# Drafting Litigation Budgets: An Opportunity, Not a Chore

By Karen D. McDaniel

When I was a second-year associate, my then-mentor came into my office with a surprised look on his face and said, "M_____ wants a budget for this lawsuit." He stroked his beard and thought about it for a moment and said, "Why don't you come up with a draft and we'll go over it."

"But how am I to do that?" I queried.

"Well, just take the number of people on the case and the number of days we think this thing will take, and that will be the upper limit of what it could possibly be," he replied. So that's what I did. We refined it some and ultimately that's what we presented to the client. We did the best we could with something we had never seen before. In fact, I know a number of lawyers who still draft case budgets this way.

Following my experience with drafting my first litigation budget, I began to hear the term "litigation budget" more often. I recall a period of time where certain lawyers would braggadociously announce, "**My** case doesn't have a budget," as though this were something to be proud of. Admittedly, the bar didn't take kindly to being put on a budget. After all, we are **professionals**. Ours is an art, something that can't be reduced to numbers. As though to do so would be to diminish our position, destroy some of the magic. Or perhaps demystify the process. Make matters more understandable to our clients.

But, slowly, gradually, all that has changed. With the rising costs of legal services and the increasing sophistication of clients, litigation budgets have become the norm. Attorneys no longer go about bragging that they are not held to budgets; however, nor do they embrace them. Budgets have become an accepted fact of a litigator's life. One of the necessary evils of doing business. Today, many attorneys grumble about doing budgets. They think it takes away from valuable time that could better be spent managing the case. They wonder if they can bill for the time they spend creating a budget. They hurry through the process. Then they hold their breath, knowing that they are going to have to defend the costs to the client, and not looking forward to that exchange.

There is nothing I would like more than to cause at least one of you who reads this paper to completely overhaul the way you do budgets, including the way you think about them. You have to start with your attitude. Drafting a budget doesn't have to be a dreaded chore. It is an opportunity to have a high-level planning session about your case with your client. It is an opportunity to determine what your client wants and needs from the endeavor. It is an opportunity to get on the same page with your client so as to increase the likelihood that the client will be happy with your work. Very happy, because if done right, the client will have a much better understanding of what it can expect out of the process.

I don't mean to sound pedantic. I don't intend to minimize the issues inherent in setting a litigation budget. It is not an easy task. There are some massive unknowns, such as how to account for the activities of opposing counsel. After all, you didn't know

when you initially set the budget that they were going to march out Napoleon's Army. But there are ways to deal with this. I'll offer some suggestions later in this paper, which may not be cure-alls, but hopefully will give you some additional ideas on how to address the process.

**1) <u>What a Budget is to a Business Manager</u>**

OK, let's start with the basics. The whats and the whys. What is a budget and why do we have one? Let's think for a moment of how our clients run their businesses. Consider that everything that most sophisticated clients do is based on a budget. A budget is, simply speaking, a means to agree to business strategy and to obtain financing to execute the strategy. The manager who wants the money presents a budget to someone who has the authority to allocate money for the stated purpose. The one who wants the money must defend the budget to the one who has the power to grant the money. "Why do you need that much? Can't you accomplish the same result for less by employing a different and less expensive strategy?" Business managers will have a dialog about the issue, the result of which is probably a compromise between the one seeking and the one allocating the money. The seeker probably gets less than desired; the provider probably pays more than desired. But in the end, the compromise solution probably is close to right. And the important thing is that, in setting the budget, the seeker and the provider have engaged in considerable dialog about the subject, and likely come away from the process with a much better understanding of the issues facing the company on both a micro and macro level.

An important thing for us attorneys to keep in mind is that “push backs” on budgets are standard procedure in corporate America. Questions about how money is being allocated are necessary and important parts of the dialog. Please do not consider these questions to be a personal affront. View them as an opportunity to educate your client about the process. The client looks to you as the expert on litigation. If the client’s expectations are not in sync with reality, those expectations need to be adjusted or the client will not be happy with the outcome – even if you win your case. Remember the client is focused on what *results* it can obtain and at what *price.*

Also remember that budgets and strategies go hand in hand. A budget represents money allocated to a particular, detailed endeavor. The budget cannot be set in a vacuum. One must know what the money will be used for and how the money will be used. The budget is the money that is granted for the purpose of executing a particular, agreed upon strategy.

When I asked a CEO friend of mine what budgets mean to him, he replied, “No surprises. I can deal with high budgets, but I can’t deal with surprises.”

“Why not?” I asked.

“You have to understand that surprises come from all over the company, all the time. The total of all those surprises hits my desk. Then I’m called upon to find another $300,000 in my bottom line. That’s not easy. It forces some hard choices. Sometimes it means killing a business group that isn’t doing so well, but might be able to take off if just supported a bit longer. Sometimes it means going to all my business units and

asking them to ante up to pay the overruns. Sometimes it means closing a factory and laying people off. No, I don't like surprises."

We can draw the following conclusions about budgets:

- A budget is an iterative process whereby business people agree to strategy, the end of which involves allocating money to the particular endeavor.
- Setting a budget forces a dialog about how and why a company is allocating money in some ways and not in other ways.
- A budget dovetails with a strategy and involves questions such as:
- Defining what the business hopes to accomplish (minimum acceptable outcome and optimal outcome; i.e., alternative outcomes along the path)
- How the business intends to get there
- A finalized budget usually represents a compromise between the group seeking the money and the group providing the money.
- A budget is a means to reduce surprises.

**2) <u>Creating a Master Litigation Budget</u>**

While it is a useful exercise to review why business people use budgets, that will not help any of you draft your next litigation budget, so I'd like to turn now to a discussion of drafting a litigation budget.

Within one week of the date of this seminar, I encourage each of you to come up with the best master budget that you can. To get you started, I've created a skeletal budget for the plaintiff's side of a patent infringement lawsuit at attachment A.

My budget is three pages long, and represents the minimal detail acceptable, in my opinion. In your budget, include everything from soup to nuts, everything you can think of. Save it. Review it often. Every time you learn something new, go back and add that thought to the master budget. If your practice is broken into specific legal areas, you might wish to maintain subfiles of master budgets that are particular to the legal topics – such as antitrust, patent, trademark, etc.

**3) Tailoring the Master Budget to the Specific Case**

Each time a new case starts, go to your master budget. Think about the case in the context of the other cases you have handled. Come up with a realistic version of what you think will happen. You know what some of the issues in the case are. For example, you know where the witnesses are located. You know whether you are going to face a jurisdictional battle. You know whether there are two or seven patents in suit, or whatever the particular legal issues presented. You know whether you may have to depose the gentlemen in Alaska who may have the killer prior art. You know what the cost of discovery was in the last five suits you handled. Don't think that you can do this exercise once and roll it out again and again. You must revise it often. As you revise it, it will improve in terms of accuracy and depth each time you do it.

**4) "The Magistrate Judge Did What?" Or, the Court's Influence on Budgets.**

In recent years, Courts have become more proactive in managing caseloads. You cannot set an accurate budget without consulting the Local Rules and thinking about the influence the particular Court will have on the

discovery schedule. For example, does the Court limit written discovery? Is your budget drafted with that in mind? In a patent case, when does the Court conduct a Markman hearing? If it is at the beginning of the case, and clarity over claim scope is established early, the costs are likely to be less than if the Markman hearing is held just before trial. Also, what is the Magistrate Judge's disposition about discovery motions? If the Judge assigned to the case has a predisposition to "let it all in", you might consider bringing only the most essential discovery motions, thus reducing costs. Review and tailor your budget to the rules and habits of the Court in the specific jurisdiction where your case will be heard.

**5) <u>The Client's Goals Drive the Budget.</u>**

Your master budget that you have tailored to fit the facts of the case and peculiarities of the jurisdiction will give you a good starting point. But before finalizing the budget, I suggest that you have a meeting with the client to establish the client's goals in the endeavor. In the intellectual property context, for the IP holder, the questions to be addressed fall somewhat along the following lines:

- What are the client's objectives in the suit?
- Is the client willing to settle the matter, and if so, at what price?
- Does the client wish to license the patent at issue?
- Does the client wish to send a message to the market that it will enforce its patent rights?
- Does the client wish to take the particular competitor to task for its current (and possibly past) failure to respect the client's intellectual property rights?

The possible case objectives are widespread, and will vary significantly from case to case. These objectives *drive the budget.* For example, if the client wants an early settlement, a valid strategy might be to front-end load some of the costs to send a strong message to the opposing party that the (unstated) alternative will be a long and expensive fight.

### 6) What do you Mean, you can't Stop Them? (Or, Managing Client Expectations).

I have already made some comments about setting the client's expectations. I would like to add a little more to that discussion here. First, I will note my observation that many times, business people believe that the legal process can accomplish more than what it actually is capable of doing. I have had many discussions with clients who are frustrated with the natural competitive process -- they keep running up against a key competitor and now they want to stop them -- and the client erroneously assumes the legal process will quickly put that competitor out of business for infringement. But the legal process is not quick. It is not cheap. *Mostly, it is not designed to put competitors out of business.* At best, the legal process surrounding intellectual property rights is designed to protect limited rights in property. The standards of proof are rigorous. The legal process is not a remedy to be invoked lightly. Rather, it should be considered one of the last resort remedies available to a client. And if invoked, it is your job to counsel the client about what that process can and cannot do for them.

Second, I note that all too often, at the beginning of the matter, a client will experience an emotional reaction to the lawsuit – whether they have initiated it or received it. None of us, including clients, make good decisions in the cloud of an emotional reaction. If you sense your client is making an emotional decision, it is best to confront the issue up front. Also, make sure the decision to litigate is a decision of the organization, and not simply that of a scorned business manager. Of course, it is our ethical duty to zealously carry out our client's wishes, even if they are not rational. However, if the decision to litigate is an emotional one, and not a rational one grounded in solid business objectives, then it is unlikely that you will have a happy client in the end. Sooner or later, cooler heads will prevail. And someday, someone will be looking to find the accountable person. You don't want to be associated with the runaway litigation train in the CEO's eyes.

**7) <u>Don't Just Present the Budget Once and Forget About It</u>**

A common mistake made by attorneys is to complete a budget at a client's insistence, and then promptly forget about it. The client probably hasn't forgotten. Further, if you simply file away the budget, you lose future opportunities to educate the client about the lawsuit and to manage the client's expectations.

I would first suggest that you, as the attorney leading the case, have the responsibility to call the budget meetings. Don't wait for the client to mention it. Be proactive. This is your opportunity to communicate with the client about this important project. Second, I would suggest that you hold budget meetings at least quarterly. After all, litigation in district court is usually about a two-year process. A lot

can go off track in a two-year period. Third, I mentioned earlier in the paper that I would address the issue of reacting to surprises. If you are regularly meeting and reviewing the case and the budget, the opportunity for surprises is much diminished. Further, if surprises do develop, through the mechanism of frequent meetings, you can address those surprises. By addressing surprises early, the client gets to make a choice: a) either it can choose to combat the surprise and allocate additional funding to do so; or b) it can choose to forego engaging in some particular activity, and save some money. Maybe you've learned that those depositions in Tuskaloosa aren't likely to be that fruitful after all. Fourth, frequent meetings will also save you, the attorney, from surprises.

A friend of mine once described to me a case that could only be considered an orphan. The case was about a year old. Outside counsel was buried in discovery tasks, flying all over the country and working like a dog. The other side was fighting like mad. And the division in which the subject matter was located went apple-cart-upset. Gone was the marketing manager that started the lawsuit. Gone was the general manager who approved it. While the outside counsel was aware of the management changes, he could have had no idea of the impact. Six months later, when the dust of the departures settled, all the new general manager wanted to do was SETTLE. The great case the attorney had spent the last year and a half building was essentially bargained away for pennies on the dollar. The client no longer had the fire in the belly to support the effort. That case probably could have resulted in a better outcome for both the client and the attorney if there had been better and more frequent communication between the business managers and outside counsel.

**8) <u>Whose Budget is it, Anyway?</u>**

It seems really simplistic to say this, but I will say it anyway. MAKE SURE YOU MEET WITH THE PERSON WHOSE BOTTOM LINE IS AFFECTED BY THE LAWSUIT. Many times, as outside counsel, we report to inside counsel. We feel that if we keep that person happy, our job is done. While I don't intend to interfere with how a company seeks to structure its reporting, I think it is critical that outside counsel has an opportunity to discuss the litigation (at least the budget) with the business person whose bottom line will be affected by the endeavor. If your only contact is with inside counsel, there is a great deal of room for miscommunication, especially about money. There are positive ways to communicate to inside counsel the benefits of outside counsel obtaining at least an occasional audience with the businessperson. This will help outside counsel to avoid surprising the business manager. It should help that manager as well, because he or she will be able to better understand and defend to others the costs of legal action if you two are in frequent communication.

Also, when you have those meetings, you will of course report on status of the case. But don't consider the meeting complete until you have *reached agreement* with the business people about future strategy and costs.

**9) <u>Don't Even Think About Delegating this One</u>**

I know, you've practiced a long time. You've earned your stripes. You've finally created a team of hard-working associates who are available and loyal to you. And you think budgeting is a boring, low-level task. The perfect kind of thing to delegate. WRONG! Only you, lead counsel, can undertake the budget. You are the only one with

the knowledge of the client, the case facts, and the judgment and experience to draft the budget properly and to present it to the client.

Done correctly, your budget is a valuable case map that lays out strategy. It is one of the best communication tools to use with the client. You can talk about "summary judgments" and "equitable estoppel" all day long with clients and not get through. Money is the currency in which they speak. They may not understand a particular legal theory. But if you explain to them that you estimate it will cost $30,000 to brief that theory and present it to the Court, I bet they will ask some remarkably intuitive questions about the probabilities of success. We need to remember to speak the language of our clients, and not to expect them to learn ours. It is part of the job, indeed part of our duty, of providing them with excellent legal representation.

I also would like to make the case that you bill the time you spend in preparing and presenting your budget. If questioned by the client, you should defend this practice. Clients, you should *want* your counsel to bill for this activity. The reasons are obvious once stated : 1) budgeting involves intensive, high-level case planning; 2) it is an important task for the business in running its overall budget during the term of the lawsuit; and 3) attorneys should be motivated to give their best possible effort to the budget – and not to treat it as some nasty task that must be completed only at the client's insistence. Making the matter billable puts it in its proper perspective and ensures that the right motivators are working all the way around.

## 10) Conclusion

Litigation budgets are not going away. Rather than shying away from them, I urge you to consider how much better you could serve your clients if you fully embrace the concept of a budget. Think of it as your most valuable aid in communicating with your client and setting expectations. While clients hire us for our legal expertise, they expect that we will communicate with them in their language – value-based results.