

CREATING AND MANAGING A CASE BUDGET

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I. What is a budget and why does your client want one?

Simply stated, the budget is defined as the plan of action mutually agreed upon by outside counsel and the client, or in house counsel at the inception of any matter requiring the service of an attorney outside the company. It is designed to give all participants advance direction of the steps that will be taken in the prosecution or defense of the matter and a reasonable prediction of what it may cost to take those steps.

Outside counsel might imagine a decision to justify a new Chevy Suburban® for the family. You shop around, analyze your finances and you decide that you can make it work. You purchase the vehicle and you are completely satisfied until several months into the purchase when the dealer calls you and tells you he needs another \$5,000.00. Even if the dealer was able to somehow persuade you that you actually needed to pay the extra money, the odds are overwhelming that your overall satisfaction level would plummet, not only with the new car but also with the dealer who sold it to you. While clients are purchasing services, rather than goods, one reason behind their desire for a budget is essentially the same as with the hypothetical vehicle purchase. The client wants to know in advance how much they are going to spend, what they are getting for their money, and why they need to spend it. Over the course of the last 20 years, the cost of legal services has risen dramatically, as has the need for the same, such that legal fees and expenses have become a point of concern for almost every corporate client. It is well understood that many business people, and most executives view litigation as a waste of their company's more valuable assets; namely its time, its money and the focus of its employees. Unfortunately, that view is oft times accurate.

Virtually every company employing lawyers today has written guidelines, whether internal or published to outside counsel, which purport to support the goal of reducing legal spending. More often than not, the guidelines require that counsel prepare and submit a budget for any significant legal matter. This guideline comports with the basic premise that one of the obvious steps required to reduce legal costs are trying to determine what they are, what they will be in the future, where they go and the extent to which they are necessary. A budget can help a client with these determinations.

Remember when gasoline was sold at a service station where they not only sold gas, but also pumped it for you, washed your windows, checked your oil and aired up your tires? Probably not. Those were the days, however, when your predecessors sent or received legal invoices at the end of a matter that simply read "Services Rendered—\$200.00." No client asked for much more detail than that and no professional expected to be asked to provide it. Those days are gone. For a number of reasons, most clients, and certainly sophisticated corporate clients, have guidelines that not only mandate the use of budgets but impose strict limits on billing practices as well. Most include language along the lines of the following:

Time entries will identify the persons performing professional services and the specific services performed. The actual time spent on each service must be clearly identified. Block billing is not allowed.

There are generally additional admonitions regarding travel, reimbursable expenses, photocopies, fax charges, etc. All are designed for use by clients who are trying to secure a better handle on legal costs, and to figure out how to control them. For younger lawyers who may not understand why this is occurring, you might ask your predecessors how many hours they billed in a year or whether they ever called the photocopier "the best associate in the firm." Regardless of the merit or necessity of these measures, litigation costs have skyrocketed and a meaningful budget is one method your client has developed to try to control those costs.

As stated, the primary purpose of the budget is to predict costs, and thereby help counsel and the client manage those costs. However, the budget serves another purpose beyond simply predicting expenses and identifying where those expenses go during the course of a case. It allows for advance consideration and discussion about the end goal of the case, and what it will likely take to achieve that goal. The budget allows the lawyer and the client an early opportunity to map a strategy designed to accomplish the goal of the client. Budgeting forces counsel to consider the entire case at the outset. In order to prepare a meaningful budget, counsel must necessarily consider the claims of all of the parties, and map

out an initial strategy to prosecute those claims, or defend against those claims through trial, or even appeal. To be truly effective, budgeting should be a collaborative exercise between in-house and outside counsel and the client. When it works, it has benefits far beyond merely predicting and controlling costs. Thoughtful consideration of the entire case while it is in infancy, allows counsel the best opportunity to get the case on the right track, and to keep it there. For example, most client guidelines also contain a reference to a commitment to “early ADR” (alternative dispute resolution). A well considered budget would require attention to when or at what stage in the litigation the “early ADR” was to occur. In some cases, liability may be uncontested and one might be able to enter into “early ADR” without a number of the steps and expenses that might otherwise be necessary when liability is hotly contested. In a perfect world (the one where the authors are retired and living on a beach) the client and the lawyer would work together to develop the specific case handling plan and the budget that goes along with it. That would afford an ideal opportunity for the client and the lawyer to agree in advance not only on the desired result, but also on the most efficient means to get there.

The budgeting process can afford a significant benefit to outside counsel aside from case preparation advantages. An early budget prepared by the lawyer and the client together, or at least reviewed and approved by the client, might avoid the unpleasant feeling which can occur when the lawyer comes to the realization that the goals of the client and the lawyer were not the same. That makes for some awkward moments. As smooth as we lawyers often think we are, most clients recognize the sound of Charles Durning singing “Ooohhh, I love to dance a little side step” from the movie *The Best Little Whorehouse in Texas*.

Another reason clients want budgets is this: In most instances, the in-house lawyer or insurer client to whom outside counsel is reporting is managing a docket of cases or matters that exceed the scope of the particular jurisdiction in which one outside counsel might practice. In other words, they have more cases than just yours. By requiring budgets from counsel statewide (or nationwide in some circumstances) in a consistent format, the client secures an ability to predict litigation expenses overall by utilizing all the budgets in a particular time period. This also affords the client an opportunity to prioritize expenses by diverting sums budgeted for matter “A” when something unforeseen occurs elsewhere that mandates

that more attention be diverted to matter “B” in another part of the state. Budgets are a way of life for corporations, and in many instances in-house legal departments operate within the same budgeting guidelines as do all of the other departments within the corporation. What this means is that sometime prior to the beginning of any fiscal year, the legal department asks for and is assigned an amount that it expects to spend in that year. This amount is based on several factors, the

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most notable of which are (i) historical performance and (ii) what is known, and what can be reasonably anticipated at the time the budget is prepared. Matter budgets help in-house counsel with both of these factors.

In short, if done properly, the budget affords an early opportunity for the outside counsel and the client to get on the same page, and put the case in the most favorable position at the beginning, and then work together toward whatever the goal of the client might be for that particular matter.

II. How do you create a budget?

At first blush, creation of a budget that has any real meaning seems impossible. While most litigation (at least personal injury litigation) follows the same basic pattern of written discovery sent, written discovery answered, records secured, plaintiff’s deposition taken, defendant deposition taken, experts retained, experts deposed, mediation and trial, it is obviously impossible to predict how long each of those steps might take or how many individual tasks each of those steps might require. But given certain assumptions, it is possible to make reasonable predictions as to the amount of effort, and thus the costs, of a particular case. For example, it does not take a genius to appreciate that the case that results from a fertilizer plant explosion will likely require a higher budget than the case that results from a minor two-car collision at the intersection of Smith and Main. For that and many other reasons, each individual case will necessarily have its own budget. One obviously cannot simply have a number in mind for the cost it takes to develop and try “a case” and spit out that number every time you are asked for a budget.

The budget should also contemplate the specific means by which certain tasks may be accomplished. Suppose the defense of the case would be aided by opinion from someone with mechanical expertise. The size of the case or the goals of the client may dictate whether the opinion is expressed by a local “shade tree” mechanic or the Dean of the College of Industrial Engineering from one of the nation’s leading

universities, and this single decision could have a material affect on the budget. Good budgeting may also help determine whether the size of the matter and the goals of the client mandate the use of expensive media production at trial, complete with litigation support professionals and their electronic wizardry, or relatively inexpensive blow-ups and charts. In an automobile collision, the size of the damage claim and the goals of the client may determine whether the expense of bio-mechanical experts is warranted.

All of the foregoing means that one of the first steps in the creation of any budget must include a common understanding of the goal of the particular matter: in other words, an accord as to what the client expects to take place during the course of the matter, and what your client hopes to gain, or at least avoid losing, as a result of the matter. In some cases, it may be that the goal for the particular matter cannot be known until there is a greater understanding about the case but that is the exception. In most instances, the client and the lawyer will be able to identify the goal of the litigation from the facts known at the time the budget is created. For example, if the goal of the matter is an efficient, expeditious resolution, without incurring much expense, the budget will vastly differ from a matter which appears to call for a “scorched earth” defense in which the goal is to prevail at all cost, and to discourage any future attempt at a similar case. A lawyer who presents a client with a budget for the latter in a matter where the client is hoping for the former, is likely to be admonished. Assuming the lawyer and the client have discussed the matter and are on the same page, hence working toward the same goal, the creation of a budget is often simplified by the client guidelines themselves. They typically include forms or grids which break the matter down into manageable pieces, each of which is a little easier to predict than is the matter as a whole. With very few exceptions, counsel and client will at some point in the process reach a mutual understanding of exactly what the client’s goal is (or was) for a particular matter. The earlier that understanding can be reached, the better; not only for the odds of achieving a good result, but for the relationship between counsel and client.

Let’s assume that the lawyer and the client have identified the goal of the litigation and the point, if any, at which early ADR is to be considered. At that point, in order to prepare the typical litigation case budget you need, at your fingertips, several key pieces of information. You need to know the pace at which most matters proceed in your jurisdiction, and your venue. Cases in smaller venues can sometimes move more quickly than those in larger venues where courts may be less accessible and lawyers busier. In order for you to determine

what tasks might reasonably be accomplished in the first quarter or six months of life of a matter, you need to know how quickly those tasks are typically accomplished in your jurisdiction and venue. You also need to know something about your opponent, including opposing counsel. If your opponent is known as someone who will attempt to tie up every loose end, no matter how distant its relationship to the matter, then it is likely that you are in store for protracted and expensive litigation, and you need to plan and budget accordingly.

You also need to have at your disposal the approximate time taken for similar tasks in similar matters. While “form discovery” is seldom advisable in and of itself, it is generally true that initial discovery starts with certain form questions which are supplemented and/or modified to fit the particular circumstances of the matter. In all but very unusual circumstances, it likely takes approximately the same amount of time to prepare written discovery. You may know enough about the matter to predict the potential need for the addition of other parties, further pleadings, or other forms of written discovery. If you are not familiar with the type of matter, chances are that your client will be. You may have a feel for how long it takes to secure records following receipt of responses to discovery. Past experiences, especially in similar matters with the same client, will be especially relevant when preparing the budget. Incidentally, a good long-term working relationship helps foster not only the mutual trust necessary to do the work in the best interest of the client but also helps to make budgeting more meaningful.

When it comes to budgeting litigation matters, detail and accuracy are interrelated. Counsel should not only estimate the amount of documents that may be reviewed and/or produced, or the number of depositions that may need to be taken: effective budgeting requires counsel to identify and discuss case specifics such as what types of documents exist, where they are located, how they are stored, and how they will be produced; in addition, counsel needs to identify potential witnesses, and give due consideration to the effort it may take to prepare to present or interrogate those witnesses. Counsel must also consider the opponent and the opponent’s counsel, and how robustly they are likely to pursue the case. This is especially true in large or complex cases where it is unlikely that a court will limit the amount and type of discovery that the parties may request.

Once counsel has an idea of what services he or she intends to perform in the particular period and how long it typically takes you to perform those services, it is simply a matter of

applying that time to the rate or the rate of the lawyer or legal assistant who will accomplish the task. The same practice applies to budgeting expert costs, although it is often more imprecise an exercise. Counsel may have an idea of how many and what types of expert may be needed, but not the amount of work the expert will provide, or the hourly fee the expert will charge to perform that work. Past experience will allow some prediction of the costs for filing fees, court reporter fees, and other miscellaneous expenses, although those costs will necessarily fluctuate, and tend to coincide with case complexity.

III. What does the client do with the budget?

Outside counsel can assume that the client will keep the budget close by, and look at the budget at regular intervals. In-house counsel and the client use litigation budgets for at least the following purposes:

- (i) determining whether to litigate;
- (ii) internal budgeting purposes;
- (iii) tracking progress of a matter; and
- (iv) re-budgeting.

With few exceptions, every decision that is made in connection with litigation, whether it is being considered, has been threatened or is currently pending always includes the question of “how much”? Clients expect advice as to whether they can win, and if so, at what cost. In some circumstances it is sufficient to provide a “back of the envelope” estimate; however, other circumstances such as when the amount in controversy is material or when a core practice of the client has been challenged, require a more accurate prediction. In the case of the latter, outside counsel should assume that the client will give serious consideration to the case budget when deciding how, or even whether to proceed, at the time the budget is created and also likely throughout the life of the matter. The client demands access to all the pertinent facts, including projected costs, when making decisions that affect its business, and the decision to litigate, or to continue with litigation is no exception. Regardless of what it is they do, corporate clients plan their operations so that they make more money they spend, and litigation costs are a necessary consideration in this overall plan. Even so, it is not uncommon for a corporate client to proceed with litigation that it expects or even knows will cost far more than what it would take to resolve the case. Nonetheless, the client will only be comfortable making a

“business” decision regarding litigation if it can do so with “eyes wide open.”

Budgets are excellent tools to track the progress of litigation beyond how much money has been spent. If we assume that the budget as revised from time to time is, and remains accurate, the budget can be used as a barometer for what

percentage of the work has been completed, and what remains. This is especially helpful in complex cases that tend to last for several years, involve many of the clients’ employees and documents, cost an enormous amount of money, and include long periods of inactivity. Both in-house and outside counsel should compare the budget with actual costs at regular intervals to

make sure that the matter is progressing per the expectations of all interested parties. Large discrepancies should be investigated to determine if they are the result of initial presumptions being incorrect, or an issue that requires remedial action.

No case goes exactly as planned. As the case develops, the budget will need to be revised to account for the unknown and the unexpected; but the original case assessment and budget remain the reference point for budget revisions and case strategy assessments. These budget revisions vary in range from immaterial, e.g., a moderate cost increase in recognition of a need for expert testimony on a subject not considered important during initial case assessment; to a systematic overhaul of the entire case strategy, e.g., a material budget increase to respond to an opponent’s permissive counter-claim. Revisions can become necessary on numerous occasions, and at any time during the life of the matter. It is important that in-house and outside counsel communicate regularly about the budget and any re-assessment that may be necessary as the matter develops. Quality communication and open dialog are the cornerstones not only of effective budgeting, but also the successful prosecution or defense of the entire matter.

IV. What should outside counsel do with the budget?

First, don’t ignore it. Do not put it in the file and forget about it. Most client guidelines require reporting on some frequency and some require detailed review of the budgets. Whether they do or not, calendar the budget to pull every three months and compare it with the billing. If the budget appears to be on track, fine. You might pick up the phone, or

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write a letter to the client and express to the client that the budget appears to be on track and that everything appears to be going according to plan. If it looks like the budget is going to be exceeded, or if the budget has already been exceeded, figure out why and then pick up the phone and call the client. Be sure that the client has an explanation in hand before the budget becomes a corporate issue. You need to put your client in the best position to answer questions from superiors. Always keep in mind that the person to whom you are reporting is seldom the President or CFO of the corporation for whom you are working. Typically your in-house counsel or client representative has a supervisor to whom they may be reporting or for whom they are preparing budgets. Questions posed to them which they cannot answer make them unhappy. One of the tenets of a successful law practice is trying to avoid making your clients unhappy. If your budget for the last three months has been exceeded because of some unforeseen cost or unanticipated proceeding, be sure your client has an explanation in his/her file and an amended budget to replace the former one.

Conversely, if the budget amount exceeds the billings, you might compare it with your work thus far to ensure that you are under-budget because of your efficiency rather than because you have not accomplished some of the tasks you anticipated accomplishing during the period. If the explanation is the latter, again, you should point that out to the client and advise why the billings have been below budget and that they might expect that the next quarter will exceed the budget to bring everything back into line.

The second use of the budget in a matter is more prospective. It is certainly not uncommon for circumstances to change between the time the budget is created and the end of the matter. New claims or defenses arise, new parties are added, new facts are discovered, new opinions are expressed by witnesses, new documents are located, new medical conditions occur, etc. There will always be times when the lawyers will anticipate the need or potential need to perform some task or incur some expense which was not anticipated at the outset, and thus does not appear on the budget. The adage that it is easier to seek forgiveness than permission may be true in a television marriage but it is not true in an attorney/client relationship, at least not where budgets are concerned. Here, it is better to alert the client in advance to a newly anticipated expense which is off budget so that the lawyer and the client can determine whether it fits within the litigation plan and whether it adds sufficient value to the prosecution or defense of the case to be warranted. That allows the client to document their file to establish that the matter was reported, considered,

and determined to be worthwhile such that the budget was adjusted by agreement. Mutual understanding is essential to effective budgeting.

None of the foregoing can be accomplished if the budget is completed as a form and buried in the file.

V. Where does outside counsel toss the budget after the case is over?

For all of the reasons described in the preceding paragraphs, it would be a great idea to compare the budget to the bills at the end of a matter. Did the case proceed along the approximate track mapped out by the lawyer and the client in the initial stages? If not, why not? Were there unforeseen matters that should be taken into account in future budgets? Maybe the basic assumptions used to formulate the budget need to be adjusted. Maybe it takes longer, and cost more to secure records than the lawyer and client anticipated, or maybe expert witness hourly rates have increased. Maybe opposing counsel was more or less aggressive than anticipated in terms of scheduling. Maybe it took less time to prepare client representatives for depositions than the lawyer thought it might. Whatever the reason may be, a review of the budget in a concluded matter provides information that might be utilized in creating the next budget, or revising budgets for those matters currently underway.

VI. Conclusion

Effective budgeting for outside counsel can be boiled down to the intuitively obvious: Communicate early and clearly your intentions for the case. What do you intend to do, when do you intend to do it, and how much will it cost the client? For in-house counsel or client, effective budgeting requires the same early communication. What are the goals of the client for the case and is the plan proposed by outside counsel consistent with those goals? Once created and agreed to, the budget becomes the map through which both in-house and outside counsel negotiate the course of the budgeted matter. While the route may change during the journey, the budget can help ensure that counsel and client travel together and that they arrive at the destination of choice without unnecessary spending along the way.

At the conclusion of the matter, the budget should be reviewed in detail by outside counsel and client to compare it to what actually occurred. This is unfortunately another of those tasks that might be accomplished in the "perfect world" and seldom in real life. Most often, when cases are concluded it is done at a time when other matters are pressing for both the lawyer and the client and the need is perceived to move

immediately on to other things. In the event time can be set aside to review the budget, especially with the client, the budgeting process might be easier and more meaningful in the future. When that actually does occur, however, the authors will be on the beach.

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