



Managing Outside Counsel in Litigation

Jim Ormiston & James Holmes

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James Holmes, Dallas

Goals:

Primer → Advanced Discussion

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Mechanics

Economics

Practices

Mechanics

Economics

Practices

General Overview

- The role of outside counsel
- The basics of a lawsuit
- Dynamics of a commercial lawsuit
- Dynamics of personal injury lawsuit against a corporate defendant

The Details

- Pre-trial motion practice
- Discovery
- Depositions
- Experts
- Summary judgments
- Trial
- Appeals

Economic Incentives

- Of outside counsel
- Of the client (the corporate defendant)
- Of the insurance company and the insured (the client)
- The alignment and potential conflicts of those incentives

Varying Fee Structures

- Hourly
- Contingency fee
- Mixed hourly and contingency fee arrangements

Billing Practices

- The "billable hour" and the "hourly rate"
- Invoices and time entries
- Budgets and limitations
- Large firm billing, and small firm billing

Best Practices in Managing Outside Counsel

- Encouraging effectiveness and thoroughness
- Efficiency
- Clear, open communication
- Other legal opinions and assessments

Seeking Collaboration and Cooperation Among "Co-counsel"

- Outside counsel defending different clients
- Different claims against a common client
- "Mostly aligned" litigation incentives

Practices

Terminating Counsel and Opting for New Outside Counsel

- The procedures
- Ethics rules
- The transition

Pitfalls

- Contentious or protracted litigation
- Attorney personalities
- The choosing of bad venues
- Surprise invoices (billings)
- The “lien on the file”
- Contingency fees on future benefits

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APPEALS

- ◆ The whole shooting match – especially in “bet the company” cases.
- ◆ Foster a healthy relationship between appellate counsel and trial counsel.

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Economics:

Hourly

Attorneys benefit from lengthier and more intense litigation

Clients usually benefit from limiting the litigation

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Economics:

Contingency

Attorneys usually benefit from limiting the litigation

Clients can benefit from limiting or extending the litigation

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Economics:

Insurance defense

Attorneys benefit from lengthier and more intense litigation, but seek to limit the litigation

Clients (insureds) can benefit from limiting or extending the litigation

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Economics: Two Key Features of Attorney-Client Relationship

- 1) Attorney is “Fiduciary” of Client
- 2) “Rules of Professional Conduct” Apply to Attorney

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“As a court, we are constitutionally and statutorily charged with promoting and enforcing ethical behavior by attorneys. This is a solemn duty the Court has guarded for decades. As we have consistently recognized, the **fiduciary** nature of the attorney-client relationship imposes heightened duties and obligations on attorneys: ‘In Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients. The duty is highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client’s interests.’” *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 506-07 (Tex. 2015) (footnotes & citations omitted).

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“When an attorney working on a contingent-fee basis is discharged without cause before the representation is completed, **the attorney may seek compensation in quantum meruit [or on the contract],** subject to the prohibition against charging or collecting an unconscionable fee. **If an attorney abandons his client without just cause, the attorney forfeits his right to compensation.**”

See, e.g., French v. Law Offices of Windle Turley, P.C., No. 2-08-273-CV, 2010 Tex. App. LEXIS 1586, at *8-*9 & *30 (Tex. App. – Fort Worth Mar. 4, 2010, no pet.) (citing *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006); other citations omitted)

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A brief aside on arbitration . . .

- ◆ Initially perceived as “business friendly” and “more efficient than the court system”
- ◆ Initially feared by plaintiffs (consumers especially) and welcomed by defendants

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A brief aside on arbitration . . .

Bloom is off the rose →

arbitration moves fast

costs money, and

can kill defenses

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Practices: *Hourly*

The Dichotomy –

**Big firms are too expensive because they have
“needy” associates and large overhead**

VS.

***Small Firms are affordable,
but come with too many risks***

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Outside Counsel Defending Different Claims

Scenarios

Some Defending Insured Claims, and Others Defending Uninsured Claims

Multiple Counsel Defending Different Entities with Incentives or Agreements to Cooperate

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Practices: *Terminating Counsel*

Disciplinary Rule 1.15(d): “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.”

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Pitfalls

Surprise Billings

- Act promptly
- Have already “set the tone” on the first invoice
- Recall budget discussions and the like
- *Respectful* requests *usually* are honored