



The True Cost of Litigation

By Mark Mazarella, Mazarella & Mazarella LLP

I was fortunate to have had some wonderful mentors over the years who imparted many memorable words of wisdom. Probably the one observation I have repeated more than any other came from one of my former Luce Forward partners, Jerry Davee, who told me to never forget: "Every case starts out about 'principle' and ends up about 'principal,' but somewhere along the line, the spelling of the word changes." It is generally true that the attorney's fees are the single greatest cost of litigation. But they are not the only cost.

Unfortunately, most of us are not likely to educate potential clients about the many costs of litigation, which can be much greater than any attorney's fees the client pays us. As "counselors at law" we have an obligation to provide prospective clients with the facts they should consider before proceed headlong into what may be years of litigation. That obligation is greater than simply providing the potential client with an assessment of the legal merit of their case. It is an obligation to counsel them about all the costs which they will pay along the way to the courthouse.

What follows is my list of "The True Cost of Litigation" which I discuss with prospective clients. Discussing these issues with potential clients is not just good lawyering—it is good business. To be sure, if done effectively, it will result in talking a lot of clients out of litigating. But clients who do not know what to expect up front are likely to be unhappy clients when they become enlightened years later. And, those clients whom you spared the trauma of litigation may become your best referral sources.

Attorney's Fees and Costs

Attorney's fees are generally the only "cost of litigation" that clients consider when it appears that litigation is in their future. Most clients know that lawyers are expensive, but they do not have a clue about the amount of attorney's fees that can

be incurred in litigation, especially in protracted and hotly contested litigation. And they often do not even think about the "costs," which also can be considerable.

Minimizing the amount of attorney's fees and costs that likely will be incurred in a case is not just unfair to the client, it is also an invitation to disaster from the lawyer's perspective, especially for litigators. No lawyer wants to have a large unpaid bill, a fast-approaching trial, and a trial judge who does not have a date available for months to hear a motion to withdraw. And most of us are aware that the fastest way to become a defendant in a legal malpractice case is to seek to recover fees and costs from a client. As a result, most lawyers talk to prospective clients about the economic cost of litigation. The smart ones ask for substantial retainers, knowing that if a client isn't able or willing to make the financial investment in their services when they are trying to persuade a lawyer to represent them, they are not going to be any more likely to pay their lawyers after they are committed.

Opportunity Costs

Clients can save themselves a lot of money (and save their attorney a lot of unrewarding work) if they personally contribute necessary time to their case. I tell my clients that they can review and organize their documents better than someone in my office can, and for a lot less. They know the facts better anyone in my office, and with a little instruction on what to look for and how to organize what they find, they will do a better job making sense of a box full of loose paper or hundreds of emails. This important work can take days or even weeks of their time, but will result in substantial savings.

I explain what written discovery they should anticipate, which may require a lot of time to answer. I tell them they will need to prepare for and attend their own depositions, and if possible, the depositions of other witnesses. This too will take time, a lot of time.

Continued on page 2

The True Cost of Litigation | *Continued from page 1*

Clients have lives beyond litigation. Time devoted to litigation has to come from somewhere. There is always an opportunity cost. If a client has a business to run, ask how the business will suffer if the client's attention needs to be turned elsewhere. Maybe a client wants to start a business, or go to school to advance their career, or write the great American novel, or travel, or spend time with their spouse, children, grandchildren. Will the demands of litigation cut into their exercise routine, their weekly golf outing, or poker game? Ask what will the client need to give up. You need them to be invested in the litigation. If they are not willing to make that investment, you—and they—need to know that fact upfront.

The Pursuit of Happiness

The pursuit of happiness was valued enough by our country's founders that it was inserted in the Declaration of Independence to be right up there with "life" and "liberty." I had an elderly and very wealthy client who was the plaintiff in a case with eight-figure damages, clear liability, and a *lis pendens* recorded against an \$8.5 million asset. Several months before trial, he was stricken with a serious illness. After he recovered, he called me and said: "Settle the case for whatever you can. I'm not going to waste one more day of however many I may have left on a lawsuit." Every client should think about how much of their quality of life they are willing to surrender to the mercurial gods of litigation.

Is Everyone Onboard Who Needs to Be Onboard

Relationships will suffer from the cost, time commitment, and emotional strain of litigation. Time, money, and energy that otherwise would be spent on relationships is high on the list of critical "opportunity costs" that need to be considered. Important relationships will always suffer some degree of wear and tear because of litigation. But the degree of damage will increase substantially if those involved are not equally prepared to pay the costs of litigation. Whatever problems appear up front can be expected to grow with every bill paid, family event missed, and sleepless night. If you detect your clients, or those whose support your client will need, do not see eye-to-eye on the approach to the dispute, do not ignore it. Discuss it with your clients and those whose support they will need to make it to the finish line.

Litigation is Hazardous to Your Health

Most clients obsess about their cases. Many do not sleep well. They all will have periods of increased anxiety, stress, and perhaps even depression. They may gain weight, lose

weight, increase consumption of alcohol or drugs, decrease consumption of healthy food, or stop exercising. Nobody needs to commission a study to determine if litigation is good for your health. It is not. The only question is, "how bad is it?" Young healthy clients may be able to withstand the rigors of litigation better than older clients or clients with preexisting conditions that could be worsened by stress and anxiety. But no one is immune to these hazards, it is just a matter of degree.

Payment of the Adverse Party's Attorney's Fees and Costs

Clients generally walk into a lawyer's office convinced of the merit to their case. They are not considering the possibility of losing, let alone losing and being ordered to pay their antagonist's attorney's fees and costs. In all cases costs are awarded to the prevailing party. Those can be significant, especially if there are a lot of experts, and the other party has perfected the right to recover expert witness fees with a CCP Section 998 offer. If a contract is involved, the potential for paying the opponent's attorney's fees can present a huge risk. If you do not candidly discuss this with your potential client (and confirm your discussion in your engagement letter) you are doing both your client and you a disservice.

Burned Bridges

It is usually safe to assume that once two people have duked it out in court, they are unlikely to kiss and make up. Clients need to consider what bridges will be burned as a result of litigation. The damage may go beyond the relationship between the litigants. Other friends or family members could "take sides." The client's future business prospects or existing customers may be impacted. Reputations may suffer. Clients need to consider this before they throw down the gauntlet.

Shattered Dreams

Another of my mentors, Bill Ravin, taught me to ask clients: "What do you hope to get out of the litigation?" If they want redemption, they should talk to their pastor, priest, rabbi or other spiritual guide. It will be cheaper, and more likely to make a difference. If they want revenge for some wrong done them, it is doubtful that you will be able to satisfy their blood thirst. In the end, you are likely to be their next target. What we lawyers are able to deliver must be capable of being reduced to a written judgment. If your client expects anything more, they are bound to be disappointed.

Continued on page 3

The True Cost of Litigation | *Continued from page 2*

The Fatigue Factor

Cases can take a long time to get to trial. Then, there is the potential for appeal. Litigation is a marathon, not a sprint. Clients should not start something they are not willing to see through. That does not mean every client should be prepared to go to trial if need be. The client may not be willing to do that. That does not mean the client needs to wave a white flag. The game plan may be to engage in some amount of discovery and then seek to mediate a settlement. What is important is that the client is realistic about how much pain they are willing to endure, and you are realistic about the possibility of effecting an end game that concludes before your client has reached the limit of their endurance.

The Bottom Line

We have a tough job. It is stressful, demanding, sometimes contentious and can occupy way too much of our thoughts when “off work.” But it is a walk in the park compared to the job of “litigation client.” Clients need to understand that litigation is not an activity that they will be able to easily pigeonhole and then carry on with the rest of their lives as if the litigation did not exist. For as long as the litigation is pending, and potentially for a long time afterwards, the litigation will be front and center in their lives. They may not have any realistic way to avoid that result; or they may be willing to endure it because of their personal cost/benefit analysis. Our job is to do what we can to help them evaluate the true costs, and the potential benefits. A client who has decided to retain you after considering the true costs of litigation is much more likely to be a satisfied client.



Mark C. Mazzarella is Owner/Founder of Mazzarella & Mazzarella LLP. Over the past 42 years, he has tried over 90 cases from San Diego to Washington D.C., mostly before juries, but also before judges and arbitrators