

ARTICLES

The Big Case: How to Win the Budget Battle

By Brian A. Berkley – November 6, 2017

Many battles are fought in litigation, and few are more important than the budget battle. Here, the lawyer must not only plan for the unpredictable but must also put a price on it. Whether you are in-house or outside counsel, your job performance may be judged in significant part based on establishing a credible budget and sticking to it. The budget stakes are higher when the battle is waged on the big case battleground, where the inherent unpredictability of litigation is magnified.

The budget, however, also offers one of the best tools for cementing the attorney-client relationship. In this world of flat demand for an ever-increasing supply of lawyers, the ability to effectively establish and manage a large litigation budget can be a market differentiator for the outside lawyer. For the in-house lawyer, a well-managed budget makes for a happy internal client. The carefully developed budget acts as the litigation road map, guiding the client through the different strategic decisions that need to be made at different phases of the litigation. It can be a valuable tool for flagging upcoming risks, which in turn helps minimize the sense of litigation's unpredictability. It gives the outside lawyer the opportunity to show his or her litigation experience, while providing the in-house lawyer the opportunity to test outside counsel's case strategy. In short, it can help strengthen the most important aspect of the attorney-client relationship and the ultimate market differentiator: trust between lawyer and client.

This article suggests eight steps that have proven effective in “winning” the budget battle. For these purposes, this article assumes that the case is big enough to incur millions of dollars in attorney time and vendor costs. While these steps have worked well in such “big” cases, they have also been modified to fit a case of any size. Because outside counsel is typically asked to develop the budget, the focus is from that perspective. Where appropriate, however, this article provides advice for in-house counsel. Sample budget spreadsheets are also provided.

Step 1: Picking the Team

For outside counsel, you first have to figure out the players. This step is as critical as it is obvious—to accurately budget a matter, you need to know who will be billing to the matter and at what billing rates. While cases differ, a good rule of thumb for a case that will cost over \$1 million is to assume a four-person litigation team—(1) senior partner, (2) junior partner/senior associate, (3) junior associate, and (4) paralegal. Ideally, you will want to pick this team before you budget. At the very least, you will want to determine the rates for each expected team member.

Outside counsel should also have at least one other budget team member who is not a member of the litigation team. That person will be responsible for populating certain spreadsheets that track the monthly spend of the case. Preferably, this person will have a background in business or accounting or both. For reasons discussed in more detail later, it is important to have one central

person not only for your budget but also for other matters for this client and for the firm. It can prove extremely beneficial for budgeting future cases and for pricing alternative fee arrangements.

For the in-house lawyer, if there is a business person within the firm whose bottom line will be affected by the litigation, then that person should be involved as much as possible. At the very least, the person should have access to outside counsel in the beginning when the budget is set and during certain budget calls. This will reduce the risk of miscommunication and will increase the chances of maintaining a happy (or, at least, a well-informed) client.

Step 2: Creating the Budget Templates

Make Excel your friend and start with a spreadsheet. In fact, you will have several categories of spreadsheets: (1) staffing spreadsheet, (2) litigation phase spreadsheet, and (3) calendar spreadsheet. While you may have more or less depending on the case and your preferences, these three categories of spreadsheets are helpful.

Step 2(a): The staffing spreadsheet. First, [the staffing spreadsheet](#) contains two separate tables. An example can be found at the end of this article. The first table identifies (1) the litigation team members, (2) each member's billing rate, (3) the estimated hours each one will work on the case, (4) the estimated fee charged for each biller, (5) the actual spend, and (6) the variance between the estimate and the actual spend. The bottom of the table totals the estimate, actual, and variance. List the most expensive biller first down to the least expensive. This table will be updated as team members are added or removed. It provides a nice snapshot of the general responsibility each attorney will have on the case, as well as the team history. This table should track the attorneys' fees.

The second table will track the non-firm fees associated with the litigation. Examples of vendors include contract attorneys (if you use those for document review), experts, copy service, court reporters for depositions, trial tech, and jury consultant. It is important to separate this table from the first table so that the client can see which legal service provider is responsible for which slice of the budget pie.

Step 2(b): The litigation phase spreadsheet. [The litigation phase spreadsheet](#) is the second and most important spreadsheet. You will estimate (and then track) the spend at each phase of the litigation using this spreadsheet. Below are two slightly different types of litigation phase spreadsheets.

The first one, "Litigation Spreadsheet by Timekeeper," is particularly useful for internal tracking. The sample breaks out the litigation into the following general phases: (1) case assessment, development, and administration; (2) pretrial pleadings and motions; (3) discovery; and (4) trial prep and trial. These are just generic suggestions. You will want to tailor the phases to the case. You also may have subsections within each phase. For instance, for discovery, you may have the following subsections: written discovery

(requests for admissions, requests for production, interrogatories, etc.); document production, depositions, discovery motions; and other discovery.

For each phase and subphase, you will estimate and track, by timekeeper, the hours and fee you anticipate for each phase. Thus, you will have three sub-columns for each timekeeper—budget, actual, and variance. These columns track the hours and then total the hours and dollars by phase. Tracking each timekeeper by phase helps show you the workload for each team member for each phase, which helps with matter management.

The second spreadsheet, “Litigation Phase Spreadsheet,” budgets and tracks the attorney fee and vendor expenses but not by attorney timekeeper. It has three columns—estimate, actual, and variance—with three sub-columns for each—attorney, expense, and total. It then provides the appropriate subtotals and totals for each phase.

This spreadsheet will provide the client with the road map for the entire litigation. When you present the budget to the client, this spreadsheet will act as the basis for having key strategic case discussions. Do you want to file that motion to dismiss? Do you want to seek agreement with opposing counsel to have 20 depositions or 30 depositions (to the extent you can reach agreement)? How much third-party discovery do you want to pursue? Often these and other key strategic decisions are made based on the substantive issues in the case, but that is not a complete analysis. They should be decided while taking into account the impact on the budget. This spreadsheet gives you the opportunity to show the client the financial impact of each of these (and other) strategic decisions.

As the case continues, the phase spreadsheets will allow you to track, in real time, whether or not a particular phase is costing more than budgeted, which will then allow you to determine why. Do you have to file more motions to compel discovery because the opposing party is engaging in “Rambo” litigation? Did the judge order more briefing on a particular issue than contemplated by the local rules? Often lawyers will blame budget overruns on such situations without actually doing the math. A budget that tracks in real time the cost of each phase (and subphase) will provide the “proof in the pudding.” On the flip side, perhaps a phase has cost less and you have dollars to spend on a new strategy that may prove fruitful. This spreadsheet will give you the opportunity to have that discussion.

This spreadsheet also acts as a good tool for anticipating future budget overruns. For instance, say you based your budget on the collection of 100,000 documents for review and production. But after identifying the witnesses and running search terms, you find out you have 300,000 documents to review. Do you want to adjust the budget to account for the additional costs you will incur for reviewing three times as many documents as anticipated? Or do you want to use certain tools, like predictive coding, which allows you to isolate only the likely relevant documents and review just those, thereby protecting your budget? While there are other factors you will want to consider in making these

decisions, the litigation phase spreadsheet gives you the platform by which to have these discussions.

Step 2(c): The calendar spreadsheet. Most clients budget by calendar, not by “litigation phase.” Thus, you will want to translate your litigation phase spreadsheet into [a calendar spreadsheet](#). This can take on several different forms. The calendar spreadsheet can be broken up by month, by quarter, or in some other way. An example can be found at the end of this article.

It is important that you identify the phases anticipated for each time period. For instance, in the example below, for each quarter there is a column titled “phase” with two sub-columns—“estimate” and “actual.” You will want to note which phases you anticipate to be started and finished within each quarter. That will help identify the costs anticipated for each quarter and explain the actual costs incurred for each quarter. This spreadsheet proves helpful in translating your litigation budget into the timeline that your client likely budgets—either by quarter or by month during the client’s fiscal year.

Once you have your budget templates together, review them and make sure they present the budget information effectively. The examples below are just that—examples. You will want to tailor your spreadsheets to whatever works best for you.

Step 3: Picking the Task Codes

As part of building out your spreadsheets, you will want to think through how to marry the billing task codes with the different phases. For each phase and subphase, you will want to think through which billing tasks you believe the litigation team members will be completing. Those team members will then use those billing task codes when entering in their time.

The billing entries and task codes will act as the basis for your ability to keep track of the budget by phase and subphase. That is, when populating the actual spend in the different spreadsheets for each phase, the accounting team member will use the entries under different task codes to keep track of the fees incurred for each phase and subphase. You can use the ABA litigation task codes as a good starting point. The sample spreadsheets use the ABA litigation codes to show different subphases of the litigation. If you use those codes in your timekeeping software, then tracking by phase and subphase will be easy. Experience teaches, however, that you will want to tailor the phases and the codes a bit more.

Three pieces of advice: First, make sure that you do not use the same billing task code for two different phases. Otherwise, it will be difficult to know which billing entry fits within which phase and subphase.

Second, your client may also have billing guidelines that require you to use specific billing task codes. Make sure to coordinate with your client. This is another opportunity to get your client engaged in the budgeting process.

Third, it is critical that you train the team members on how to bill for the case. This is an important but often overlooked step. Nobody likes to talk about how to put in billing entries. Nevertheless, schedule a meeting and go through each phase and each task code and explain to each team member how the task codes marry to the budget. Explain the importance of the budget. Do not assume that simply because folks have been billing time for years (and, for some, decades) that they know how to bill accurately on this particular case. Accurate billing is critical to the accuracy of the budget.

Step 4: Estimating the Budget

You've set up your spreadsheets and thought through the different tasks for each phase and subphase of the litigation. It is now time to plug in some numbers.

We will assume that, at this stage, you have yet to get the matter in through the door. Typically, to get the work for a "big" case (or any case), clients ask outside counsel to submit a budget. This can get tricky. On the one hand, you do not want to scare off the client. On the other hand, you do not want to set yourself up to oversell and underdeliver with an unrealistic budget. You are very likely competing with other firms for the work. You will have limited information concerning the matter.

A few tips: First, get some basic information about the case, such as the complaint, opposing counsel, judge, and parties.

Second, get a handle from the client on the number of documents and witnesses, if possible. In most cases, discovery is the biggest ticket item in a litigation budget, and the documents and depositions drive the cost of discovery. Getting an estimate of the number of documents and witnesses will allow you to ballpark the document review and deposition budget items.

Third, make sure you, the senior lawyer, take the lead in drafting the budget. At this stage, you will be guided more by your experience in drafting many budgets in the past than by an in-depth analysis of the substantive issues (because you likely will not have access to the information to make such an analysis). You will be the one ultimately responsible for the budget, and so you do not want to outsource the budget-making process.

That does not mean, however, that you should not seek input from the other team members. Quite to the contrary, once you have put together a ballpark estimate, you absolutely should ask each team member at each level for input. Some may have a better handle on the true cost of e-discovery, contract attorneys, depositions, etc. Further, it allows you to obtain buy-in on the budget from the rest of the team.

Finally, recognize that this entire process is iterative, including this step. Once you have a ballpark number and have talked to the rest of team, test your numbers and refine. There should be several rounds of vetting before you share the budget with the potential client.

Step 5: Initial Case Assessment and Budget Editing

After you have secured the engagement, you will do an initial case assessment. That entails talking to the key witnesses and the client’s information technology department contact, reviewing the “hot” documents collected from the key files, and formulating initial case strategy with in-house counsel. This important phase allows you and the client to size up the case and start to set expectations and map out the strategic decision points. Many times counsel will provide an initial assessment of the likelihood of success on the claims. Depending on the case and its posture, this initial case assessment should occur within 15 to 30 days of securing the engagement.

Do not forget to update your budget estimates. You now have the opportunity to engage in an early in-depth analysis of the issues. You are talking case strategy with your client. You are getting a better handle on the documents and the witnesses. This means you should now be able to further refine your initial budget estimates.

Step 6: Initial Case Assessment/Budget Meeting

After you have engaged in your case assessment and budget refinement, it is a good idea to have a face-to-face meeting with the client. In this meeting, you may review (1) initial litigation strategy; (2) estimates of the likelihood of success, if possible; (3) experience with opposing counsel and the court; and (4) modifications to the budget.

Use the budget in this meeting to highlight some of the strategic decision points. Show the client, through the phases and subphases, where its money will be spent. Identify the areas where the actual spend may vary from the budget. Discuss the different tools that may be available to control the budget when the unexpected occurs (such as the use of predictive coding, the use of contract attorneys, streamlining depositions). These conversations will focus the client. You may be surprised by some of the astute litigation strategy questions you will receive when focusing the client on where the money is actually going. If possible, involve the client contact who has budget responsibility in the conversation, in addition to in-house counsel.

This is a critical meeting. It sets not only the client’s initial expectations of the case outcome but also the budget expectations. Any future budget discussions and changes will be based on the expectations set in this meeting. Make sure to discuss how and in what manner the client would like you to provide budget updates. Not all the suggested spreadsheets are for the client’s consumption. Some clients may want a much less detailed budget. Others may want more. What is important is that you engage in this conversation.

Step 7: Budget Tracking and Client Updating

Once you have had your client meeting and set budget expectations, it is now time to track your performance. The accounting member of your team should take the lead in populating the spreadsheets.

We recommend you internally track your progress more frequently than you update the client—weekly would be a good rule of thumb. Have your team members keep their billing time entries

current on a weekly basis. Have the accounting team member generate weekly reports. Appoint one lawyer responsible for reviewing those reports. Have that person identify for you any anomalies.

Make the weekly reports user friendly to capture such anomalies. For instance, the accounting member could create a bar or pie chart that shows, by percentage, the amount of attorney time used for a particular phase as compared with how much was budgeted. The reviewing attorney can compare that number with the litigation's progress. Thus, if you have spent 70 percent of your budget allocated for written discovery but have yet to produce a document, then you will know, ahead of time, that you may not stay within budget for that part of the case.

The client will likely dictate when you update the budget. The key is to make sure the budget updating actually happens. Too often, clients and lawyers spend time setting the budget but then ignore it when things start moving fast. Do not make that mistake. Schedule either a monthly or quarterly call that includes the budget as a key piece of the discussion. Use this opportunity to highlight any upcoming potential departures from the budget. Keep the budget a focal point for strategic litigation decisions.

This regular updating is critical. It helps remove the risk of "surprise" that clients so often complain about when it comes to the cost of litigation. By keeping the team updated weekly and the client periodically, you will stay ahead of budget overruns. You will cement the trust between lawyer and client, thereby strengthening your relationship. It is through this updating process that the budget and its potential for improving client relationships becomes most beneficial.

Step 8: Budget Lessons

At the end of the engagement, take stock of the lessons you and the client learned. How well did you budget? What were the reasons for the variance? How did the outside vendors do? What phases and subphases cost more (or less) than you thought? What are some processes you can put in place to control such costs in the future? Did the strategic decisions that were made based on the budget work out? Would you make the same decisions again? Schedule a call or meeting with the client to discuss.

You can also use these lessons to help price future litigation when offering alternative fee arrangements. The accounting team member could become the firm's resource for centralizing the firm's budgets and budget lessons. This institutional knowledge becomes an important tool for competing in the marketplace.

The budget lesson step is a great opportunity to take what you learned from managing the case and apply it to the future. It gives you an excuse to get back in front of the client after the case ends. Do not let the rush of the next matter for the next client get in the way of your ability to take advantage of this step.

Conclusion

These steps highlight some best practices in budgeting: (1) detailed budgets, (2) constant client communication and updating, (3) diligent budget tracking, and (4) strategic use of budget information. The budget acts as another opportunity for you to show your client your ability to manage an important part of a significant engagement. It gives you the opportunity to get the client engaged in the strategic decisions in the case. It also allows you to show the client that you are not just a hired gun with a specific expertise to litigate a “big” case. Instead, it shows that you take seriously the impact that case has on your client’s bottom line and that you are willing to engage in a proactive manner to help manage and protect that bottom line. This will help strengthen your relationship. In this regard, the budget may be your best client development—and retention—tool.

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