

# Managing litigation costs

How to make a difference on the bottom line **Interviewed by Leslie Stevens-Huffman**

**E**scalation in the hourly rates charged by attorneys, experts and court reporters has driven the cost of litigation up. This makes the need for pragmatic decision making by CEOs vital — especially when it comes to deciding if “having your day in court” is the best way to handle business disputes.

Using an average cost of \$400 per hour for attorneys’ fees and the customary charges for court reporting services, a one-day deposition taken from a single witness in preparation for trial can cost \$5,000. While the trial itself may only last a few days, most of the costs associated with going to court revolve around all of the discovery and preparation needed to actually bring the case to trial.

“It’s vital for CEOs and other executives to really conduct a thorough cost-benefit analysis before deciding if they want to litigate a matter, and they need to have a cost estimate based upon winning or losing the case,” says Richard A. Heller, partner with Procopio, Cory, Hargreaves & Savitch LLP.

*Smart Business* spoke with Heller about how CEOs can manage these costs.

## What makes litigation expensive?

Clients have played a role in attorney rate increases. While clients don’t want to be charged above-market hourly rates, they often correlate an attorney’s capability with the rates he or she charges. This assumption may not be accurate and it could result in overpaying for attorneys’ fees. I also recommend a process that I call reverse engineering the litigation budget. Before deciding if you want to take a case to trial, request a full disclosure of all immediate and long term litigation costs. While trials aren’t cookie cutter, you should be able to get a fair estimate of the total cost from your attorney, so you can make a pragmatic business decision.

## What is the client’s role in managing litigation costs?

The client needs to be engaged and maintain a proactive posture from the outset.



**Richard A. Heller**  
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Inquire about the outcome of various steps in the litigation process, such as the result of hearings conducted on pre-trial motions. E-mail is a cost-effective way to get updates about the status of your case, and staying involved keeps attorneys on their toes. Also, while you don’t want to nit pick invoices, you certainly want to review them. Look at the trends and keep a running tabulation of the total costs of projects so you can continue to track actual expense versus budget. Also, note how many attorneys are billing on the matter. Each time you bring in a new lawyer, he or she needs to get up to speed on the case, which generates billable hours.

## Is mediation an effective alternative to litigation?

I have observed that clients frequently have the notion that if they propose mediation to settle a matter that it’s a sign of weakness. As a 32-year litigator, I don’t see it that way. When used at the right time, mediation can be a cost-effective solution to disputes. The key is proposing mediation when you have conducted enough relevant discovery to begin to project an outcome for the case and to allow both sides a

clear understanding of the issues, but before the cost of conducting full discovery is incurred. It also allows diversion of funds earmarked for trial costs to be used toward settlement of the matter. The thing to remember about mediation is that the process itself doesn’t decide who was right and who was wrong, and participation is purely voluntary. This is where pragmatic decision making comes into play, because success is not always about being right — it’s about how little you have to pay.

## When should arbitration be used as an alternative to trial?

Arbitration used to be considered the cheaper, faster alternative to trials, but today that may be changing. Arbitrators are independent judges who can make rulings as to who wins or loses the case, but those rulings do not have to follow the law and they cannot be appealed. In addition, more discovery is allowed in arbitration these days, which doesn’t do much to reduce litigation costs. And arbitrators can charge up to \$1,000 per hour.

## Aren’t litigation costs paid by the losing party?

Frequently disputes occur over issues governed by business contracts, and unless the contract contained a provision stipulating that the winning party can recover attorney’s fees, you will be unable to do so in California. Clients sometimes mistakenly think that it’s better not to settle a case because if they prevail, they’ll recover attorney’s fees. Knowing if it will be possible to recover attorney’s fees is all part of doing your homework and should be part of your cost benefit analysis before deciding if you should take a case to trial. More facts and less emotion make for good litigation decisions and better managed costs.

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