

Managing Difficult Litigation Projects **By Jason W. LeRoy, ASA, CVA**

As an appraiser who works on both litigation and non-litigation assignments, I have come to appreciate the challenges involved in effectively managing difficult litigation projects. My experience has taught me several ways to ensure that the appraiser, client, and attorney are all satisfied at the closing of an engagement. Effective planning at the onset may yield reduced stress levels, improve realization, and hopefully results in repeat referrals for the appraiser. As stated in a presentation by Joy Feinberg and Donald DeGrazia, “most problems at the back door can be traced to bad decisions or insufficient due diligence at the front door.”¹

Engagement Letters

One of the most effective ways to manage a difficult litigation assignment is to prepare a thorough engagement letter clearly defining the scope, reporting requirements, and deadlines.

Scope Definition

The engagement letter should clearly define the scope of your involvement. Often times the scope of the engagement is an ongoing process which may change throughout the course of the project. Our standard litigation engagement letter includes language stating that “our specific responsibilities under this Agreement are subject to change as agreed upon by you and our firm.” This provides some protection to the appraiser for any scope changes.

Changes in scope are commonly directed by the attorney (and sometimes the client) according to changes in the overall case strategy. Depending on the severity of the change in scope, we will often re-issue or amend our initial engagement letter. For scope revisions which are less significant, our common practice is to save any correspondence documenting the change, draft a memo to the file, or prepare an addendum to the initial engagement letter. With any scope changes, it is important to communicate any anticipated alterations in the fee to the client and/or attorney prior to commencing with the scope changes. If a significant fee increase is anticipated, it may be appropriate to request an additional retainer or settle any outstanding accounts receivable or work-in-process balances.

Reporting Requirements

Different attorneys have different expectations as to the type of report to be produced. Some attorneys follow the “less is more” philosophy while others prefer a detailed and comprehensive report. It is important to determine what type of report the attorney (and your client) expect and to document your engagement letter accordingly. It is also helpful to determine if your work product will be issued as a draft or final. Rule 26 of the

Federal Rules of Civil Procedures was revised in December of 2010 giving draft expert witness reports the protection of the work-product doctrine and exempting them from mandatory disclosure. We have been involved in numerous engagements where a final report was never even issued; therefore, it is helpful to clarify the reporting expectations up front.

Deadlines

Managing deadlines is an important element in any litigation engagement. I have received numerous phone calls in my career from frantic attorneys expecting a draft or final report when we were days or even weeks away from completion. Often times this is out of the appraisers hands as changes to the scheduling order can be made without notification being provided to the appraiser. Communication of deadlines for draft or final reports up front along with proper documentation in your engagement letter will hopefully help minimize any frantic phone calls. Our standard practice is to review project deadlines on a weekly basis with the goal of proactively communicating expectations with attorneys and/or clients as deadlines approach.

WIP and A/R Management

Most litigation projects we are involved in are quoted on an hourly basis. Our engagement letter states that "fees for our services are based upon the actual time expended on the engagement at the standard hourly rates for the individuals assigned." In the instances where the client has requested a fixed fee or a not to exceed fee arrangement, it is imperative to clearly identify what is, and more importantly, what is not included in the fee. Most clients, especially those responsible for the fee, will attempt to incorporate as much of your services as possible under the fixed fee or not to exceed "umbrella". It is important to clarify what is and what is not included in the fee on the front-end of the project in order to reduce the risk of discrepancies on the back-end.

Another important factor to determine up-front is who will be responsible for paying the fees for your services and when. We have been involved in numerous divorce cases where the husband, the wife, or both parties were responsible for paying the fee, regardless of which party was our actual client. There have also been divorce engagements where the parents of one of the parties were responsible. Determining when fees will be paid is also important to determine at the onset of an engagement. Often times we will require any outstanding accounts receivable or work-in-process balances to be paid in full prior to issuing a report (draft or final). It is helpful to have these payment issues determined early on, and when possible, documented in your engagement letter.

Regular communication with your client regarding outstanding fees is a good business practice to have. Our normal billing practices are to send invoices for work-in-progress

as well as statements for outstanding accounts receivable at least monthly. In litigation projects specifically, we will commonly send interim invoices after a significant event in the engagement has occurred. These events may include providing testimony at deposition, attendance at mediation, arbitration, trial, etc., or delivery of a draft or final report. We have found that the shorter the time between incurring the fees and submitting an invoice results in a quicker payment from the client. A less formal approach to keeping clients informed is through email. In litigation projects where we are incurring large fees over short periods of time, we will commonly provide the client and/or attorney with an email identifying the current work-in-progress balance.

Requesting an initial retainer is common practice among most valuation professionals. In today's economic times, it is becoming more common for experts to request larger initial retainers.

The amount of retainer we request depends on our prior relationship with the client as well as our perceived risk of collecting fees when the project is completed. For clients with which we have a previous relationship, we may waive an initial retainer or request a nominal amount. Our standard practice for new clients is to request an initial retainer equal to half of the expected total fees. For new clients which we perceive as higher risk, we may request retainers upward of 75-100% of the total expected fees. As a courtesy to our clients, we will occasionally notify them when the initial retainer has been exhausted. It is up to each professional to gauge the retainer amount appropriate for each situation.

When to Withdraw from an Engagement (or temporarily stop work)

There have only been a few engagements that we have withdrawn from prior to completing the project; however, several projects come to mind that we probably should have. Below are a few examples of when it may be appropriate to withdraw from an engagement, or at least temporarily stop working.

- If you feel your credibility is being compromised – On occasion, the client or attorney will ask (or demand) that you take a position different from your opinion. Deviating from your opinion to please a client may help you through that particular project, but will surely hurt your credibility in the long-run. One of the most important assets that an appraiser has is their reputation, and that is not worth jeopardizing to please any client.
- If you feel you will not be paid – As professionals, we deserve to be compensated appropriately for providing our services.
- If you have been asked to meet an unrealistic deadline – As appraisers, we typically have numerous projects and deadlines to meet at the same time. A client asking you or your staff to work nights or weekends to meet an unrealistic deadline is unprofessional, and you have the option to turn down the project. If

you accept an unreasonable deadline on one project, it is likely that the client or attorney will have the same expectations for the next one.

It is important to have specific language in your engagement letter stating the terms that will be followed in the event the engagement is terminated prior to completion. Terms should include what fees the client is responsible for, what work-product will be provided to the client, and what portion of the unused initial retainer will be returned to the client.

Conclusion

Litigation projects can be interesting and challenging assignments. They can also be the cause of stress and long hours in the office. Determining the terms and scope of your engagement at the front-end can help lead to a satisfying and profitable project on the back-end.

About the Author

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ⁱ Practical Tips for Digging Out of “Black Hole” Cases, Business Valuation Update Volume 18, No. 7 (July 2012) : 2 – 5.