

LITIGATORS CORNER:

Are Alternative Fee Arrangements Better for the Plaintiff Than Contingent Fee Litigation?



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The cost of a patent lawsuit is climbing faster than a Saturn V rocket heading for the moon. A patent suit with one to twenty-five million dollars at risk increased in cost from \$1,499,000 in 2001 to \$2,000,000 in 2005, according to the AIPLA. That is a thirty-three percent increase in only four years. For larger suits, it's even worse. For a suit with more than twenty-five million dollars at risk — a common occurrence in patent cases — the cost increased from \$2,992,000 to \$4,500,000, a fifty percent increase in only four years.

According to the Bureau of Labor Statistics, the Consumer Price Index only went up about 5.8 points for the same period. Even the increase in cost of medical care was measly by comparison, with only a gain of about nineteen points in the same time period. What you could buy for a dollar in 2001 would cost you a dollar and ten cents in 2005, according to

the Bureau's inflation calculator — unless what you were buying was a patent lawsuit. Large trade secret cases doubled in cost. About the only thing that has gone up as much as the cost of a patent or trade secret case is the price of gasoline. Maybe there's an OPEC for lawyers.

Lawyers who bill by the hour in larger firms are making good money on patent lawsuits. The AIPLA says that when the firm has more than one hundred and fifty lawyers, the third-quartile for a lawyer's total gross income in 2004 was \$1,000,000, more than double what is earned in a small firm of six to ten lawyers. The next closest total gross income listed was \$675,000 for firms with 51 to 100 lawyers. The hourly rate for the large-firm lawyer was \$550. In 2004, in small firms with 6-10 attorneys, each attorney billed an average of 1780 hours. The same year, large firms with over 150 attorneys billed an average of 2004 hours per attorney. I find it tough to imagine that the large firm lawyer works five and a half billable weeks more than his small-firm counterpart. Maybe associates do, but not partners. Total billings for firms having more than one hundred lawyers (33 firms) were \$392,500,000.

There is a lot of pressure for lawyers to make money. Justice Breyer noted that "law firm salaries have grown exponentially" and that new lawyers have to repay student loans of \$100,000 or more. See the *ABA Commission on Billable Hours Report*, 2002, page vii. The *Report* says that billing by the hour "fails to promote a risk/benefit analysis," and "promotes duplication of effort by not providing any incentive to limit the number of lawyers participating at a given event." See page 6. I would go farther: billing by the hour is an incentive to duplicate services.

The *ABA Report* said that hourly billing causes excessive hours, "due to incompetence and inefficiency," which are billed to clients, and encourages "profligate work habits." I recall a claim construction hearing last year where the judge completed his call, which was longer than normal because he had just returned from a trip. He asked for anyone in the courtroom who hadn't yet been called, and who was not there for our hearing (the last item on the call), to raise his hand. No one did. He asked in an astonished tone, "You're all here for the claim construction hearing?" Then he began counting. There were twenty lawyers present: two for our side, and eighteen for the three defendants, two of whom claimed to be indemnified by the third. I estimate that lawyers fees for attending that hearing cost the defendants at least \$100,000.

This duplicative and wasteful approach isn't isolated. In my September, 2001 column, *Don't Hire the Law Firm; Hire the Lawyer*, I described how a large Chicago firm piled lawyer upon lawyer in a case, including one who read a book at a deposition. In my August, 2005 column, *Who Says Contingent Fee Lawyers Are the Biggest Money-makers?*, I described a telephone conference call including seven lawyers representing a single defendant. I was by myself, except for one of my partners, who joined me on the call for 45 minutes. In the same column, I also described a status conference where I appeared by telephone, while one of the defendant's attorneys traveled over 1000 miles, from Los Angeles to Minneapolis, and did nothing but introduce himself. This in-person appearance most probably cost the defendant two days of billings, a round-trip airline ticket, a hotel room and several restaurant meals.

There's a good deal of discussion of the DuPont model, which supposedly reduces litigation costs. DuPont apparently decided that it would funnel its work to a few selected firms. In exchange for the continuing work, the firms agree to a fee structure where they share "risks as well as rewards." The DuPont model

gets mentioned in legal publications a number of times, most often in very positive terms, but usually with a lack of details and a lot of glowing platitudes, including phrases like “shifting paradigms,” “promoting teamwork,” “Six Sigma methodology” and “leaping into the future” — all phrases which one of my partners would disparage as “lacking informational content.” Some of the descriptions of this model are unintentionally hilarious. One article in the August, 2005, *ABA Journal*, “Thrifty: Law Firms are Still Learning How to Hold Down Litigation Costs to Please Corporate Clients,” says that part of DuPont’s model is to save money by making its law firms buy its carpeting.

Another article in *The Metropolitan Corporate Counsel* describes how a lawyer from one of the DuPont firms is trying a case. Each night, he would have a telephone conversation with a lawyer from another firm. That’s the sort of preparation that should have been done before trial, not during. The same article includes a description of meetings and “sitting down and talking” and “teams.” This is the grist Scott Adams uses for *Dilbert*. I wonder how much the corporate client has to pay for people talking about things and making strategic plans, as opposed to actually doing something. Maybe it works, and works well, but one cannot tell from these articles. I guess I am skeptical.

DuPont’s website lists forty-two “primary law firms,” as well as “ten Services Providers and a select group of consultants.” It gives awards out, too, sort of like merit badges. Alternative billing plans are frequently mentioned, but without details, so it is hard to judge how much is really being saved. More to the point, I haven’t seen how a DuPont model deals with the problems inherent in hourly billing, as described by the ABA. The details don’t appear to be published, only the glowing praise. DuPont’s web site offers a book on the subject. I might have bought it, but it was seventy-five bucks, and I figure that if DuPont wants to encourage law firms to reduce their costs, it ought to give the book away,

especially since it is such a good ad for DuPont.

Many writers and some law firms talk about or promote hybrid billing. A hybrid billing plan can be very expensive. Suppose a firm offers to cap its fees at \$50,000 per month, with the hours in excess of the cap not billed. Further assume that a favorable result requires that the firm be paid some multiplier (for example, four), of the value of the hours in excess of the cap. Suppose that the total billings by the firm are \$4,000,000, and that the case lasts thirty-six months. The client would pay \$1,800,000 of the fees — that is, \$50,000 per month for thirty-six months. The remainder, \$2,200,000, goes into the multiplier fund. Now, suppose that the client recovers \$20,000,000. The law firm would have already received \$1,800,000, and would get another payment in the amount of four times \$2,200,000, or \$8,800,000. The firm’s total recovery would thus be \$10,600,000. That is fifty-three percent of the total recovery! If the client loses the case, it has paid \$1,800,000 for nothing, since the law firm gets \$1,800,000 — win or lose. Hybrid schemes thus shift the risk to the client. Guess who likes that result?

Contingent fee representation avoids the pitfalls of hourly billing, and offers more advantages than hybrid billing schemes. First, the client pays no fees at all if it does not prevail. Contingent representation is superior to normal billing and to alternative billing schemes in that respect. Second, any fees that are paid are proportionate to the result achieved. Again, contingent representation is far better than normal hourly billing or alternative billing plans. Third, the law firm has no incentive to continue the case for the sake of billing more time.

One of the supposed advantages of the DuPont model is that it does a better job of the “assessment of benefits against costs.” See *Fortune*, May 15, 2006, page 2. That is a main advantage of contingent fee representation. As I have said before in past columns, the contingent fee lawyer has every reason to assess the prospects of the case, including what can

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be achieved by settlement, at an early stage. That lawyer has a disincentive to continue a case whose prospects for success dim for any reason along the way. Contingent fee representation creates the incentive to do the risk/benefit analysis that the ABA said is lacking in hourly billing.

Law firms doing contingent fee work don’t duplicate effort. They have the incentive to avoid duplication that the ABA says is lacking in billable hour plans. They send two lawyers to a claim construction hearing, not a platoon. They send one lawyer to a deposition, not half a squad. Given the risks inherent in patent litigation, the best route for a client is contingent fee representation.

For many smaller clients, especially independent inventors, contingent fee representation is the only way they can possibly enter the courthouse. Even though companies employing attorneys who use the DuPont model or other hybrid fee plans may save money doing so, they are still spending handsomely on legal fees. A discount on an hourly rate of seven or eight hundred dollars an hour is still more than five hundred dollars an hour. That is simply not affordable to individuals and even small companies.

To me, companies who are plaintiffs in patent infringement suits don’t save money with these alternative plans. They waste it. They can only say that they waste a bit less than other companies who follow tradition and pay by the hour. 