the complaint (if it is feasible at the time). It also will identify who will provide services and estimate the time needed to provide them. In addition, a well-designed budget incorporates input from the rest of the engagement team, which improves accuracy and ensures the team's buy-in and ownership—each a valuable asset in managing to the budget. These decisions highlight for discussion whether the work can be disaggregated or how much of the work will be done by the client. Thompson Hine lawyers have designed a budgeting tool that lets them create "what if" scenarios in real time to test the financial impact of strategy decisions and staffing options.

Experience has shown that there are common elements that "bust" budgets. Planning for and having frank discussions with clients at the outset of matters about some of these potential budget busters results in better setting of expectations:

Poor communication among the engagement team. Lawyers entirely control the extent of this budget buster. A budget or work plan is only one of the tools needed to manage litigation effectively. A common understanding about timing and methods of communication, expectations on how to give or receive assignments, the client's billing guidelines, the scope of work and excluded work all minimize the risk for write-downs and re-work.

Client conferences. Sidestepping this budget buster is entirely within the client's control. Clients should get the frequency and detail they want in communications. But once the budget is built based on these preferences, the 30-minute, once-a-week email report cannot evolve into a two-hour-a-day telephone conference without busting the budget. If events require a change in frequency or detail, the budget needs to be re-worked.

Unpredictable third parties. These range from uncontrollable local counsel to obstreperous opposing counsel to judges who delay rulings. Here the lawyer can show the client their value beyond legal expertise. There are lots of good lawyers who can do the legal work. There is real value in knowing the players and their predilections and explaining these to the client to set expectations.

Poor scoping of work. Mastering your own historical data and taking the time to closely analyze the task at hand improves scoping of the work. Budgeting well is time-consuming, but the management benefits on the back end of the engagement far outweigh the additional effort on the front end. Clients and lawyers benefit from an investment in tools to assist in consistent and disciplined scoping.

Once a draft budget has been created, the lawyer and client need to review in detail the implications of the choices made in the budget. This is the time to agree on strategy and tactics—at least so far as can be done at this stage of the engagement. In some sense, a client is investing (perhaps not voluntarily) in an expensive business process—the litigation. Like many investments, this one won't be easy to get out of. The client needs to be clear-eyed about the cost and the potential "return on investment." The lawyer needs to help them get there. We find it useful to prepare for this discussion in a comprehensive way. While the budget may present the matter's parameters in summary fashion, as the budget is reviewed, there needs to be detailed discussion about the reasons for the choices and the implications of each of them in isolation and in aggregate. This is also the time to confirm scope and exclusions from scope, define business goals for the litigation, clarify lines of communication and understand each stakeholder's role. Sometimes these topics can be uncomfortable or unstated.

Proper Litigation Budgeting Delivers True Value to Clients

Reviewing the budget and seeking consensus on it forces these necessary conversations.

An agreed-upon, well-designed budget or work plan is more powerful than a financial estimate. It is a road map to executing the engagement and monitoring progress to plan. How many lawyers when asked for a budget create a document, send it to the client without discussion and file it, never to be seen again unless or until the client screams about cost? The budget as historical artifact lies dormant, buried in the file like a land mine waiting to explode in the lawyer's face when it finally resurfaces, inevitably, at a discussion about cost. The client will remember or be reminded of the number, even if the lawyer has forgotten about it. Circumstances will have changed, but the artifact did not. The client will justifiably ask, "Why didn't we discuss this?"

The budget/work plan as a living management tool, on the other hand, provides a ready vehicle for communicating with the client about developments and their impact on the merits and costs of the engagement. Expectations are continuously tuned and changed circumstances factored in. Ancillary management tools like a communication protocol, standard budget to actual reporting and workflow monitoring tools are additional keys to unlock the power of the budget. The combination of these tools creates a managed process in which issues are raised and resolved with the client in a disciplined fashion.

We have found that this approach to matter management delivers true value to our clients. It provides a level of predictability that aids and enhances the working relationships between our attorneys and our clients, and those between our clients' in-house attorneys and their CFOs or GCs. It is a smarter way to handle engagements and shows our clients that we are responding to the pressures they are experiencing in their own businesses. And, it is increasingly becoming a required skill in a rapidly changing legal market. To finish the stanza:

Your old road is

Rapidly agin'

Please get out of the new one

If you can't lend your hand

For the times they are a-changin'.

—Bob Dylan

—Richard A. De Palma is a partner in the business litigation practice of Thompson Hine's New York. William T. Garcia is the firm's director of legal project management.

Reprinted with permission from the April 15 edition of the New York Law Journal, 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 - reprints@alm.com or visit www.almreprints.com.