Litigation Budgets in Non-Compete Cases

Insights
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Litigation budgets can be difficult to prepare under the best of circumstances. Budgeting for non-compete litigation, with its unpredictable nature and often front-loaded cost structure, is even more difficult. Although many factors are outside the control of parties and their counsel when it comes to litigation costs, the litigation strategy you choose can have a particularly significant impact on your budget in a non-compete case. Moreover, given the fast pace of non-compete litigation, there is an increased need to continually reassess your budget early on as developments unfold.

Litigation Budget Uncertainties

In-house and outside counsel alike understand the imprecise nature of budgeting for litigation. It is difficult to predict with exact precision the magnitude or cost of the work required to bring any particular case to a final resolution. This is true because the work necessary to litigate any matter is subject to a variety of independent factors not fully under the control of the parties or their counsel.

These well known factors include (but are far from limited to): the extent and nature of discovery sought by the other parties; the number of, and extent of preparation required for, depositions and preparation of witness testimony; the nature and extent of electronic discovery and computer forensic work that may be required; whether you or opposing parties decide to engage an expert; the timing of any settlement discussions; the manner in which the defendants may choose to defend

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against your claims (for instance, by filing a multitude of motions), or the counterclaims they may assert; as well as the discovery, hearing schedule and briefing required by the court; and many other factors that may be difficult to predict or control.

These issues become even more challenging in preparing non-compete budgets in part because judges have remarkably broad discretion when it comes to the procedures they require. Some judges will decide motions for temporary restraining orders on the basis of briefing and/or quick oral argument only, while others may require extensive argument or even an evidentiary hearing. Some judges may permit expedited discovery in aid of a preliminary injunction hearing, while others may not. Some judges may require detailed proposed findings of facts and conclusions of law for preliminary injunction hearings, and others may simply ask for post-hearing briefs. Depending upon how quickly a court schedules a hearing, deposition costs can multiply if expedited transcription is required.

And the complications don't end there. Because requests for injunctive relief rest within the sound discretion of a court sitting in equity, non-compete plaintiffs can bet that defendants will raise many fact intensive defenses with the aim of convincing the court that equities favor the denial of relief – for example, pursuing discovery on arguably related matters in support of an unclean hands defense. Moreover, because the law concerning restrictive covenants often varies dramatically (and sometimes varies dispositively) from state to state, defendants frequently challenge a plaintiff's choice of venue by moving to dismiss or transfer a case, or by filing a separate action in another jurisdiction, which could result in two parallel legal proceedings for some period of time. As a result, actual fees and costs in non-compete cases can vary dramatically from what had seemed like entirely reasonable pre-litigation estimates.

Approaching Your Non-Compete Litigation Budget

Does all this mean that in-house counsel and their law firm colleagues should throw up their hands, skip the budgeting process and just hope for the best? Absolutely not. The key is to recognize what parts of non-compete litigation are in a party's control, and what parts are not, and then to make realistic projections with the understanding that they likely will need frequent updating as the case evolves.

Although a good starting point for most litigation budgets is to divide the case into phases and estimate the fees and costs associated with each phase, this approach may be especially difficult in a non-compete case. As noted above, non-compete cases are front loaded with litigation activity. Consequently, non-compete plaintiffs must make early strategic decisions that will affect the pace and extent to which fees and costs are incurred, and the decisions of the court (e.g., granting or denying a temporary restraining order) will impact costs and the pace at which they are incurred. Non-compete plaintiffs should begin by deciding the manner and pace at which they intend to litigate the case. For example, will you be seeking injunctive relief or damages only? If you are seeking injunctive relief, will you move for a temporary restraining order on an expedited basis or a preliminary injunction? Will you seek expedited discovery? If so, to what extent? Depositions?

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Documents? Electronic discovery? Interrogatories? Open communication and candid assessment of the costs and benefits of these procedures, in light of the harm being suffered and/or the potential value of a recovery, should inform the decision-making process.

Assuming a typical non-compete case involving a request for preliminary injunctive relief, an estimate of fees should take into account the following litigation tasks:

- Pre-Complaint investigation
- Preparing a Complaint
- Preparing injunctive papers (typically, a motion for preliminary injunction, a memorandum of law in support thereof, a proposed order, and one or more affidavits in support of the motion)
- Preparing a Motion for Expedited Discovery, memorandum of law in support thereof, a proposed order, and supporting affidavit(s)
- Preparing written discovery requests
- Responding to discovery requests received from the defendant and preparing document production
- Addressing anticipated discovery motions for discovery disputes (including efforts to meet and confer with opposing counsel, preparing legal memoranda, and possibly presenting arguments to the court)
- Reviewing and analyzing documents produced by opposing parties (including reviewing forensic evidence if computer forensic discovery is involved)
- Preparing for and taking depositions
- Preparing witnesses and defending depositions
- Preparing for and defending a deposition of your computer forensic expert
- Reviewing opposing parties' pleadings (Answer to complaint, Opposition to motion for preliminary injunction, etc.)
- Conducting targeted research to assist in responding to defense pleadings and arguments
- Preparing supplemental briefing responding to defense papers
- Preparing for a hearing on motion for preliminary injunction including drafting witness outlines, preparing and analyzing exhibits, preparing proposed findings of facts and conclusions of law, and drafting motions to exclude evidence / motions in limine

In most cases -- or at least those involving expedited discovery -- all of this must happen before a non-compete plaintiff even gets its day in court. Naturally, some or most of these costs might be avoided if settlement becomes a realistic option along the way.

In addition to the costs outlined above, there are other costs that may be incurred ranging from filing

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and service fees, deposition transcripts, and possibly expert fees and expenses.

The bottom line is that litigation budgets in non-compete cases can be particularly challenging to prepare, but they can be an equally worthwhile exercise. Thinking through a budget and analyzing strategic options often are two sides of the same coin. The key is to develop a shared understanding of business and legal goals, based on a recognition of how much it might cost to employ the procedures necessary to achieve those goals and how unpredictably things might evolve if you start down one path versus another. To the extent that an estimate differs from a potential plaintiff's desires or constraints, in-house and outside counsel should explore ways to align the case strategy with the desired budget.

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