

# LITIGATORS CORNER: Don't Hire the Law Firm: Hire the Lawyer



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A friend asked me the other day which law firms I respected. I told her "None." She said, "Seriously?" I said "Yes." She asked why. I told her that a smart client hires a lawyer, not a law firm. If you and your client are smart, you will do the same thing in any lawsuit, whether the suit is done on a billable or contingent fee basis. Think about it: Do you respect all the lawyers in your firm to do all kinds of IP work equally well? Of course not. Some are good at prosecution, some are good at litigation, and others — well, we won't go there.

But my friend's question got me thinking. How should one choose a lawyer? There must be some criteria for choosing an attorney, and these criteria will be even more important in contin-

gent fee litigation, because with contingent fee cases, it is especially important not to waste time and money. I'd like to touch on a few of these criteria in this article.

First, if you want an engineer, hire an engineer. If you want a lawyer, hire a lawyer. I have seen some clients who want their lawyer to have as much technical expertise as they themselves have. That simply is not possible. The client should be looking for someone who is talented in discovery, in writing briefs, in negotiating, in dealing with judges and juries — and who also has enough experience and intelligence to understand the technical issues in the case. For example, if you have a computer-related patent, do not hire a lawyer simply because he or she has a computer science degree. The same is true for other technical disciplines. Of course, some patents may be so technically difficult that the lawyer must have intimate technical knowledge. But that is the exception. Technical expertise is an asset, but much more is required in finding the right lawyer.

Next, don't hire a firm simply because it does intellectual property work. What kind of IP work does it do? Prosecution? Litigation? Both? In our firm, there are really only one or two lawyers I know who are adept at handling both prosecution and litigation at the same time. But they are the exception. Most lawyers are clearly better at one or the other. So, help your client choose the attorney who has the skills to do the kind of work that needs to be done: litigation.

Third — and this is one of the main points of this article — be wary of hiring a big firm because of its big name. In other words, do not assume a firm can do the job just because it is big and well known. Don't get me wrong; I know

lawyers at large firms who are outstanding lawyers, and whom I am happy to recommend. But when I do make such a referral, I send the client to a particular lawyer, and not to the firm as a whole. It's true that big law firms can offer a lot of resources. But they also frequently impose great expense, because they have very high overhead. I am thinking particularly of the price war that broke out in the last two or three years, with big name firms paying new associates, fresh out of law school, more money than federal judges make. Associates with no experience are now being paid \$140,000 a year! (I wonder if some Silicon Valley law firms are now regretting these salaries.)

The expense that results from inefficient representation by a large firm can be crushing. In one of our cases a few years ago, the defendant was a family-owned company with annual sales in the low hundreds of millions of dollars. The defendant retained a large, well-known law firm to represent it in its patent litigation. This large law firm could have organized its lawyers into teams working on various aspects of the case. For example, two lawyers could have focused on paper discovery. Two more could have concentrated on depositions and third-party discovery. Two more could have addressed damages issues. Or the teams could have been organized into an offense and a defense. There were any number of plausible schemes that could have been employed to best utilize the large numbers of lawyers that a big firm has.

But, unfortunately, this did not happen. Instead, the big firm played it like the last decade's Bears: confusion and disorganization were the order of the day. (I used to be a football fan). The law firm did not use its size to the advantage of its client. At different times, up to seven different lawyers worked on the defendant's case, frequently overlapping with each other. Multiple lawyers from the law firm pursued the same topics, calling us, the plaintiff's firm, about the same things. Not one lawyer seemed to know what the others were doing.

Multiple lawyers attended depositions. (One of them even read a book during a deposition!) They didn't pile on the opposing quarterback; they piled on their own client who, I suspect, could not afford the expense. It was like a football team with four quarterbacks and seven wide receivers — no guards, tackles, or ends.

They did apply teamwork to one thing: they quit as one. When the client got smart and replaced them with a smaller, leaner law firm, all seven of the big firm's lawyers signed the motion to withdraw.

In another, more recent, case, I was participating in a telephone conference regarding a joint claim construction statement in a patent case. Our client was represented by me and, for part of the conference, one other lawyer. The defendant was represented by seven lawyers during the one telephone call. Two of them did almost all the talking; I have no idea what the other five were there for.

An advantage that should inhere in a big firm is that nothing gets lost in the cracks, because there are people to cover everything. But that may not be the case, either. In another of our cases where the defendant retained a large firm, the firm twice failed to file a timely notice of appeal. The rules for timely appeals are sometimes tricky. One would think, however, that a big firm with a big docketing department would be on top of all of this.

There is a natural tendency for big organizations to use their size; the army has to be kept busy or it gets crabby. This tendency to throw bodies at a case is not unique to law firms. It can occur in any large organization. In some of our cases where damages expertise is necessary, we have on occasion worked with large accounting firms. In such a firm, "The Person Who Will Be the Expert" is usually supported by a number of background people you don't even know about until you see the bill. I am a hands-on guy; I like the damages expert to have gotten his hands dirty, and to have done some real number-crunching. And despite the

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expense of using a big accounting firm, we got less than the best work in one of our cases. Our expert was criticized by the judge for using an interview technique instead of a regression analysis to explore damages in various what-if scenarios common in patent cases.

Another good guide to picking a lawyer is to get someone who has actually been inside a courtroom. Anyone who has spent time in a trial knows that the amount of discovery accumulated in modern lawsuits is too much for anyone to digest — regardless of intelligence. To me, one of the real benefits of contingent fee cases is that discovery is and must be focused. We contingent fee lawyers do not waste our time, because our resources must be husbanded and because time is valuable. We let the other fellow run around and waste his money.

There is an inherent reluctance on the part of lawyers to tell a paying client that some item of discovery isn't worth pursuing. We are always concerned that the discovery not taken will

be our client's undoing. Therefore, when hiring a lawyer, look for some actual trial expertise. There are lots of litigators out there who have never been in a trial that requires an economical, efficient and comprehensible presentation of evidence.

Last, consider hiring the lawyer who will take your client's case on a contingent fee basis, even if he or she has the ability to pay hourly. A lawyer who isn't being paid by the hour is wonderfully focused on achieving a result, rather than engaging in litigation, which, as someone I can't remember said, shouldn't be immortal.

The bottom line is to pick the lawyer, and ignore the herd. Pick someone primarily for his or her legal expertise, and only secondarily for the technical background. Hire someone who has been in a courtroom for something other than a motion call. Find a lawyer who is willing to avoid taking all the discovery in the world. 