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## JOURNAL

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### LITIGATION

Companies and their in-house counsel are under unprecedented pressure to stabilize or reduce litigation costs. Many are turning to intellectual property litigation cost control counsel to manage and control those expenses.

### Intellectual Property Cost Control Counsel—Addressing the Structural Components of Skyrocketing Litigation Costs



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**C**ompanies and their in-house counsel are under unprecedented pressure to stabilize or reduce litigation costs. Yet for companies whose business is driven by technology, intellectual property litigation is a critical and unavoidable component of doing business.

Stabilizing or reducing litigation costs has never been more difficult, but it also has become essential. Even when economic conditions improve significantly, companies will need to find new and effective approaches for controlling intellectual property litigation costs.

In recent years, companies have tried various techniques for cost control, such as alternative fee arrangements, monthly budgeting, and competitive bidding among law firms and vendors. In some circumstances, these techniques have achieved short term economic benefits for the companies who use them.

However, as the novelty wears off, these techniques often are found to be more cosmetic than real. For example, elimination of the billable hour has not necessarily reduced compensation to outside counsel—whether the measurement is billable hours, monthly agreed amounts, or discounted fees with a contingent performance-based upside, the cost of using traditional outside law firms has continued to increase. In fact, many companies that have flirted with alternative billing arrangements have found it beneficial to return to the billable hour.

Companies and their in-house counsel have increasingly realized that the causes of skyrocketing intellectual property litigation costs are structural, and the various alternative methods by which companies budget and formulate fee arrangements with outside counsel do nothing to address the structural causes of increasing litigation costs. The structural causes of increasing litigation costs can be addressed only by focusing on how the litigation is managed from start to finish.

The structural factors that drive litigation costs include, among others: (a) the scope of the litigation—what issues are being litigated? (b) the schedule for the litigation—is it on a fast track or slow track? (c) the scope of discovery—is it narrow and focused or a broad fishing expedition? (d) the conduct of the parties during the litigation—scorched earth warfare or cooperation among counsel for the parties? (e) the scope of motion practice; (f) the scope of expert testimony; and (g) the scope, duration and complexity of pre-trial hearings (such as *Markman* claim construction hearings in patent cases) and trial.

Achieving effective litigation cost control requires developing and implementing case-management strategies that address these structural factors. This requires the exercise of sound, independent judgment at all stages of the litigation by an experienced senior trial lawyer with a mandate to assist the company in controlling litigation costs.

Recognizing the cosmetic and ineffective nature of many of the traditional approaches to controlling litigation costs, companies are now turning to intellectual property litigation cost control counsel, or IPLCC, to lead their efforts to effectively manage and control the structural components of litigation costs. In so doing, companies have recognized that in most circumstances, neither outside counsel nor in-house counsel are well-suited for developing and implementing such strategies. The institutional interests of both outside counsel and in-house counsel often prevent them from effectively controlling the structural components of litigation costs.

Traditional outside law firms are organized in a way that prevents them from effectively controlling the structural components of litigation costs. Associates are evaluated in part based on the number of billable hours,

and partners are compensated based on the revenues which they generate.

The highest-paid partners in traditional law firms are the rainmakers. Effective control of litigation costs is often at odds with this system of economic incentives, because a reduction in legal fees will trickle down to a reduction in compensation for partners and associates.

While firms may attempt to convince their clients that they are committed to reducing legal costs by offering to engage in budgeting or alternative fee arrangements, and while companies may achieve short term benefits from such alternative arrangements, in the long run law firms have little or no economic incentive to effectively address the structural components of litigation costs.

Moreover, it remains the predominant cultural presumption within traditional law firms that their corporate clients want them to do everything possible to achieve victory, regardless of the cost. The traditional view—still dominant today, is that the legal fees charged by outside law firms are relatively minor when compared to the amount of money at risk for the company. And because the ability of traditional law firms to retain and expand their client rosters remains dependent upon achieving success, even today the culture of most large law firms does not lend itself to helping clients achieve effective litigation cost control.

For most companies, in-house lawyers also face institutional pressures that limit their ability to manage the structural components of litigation costs. Most in-house counsel simply do not have the time, resources, or litigation experience to engage in the proactive, aggressive oversight necessary to control costs. Moreover, in-house counsel often do not want to give senior management the impression that their department's legal budgets can be easily cut and, therefore, litigation cost reduction is not necessarily consistent with the institutional interests of in-house counsel.

In addition, effective litigation case management often requires deploying resources of the company (human and tangible) in support of litigation—deployment that is often resisted by executives and scientists. The political and bureaucratic constraints under which in-house counsel operate often inhibit them from requesting that senior management make difficult decisions necessary for effective litigation cost management.

In addition, in many companies, senior in-house counsel develop deep personal ties with senior partners in traditional law firms that have long provided legal services for the company. Senior in-house counsel and the company's long-term outside counsel often have navigated the company through difficult legal and political situations, and outside counsel "knows where the bodies are buried." In such circumstances, it becomes very difficult for in-house counsel to provide effective oversight.

Recognizing that neither law firms nor in-house counsel are in a position to effectively control litigation costs, companies are turning to IPLCC. Ideal candidates for IPLCC typically are senior trial attorneys with extensive experience in managing complex litigation of the type engaged in by the company (i.e., patent, trademark, copyright, securities, etc.).

IPLCC generally is expected to regularly identify options available for limiting litigation costs and, in so doing, provide in-house counsel and/or senior management the information and tools necessary to overcome structural and institutional barriers to effective cost

control. In most circumstances, IPLCC will be more effective if he or she reports directly to senior management.

In view of the need of many companies for qualified IPLCC, a small number of senior attorneys and boutique firms have begun to specialize in this area. Recognizing that clients may be somewhat skeptical about the value of retaining IPLCC, these firms often invite clients to test the value of using IPLCC on a trial basis by retaining IPLCC at discounted rates to conduct an initial litigation audit, during which time IPLCC typically review and analyze one or more ongoing litigations and make concrete recommendations.

The focus of such a review is on the structural components of litigation costs described above. In most circumstances, this initial review will achieve reductions in litigation costs that far exceed the amounts paid to IPLCC.

After this “audit,” many clients elect to retain IPLCC to serve on a continuing basis in connection with the matters that were the subject of the audit and/or other litigations. The proactive oversight provided by IPLCC will invariably result in cost savings that are substantially greater than fees paid to such IPLCC.

IPLCC and their clients typically find it productive to focus on the following structural components of IP litigation costs:

#### **1. Back-Loading and Frontloading**

A common approach by law firms to managing litigation has been to perform relatively little work during the early stages of litigation, and then play “catch-up” when facing deadlines for completion of discovery and trial. The modest legal bills received by clients in the early stages of litigation often lull clients into the false impression that litigation costs are under control, when in fact at later stages of the case clients find that costs explode because work has been “back loaded.”

IPLCC help clients to recognize that one of the most effective approaches to controlling litigation costs is to “front-load” some of the work, and conduct the litigation at a consistent pace that avoids the high costs associated with crisis management.

#### **2. Issue Selection**

One of the most effective ways to control litigation costs is to make judgments as early as possible concerning the issues that will be litigated through trial, and the nature of the evidence that will be necessary to prove the company’s case. This involves more than just determining which claims and defenses will be in the case—rather, this involves early stage determination of *how* those claims or defenses are likely to be proven.

IPLCC can help companies substantially reduce costs by assisting them in making these determinations early in the case, which then allows companies to avoid expensive discovery and motion practice concerning issues that may never need to be resolved.

#### **3. Motion Practice**

Motion practice, including discovery motions, summary judgment motions, and motions in limine, consti-

tute some of the most expensive structural components of any litigation. IPLCC can achieve substantial cost savings by assisting companies in avoiding wasteful and unnecessary motion practice.

For example, in most patent cases, the chances of obtaining summary judgment are very slim—in fact, in an increasing number of district courts, summary judgment motions are prohibited in patent cases without advance approval of the district judge. Yet traditional patent litigants frequently insist on flooding the courts with summary judgment papers.

Most of these motions often are doomed to failure. Indeed, it is not unusual for district court judges to summarily deny them without comment. Companies are well served by assigning IPLCC the task of providing oversight concerning whether they should expend the resources necessary to pursue summary judgment and other motions.

#### **4. Discovery**

Discovery is often the most expensive component of litigation. Controlling the costs of discovery requires a sophisticated approach for dealing both with opposing counsel and the court. While there is no one-size-fits-all solution, by appointing an experienced trial attorney as IPLCC, companies can achieve substantial cost-savings.

Among traditional law firms, the model often has been to view the discovery process as warfare—every discovery disagreement must be battled, no potential avenue for obtaining possibly useful evidence should be turned down, and every effort must be undertaken to protect the client from providing damaging or confidential information to its adversary. Thus, counsel for opposing parties endlessly debate the provisions of proposed protective orders, propound objections to virtually every discovery request made by an adversary, and after interminable “meet and confer” sessions, ask the court to resolve dozens of discovery disputes.

This traditional approach must be rejected if companies are to achieve effective cost control over discovery. Discovery should not be treated as warfare. It should be treated as a cooperative search for relevant evidence. Further, discovery should be narrowly focused on what the parties truly need to prove their cases at trial. If IPLCC can succeed in moving the parties toward this cooperative, narrowly focused approach, the cost savings can be substantial.

There are numerous other opportunities for IPLCC to assist companies confront structural components of litigation costs, including limitations on fact and expert depositions, efficient use of expert witnesses, oversight of outside vendors, and cooperation with opposing counsel and the court on scheduling and case administration issues.

The job of IPLCC is to provide aggressive, vigilant oversight on the structural components of costs at every stage of the litigation. By serving as the eyes and ears of senior management, IPLCC empowers senior management to achieve effective litigation cost control.