



Counselors at Law

Page 1 of 3

“Managing the Small Ones (Alternatives to the Hourly Fee),” Under Construction
(American Bar Association “ABA” Journal for Construction Industry)
(February 1999)

by L. Stephen McCready, Esq.

Much has been written about the difficulty of managing construction cases where the amount in dispute is small, usually under \$100,000. It could be argued that this amount should really be higher or lower, depending upon the nature of a particular organization’s disputes, but for our purposes, let’s call it \$100,000. The problem for the in-house attorney managing these cases is both the potential cost in outside legal fees compared to the rather small range of expected outcomes and the amount of time necessary to properly manage each case. It just does not make economic sense to spend \$50,000 to reduce a \$100,000 case to a \$75,000 case. To make matters worse, the in-house attorney has to work even harder on strategy in order to keep outside expenses within reason.

The litigators will remind us that small matters must frequently be pursued because some important principal is at stake. You don’t want them to think you are a pushover, do you? I contend these cases are few. And our clients, who so passionately argued that “this is the case,” quickly lose their passion, and any memory of it, when confronted with a legal budget larger than the amount in controversy. For purposes of this article, assume there is no great corporate principal at stake.

Proposed solutions to the small case predicament frequently center around the avoidance of disputes, which I applaud, or alternate dispute resolution (ADR), which I champion. Every in-house legal practitioner should be well versed in both of these and should be doing everything possible in the areas of training, preventive lawyering, and ADR. But that’s a given. You can not even think about a trial for a \$100,000 construction case. Early case assessment and strict budget guidelines are also helpful, but how much can you afford to spend? Some propose limiting hourly rates. My experience with extremely low hourly rates is that you get what you pay for and it still takes more hours. Because I believe the key to success is in the relationships, I’m not even going to get into auditing of legal fees after the fact. Who was managing these cases that need to be audited, anyway?

I encountered the multiple small case dilemma while managing construction disputes for Simplex Time Recorder Co. (Simplex). Simplex is an international company based in central Massachusetts that manufactures, supplies, installs, and services electronic building systems such as fire alarm, security, access control, sound, and communication systems. The largest piece of the business involves fire alarm/life-safety systems. Fire alarm systems get roughed-in early but can not be completed until almost everything else is finished. They are also the final requirement for the certificate of occupancy. With this high visibility at a critical time, Simplex gets involved



Counselors at Law

Page 2 of 3

in more than its share of construction disputes. Some of these disputes are very large, but many of them are well under \$100,000.

Small cases are just as problematic whether you are the defendant or the plaintiff. As a defendant, what instructions do you give to outside counsel when you have been sued by a small specialty contractor for \$50,000 resulting from a multi-million dollar construction project? Collection cases, in the construction context, take on new meaning. Say you just completed a large project and the electrical contractor refuses to pay the last \$50,000 for some vague reason. Here, the small collection case almost always has potential counterclaims in the nature of a construction dispute. As the in-house counsel managing these cases, what steps can you afford to take? And how much time and effort can you put into it?

The solution to this problem that has worked for me is found in the relationships with outside counsel. We called it the "Preferred Provider" strategy at Simplex. You could also call it outsourcing. That is a popular term these days. It is really a combination of strategies with a focus on the relationships. The bottom line is to let your most trusted outside attorneys manage the cases. On their own nickel, of course! This is how it works: First, you reduce the number of attorneys working on your cases to a small number of great attorneys with whom you have a good professional relationship. These attorneys are promised all or most of the cases in their area, whether it be by practice area or geography. This is an important step in the overall process of making the legal function more efficient. By working closely with you over time, these attorneys get to know you and your business. Equally important, you and your managers get to know them. This step alone increases efficiency.

The large case work (over \$100,000) handled by your preferred providers is on whatever terms make sense under the circumstances. This is frequently hourly billing with early case assessments, real case budgets, and ADR. But there are two more pieces. In addition to the "good stuff," these preferred providers also agree to handle all of your small cases under alternative billing arrangements. Small, collection-type (plaintiff) cases are handled on a contingent fee basis. The contingent fee arrangement provides that they will receive from 10% to 60%, depending on the stage at which the matter is resolved. They can also decline to pursue the matter. They decide. Again, the relationship is critical. You must trust these people for this strategy to work. And they must trust you. If there is money to be made, the matter will be pursued and resolved. If it doesn't make economic sense to pursue, the matter will be dropped. And the in-house attorney is not left trying to decide how many depositions make economic sense, or what motions should be filed, without knowing all the facts of what may have been a very large and long-term project.

Finally, the small disputes, claims, and defense matters are handled on a fixed fee. You need some history to properly set the fixed fee. It is a good idea to have outside counsel track



Counselors at Law

Page 3 of 3

actual hours so the arrangement can be reviewed on an annual basis. The outside attorney is acting as a support function here to help the local project managers negotiate disputes and claims during the course of the project and after completion. They might help with letter writing, attend meetings, or just provide an opinion here and there. And you can let your project managers call them directly without fear of runaway legal expenses. Here the concept really is outsourcing. With appropriate staffing, this piece could easily be handled in-house. But by packaging this function with the others, you are able to maintain a smaller in-house staff with more flexibility in how you spend your legal dollars. Because this outside attorney is already heavily involved in your business, he or she is able to respond effectively to the needs of your project managers.

In addition, although not the most desirable work, the small matters give firms an opportunity to train young associates since you no longer allow them to bill you for this on the large cases. The in-house attorney is relieved of the burden of micro-managing these small matters and trying to justify case budgets. The in-house attorney is able to focus on the larger, more important matters, where a far greater impact can be realized from his or her direct involvement in the litigation or ADR. The in-house attorney is happier with the more interesting and satisfying work. The organization receives better value for its legal dollars - both inside and outside. And the outside preferred providers get a larger, more consistent, volume of work. The result is the highly desirable "win-win" scenario and it all comes back to the relationships.

I have utilized this strategy and found it to be very effective. I know many of the preferred providers are happy with it, too. They get a monopoly on legal work in a given area. The fixed fee work is predictable income. And they control the contingent fee work. One Simplex preferred provider who is very happy with the arrangement is Attorney Joseph McGuinness of the firm Joseph G. McGuinness and Associates in Los Angeles, a small firm that specializes in construction matters. Attorney McGuinness tells me that he is very happy with the relationship and I know Simplex is very happy with the great work done by his firm.

This is not the solution for everyone. You must have the trust-based relationships. You need the large volume of small cases and you need some big ones to make the package attractive. And still, many have been skeptical. But it worked for me and it is one more idea to consider as the paradigm for managing the corporate legal function continues to evolve.