

Value Practice:***Deconstructing IP Litigation Matters and Implementing Alternative Fee Arrangements*****David Bohrer****Confluence Law Partners****June 2009****Background**

A Silicon Valley supplier of hard disk drive manufacturing equipment wanted to bring a lawsuit to protect annual revenue of \$20 million on its flagship product against infringing competition-- but did not want costs and uncertainties that come with legal work done on a billable hour basis.

The company met with Confluence Law Partners (CLP), self-described as a boutique IP firm consisting of partners who recently left large worldwide law firms where they had handled major IP litigation. CLP says that it is structured to handle these types of matters on a flat fee basis, not by billable hours.

Deconstructing the Matter into Phases

CLP notes two immediate challenges to reaching agreement on a flat price for the litigation: The company needed to move quickly to prevent customers from locking in long term contracts with the infringing competition - there was less time than is normally available for early case assessment and budgeting; and this was the first time the company and CLP had worked together – it is harder to achieve the mutual trust that is crucial to reaching agreement on a fixed fee if there is not a pre-existing relationship.

The solution was first to break the matter into the following phases:

- early case assessment of likelihood of success on specific legal claims
- competitor notification and follow-up communications
- pre-litigation due diligence regarding collection and review of supporting evidence
- preparation and filing of the complaint and following litigation

The price for each phase was not set at the outset. Instead, by leveraging the knowledge gained over the course of completing the first two phases (30 days into the project), CLP and the company were able to set an accurate price for the due diligence phase. Upon completing the due diligence phase (45 days into the project), CLP better understood the company's business and goals for the litigation. Likewise, the company's extensive communications with the trial team over a five to six week period gave it a much deeper appreciation of what needed to be done to implement its goals. Based on their mutually improved knowledge and experience, the company and CLP developed a fixed price for the final litigation phase.

Methodology

In the course of implementing the phased pricing, CLP collected the following information and adjusted the price accordingly:

- Benchmarking against similar cases:
- Non-billable legal research on previous reported decisions out of the same jurisdiction for:
 - Additional information on likely case schedule;
 - Substantive or evidentiary rulings that could affect strategy
- Sales and other company business concerns affected by litigation
- Tendencies of opposing counsel
- Likely areas of expert testimony and potential candidates

Staffing

All work has been handled exclusively by two senior attorneys, both of whom have first chair patent and trade secret trial experience. This was recommended by CLP as more effective and cost-efficient than using a larger, leveraged team of a senior trial attorney, junior partner and one or two associates. The company agreed to the recommendation after providing input as to the specific trial attorneys that it wanted on the file. The engagement agreement confirms these staffing arrangements.

Communications/Technology

CLP has communicated with the company through continuously updated wikis on case schedule and factual development, and by copying the company on all trial team emails. CLP attorneys (special IT assistance was not required) developed the wikis on a secure web site using the commercially available WetPaint platform. There are separate wikis for case schedule that keeps everyone informed of important deadlines, a litigation drive sheet of projects and responsible attorneys, a list of the case issues and supporting facts, and a timeline of all relevant information. Administrative permissions were granted to the trial attorneys and company management, giving them editing rights. Other key personnel were given viewership access and the ability to make comments in discussion boards related to each page.

The wikis are inexpensive (there is no setup or access charge), easy to set up, keep everyone updated, leverage client knowledge of their business and industry, track new case advancements in real time, and are an effective tool (in addition to aggressive client copying on email communications) for coordinating case knowledge and communication.

Leveraging Relationships

The firm leveraged pre-existing vendor relationships to obtain low-cost and expedited collection and storage of company electronic data and documents.

CLP used a local electronic data vendor, who was willing to waive the minimums for what was to be a smaller collection. Within a few days of CLP's engagement, the vendor was brought in to work with CLP and the company on a document collection strategy that culled over

2/3rds of the collected electronic data before upload, processing, conversion and storage charges were incurred; the company paid approximately half of what the national vendors had bid for the same work.

Contact Information

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