



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Stretching Your IP Litigation Dollar

Law360, New York (March 10, 2009) -- In these difficult economic times it is more important than ever for those involved in intellectual property litigation to prepare and appropriately manage a case budget. There are two keys to an effective budget.

First, the initial budget must be thorough and realistic. Second, the budget must be a living document that is regularly monitored and adjusted as the case proceeds. This article lays out some basic tips and guidelines for meeting these two needs.

Preparing a Budget

Most litigation budgets are task based. As you build your task-based budget, here are some guidelines to keep in mind:

The most important part of developing a task-based budget is to answer the questions, "What must be done?" and "When must it be done?" The answer to these questions will allow you determine a logical sequence of tasks to accomplish as well as the logical phases in which these tasks will fall.

For example, when representing the plaintiff in a patent litigation matter, the initial phase would be "Pre-Filing Investigation and Preparation of the Complaint." Within this phase would be several sub-tasks, such as "reviewing patents and file histories" and "preparing infringement analysis."

Depending on your case's schedule, there are several ways to group the remaining tasks into phases. One example of patent litigation phasing would be "Post-Complaint/Scheduling Conference," "Discovery," "Claim Construction," "Expert Discovery," "Pre-trial," "Trial" and "Post-trial."

Even if clients want a monthly budget, it is still possible and effective to prepare a phased budget and then transfer that information into a monthly template.

After you have compiled a list of the tasks and phases, the next step is to assign people and costs to each task. This is the tricky part.

Among the questions you should ask to come up with an estimate in a patent case are: How many patents and claims are at issue? How complex is the technology? What are the likely issues with respect to non-infringement, invalidity, damages? Is inequitable conduct an issue? Will damages include a lost profits analysis or only reasonable royalty? Will there be any eBay related issues with respect to a possible injunction?

Given the issues identified — what will be the likely scope of discovery? Will there be extensive electronic discovery? Will there be third-party discovery? Will there be extensive travel or travel outside the United States? How many experts will you need and what are their rates? Will you need testing or analysis? Is summary judgment a possibility? How complex will the Markman process be? Are you going to use a mock jury? How long will the trial be?

Once you answer these questions, you can determine how many attorneys will need to be assigned to the matter, as well as their experience level. Once you have the team identified, one way to estimate the cost of each task is to identify which attorneys you expect will be working on each task and how much time you estimate they will spend.

For example for a simple motion to dismiss you may estimate a total of 55 hours, 40 associate hours at \$400 per hour, 10 partner hours at \$650 per hour and five paralegal hours at \$225 per hour for a total estimate of \$23,625.

If you have done similar projects in the past, use your experience and knowledge of those projects to build your estimate. If possible, refer to prior budgets or prior billing statements for similar matters.

Litigation is particularly amenable to this sort of analysis because many of the same tasks are done in nearly every case. You should also tap into your project team members to get their input on your estimates.

If the case is in a jurisdiction you do not normally litigate in, be sure to get input from your local counsel and do not forget to include local counsel fees in your estimate. Also, with respect to the fee basis of your estimate, make sure to factor in any anticipated billing rate increase during the course of the matter.

Costs also need to be carefully considered. A good rule of thumb is that in a patent case your costs will run somewhere between 15 to 25 percent of your fees. Be sure to take into account the sometimes significant expense of electronic discovery. Also make sure you have a good handle on the scope of expert testimony and related testing and analysis as these expenses can add up quickly.

Make sure when you present your budget estimate you determine whether your client has a standard or preferred format. Because you do not have a crystal ball and can

generally count on Murphy's Law to impact your matter when you least expect it, you should also always present the budget estimate as a range.

You should also document the assumptions you use when building your budget estimate. These assumptions will be very helpful as your matter proceeds, especially if circumstances change and you need to discuss a budget revision.

Finally, do not forget to mark your budget estimate as privileged and confidential attorney work product.

Monitoring the Budget

Dividing your budget into phases allows you to revisit the budget at the end of each phase to address such questions as: Were we over or under budget? If so, why? What tasks need to be added going forward? Which can be eliminated? Given developments and new tasks do we need to revise the budget for future phases, either upward or downward?

The attorneys and client should schedule a meeting at the end of each phase specifically to discuss these questions and to mutually refine the budget as appropriate.

Once your case is over, be sure to maintain the documents related to your budget so that you can benefit from what you have learned when preparing a budget for your next case.

--By Larry L. Shatzer, Foley & Lardner LLP

Larry Shatzer is partner and chair of the IP litigation practice at Foley & Lardner in the firm's Washington, D.C., office.

The opinions expressed in this article are those of its author alone and do not necessarily reflect the views of Foley & Lardner, its clients, or Portfolio Media, publisher of Law360.