



RECOVERING ATTORNEY'S FEES FOR LITIGATION WORK PERFORMED BY IN-HOUSE COUNSEL

by **Stephen J. Siegel and Christopher S. Moore***

Litigators are often on the lookout for ways to escape the so-called “American Rule,” under which each party – win or lose – pays its own attorney’s fees incurred in litigation. Legal authority to obtain an award of attorney’s fees can be found in fee-shifting provisions in (a) a statute under which a claim has been brought, (b) a forum state’s code of civil procedure, or (c) a contract at issue.¹ Fee requests under these mechanisms typically focus on recovering the fees clients paid to their outside counsel of record.

However, courts also have awarded fees for litigation work performed by in-house counsel. As with outside counsel, such awards have been made under a range of fee-shifting statutes², court rules³ and contracts.⁴ Indeed, a majority of reported cases have held that, in appropriate circumstances, fees may be awarded for an in-house attorney's efforts in litigating a dispute. This article addresses several key factors that attorneys and their clients should consider in seeking to recover fees for in-house counsel's litigation work.

Most Courts Allow Fee Recovery For Litigation Work By In-House Counsel

It may seem counterintuitive that a prevailing party can recover the "fees" it paid to in-house counsel. After all, in-house counsel typically are not paid an hourly fee but, instead, are salaried employees who receive the same compensation whether they devote their time to a pending litigation or other matters. In this sense, in-house legal salaries are often characterized as "overhead." It has been argued that an employer-client incurs no added attorney's fees when its in-house counsel assists it in litigation. Courts that have refused to award fees for litigation work by in-house attorneys often have adopted this rationale.⁵

By and large, however, courts have rejected the argument that fees for litigation work by in-house counsel are not recoverable because the employer-client would have incurred the in-house litigator's same salary regardless of the litigation. For example, in *Textor v. Bd. of Regents of N. Ill. Univ.*, the United States Court of Appeals for the Seventh Circuit rejected such reasoning as an oversimplification and concluded that a party's representation by in-house counsel should not – and does not – prevent the litigant from recovering legal fees. After all: "for every hour in-house counsel spent on this case defendants lost an hour of legal services that could have been spent on other matters."⁶

Likewise, in *PLCM Group, Inc. v. Drexler*, the California Supreme Court sustained an award of attorney's fees for work by in-house

counsel. The court found no basis to penalize litigants for using in-house counsel and reasoned that "the payment of a salary to in-house attorneys is analogous to hiring a private attorney on a retainer."⁷ Thus, where fee-shifting is permitted under a statute, court rule or contract, most (but not all) courts that have faced the question have allowed parties to recover fees for litigation work performed by in-house counsel.

In-House Counsel Must Have Acted As Lawyers, Not "Liaisons"

The majority rule does not mean, however, that any or all fees and expenses attributable to in-house counsel's work on a particular case are recoverable. Aside from the standard obstacles to fee recovery faced by all litigants (e.g., demonstrating the fees were reasonable), claims to recover fees for litigation work by in-house counsel must cross at least one additional hurdle. That is, in-house counsel must, at a minimum, "substantially" and demonstrably contribute *legal* services to the prosecution or defense of the case.

In *Travelers Indem. Co. of Ill. v. Millard Refrigerated Servs.*, the court ruled "[f]ees for work performed by in-house counsel are generally recoverable upon a showing that such counsel contributed something of substantive value to the litigation."⁸

More specifically, courts have held that to support a fee award for their time spent on litigation, in-house counsel must be *representing* a client as its *lawyer* in the case – not acting merely as a "liaison" between the client and outside counsel nor as a "client representative."⁹

Unfortunately, there is little discussion in cases about how to determine whether in-house counsel is acting as a lawyer or merely a "liaison" or "client representative." Nevertheless, it appears that when in-house counsel performs litigation tasks such as preparing discovery documents or deposition questions, examining witnesses, or participating in tactical decisions at trial, fees may be awarded for such services.¹⁰ Conversely, fees will not be allowed for "time spent by in-house counsel in the

¹ See, e.g., *Washington Metro. Area Transit Auth. v. U.S.*, 57 Fed. Cl. 148, 151 & n.5 (Fed. Cl. 2003) (collecting cases); *Softsolutions, Inc. v. Brigham Young Univ.*, 1 P.3d 1095, 1106 & n.5 (Utah 2000) (collecting cases); Robert L. Rossi, 1 ATTORNEY'S FEES § 6:14 (3d ed. 2007) (collecting cases).

² See, e.g., *Washington Metro. Area Transit Auth.*, 57 Fed. Cl. at 151 & n.5; *Travelers Indem. Co. of Ill. v. Millard Refrigerated Servs.*, No. 8:00CV91, 2002 WL 2005717, at *1-2 (D. Neb. Sept. 3, 2002).

³ See, e.g., *Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1396-97 (7th Cir. 1983); *B-E-C-K Constructors v. State Dept. of Hways.*, 604 P.2d 578, 585 (Alaska 1979).

⁴ *El Dorado Irrigation Dist.*, 2007 WL 512428, at *7; *Softsolutions, Inc.*, 1 P.3d at 1105-07 & n.5.

⁵ See, e.g., *Burger King Corp. v. Mason*, 710 F.2d 1480, 1491, 1499 & n.13 (11th Cir. 1983) (en banc); *In re Cummins Utility, L.P.*, 279 B.R. 195, 207 (Bankr. N.D. Tex. 2002).

⁶ *Textor*, 711 F.2d at 1396-97; accord *In re Stewart*, 2004 WL 3130573, at *14 (quoting *Textor*, 711 F.2d at 1396-97); *Softsolutions*, 1 P.3d at 1105-07.

⁷ *PLCM Group, Inc. v. Drexler*, 997 P.2d 511, 517 (Cal. 2000).

⁸ 2002 WL 2005717, at *1-2; see also *FDIC v. Bender*, 182 F.3d 1, 6 (D.C. Cir. 1999).

⁹ *Bender*, 182 F.3d at 6; *El Dorado Irrigation Dist.*, 2007 WL 512428, at *5; *Travelers Indem.*, 2002 WL 2005717, at *1-2.

¹⁰ See, e.g., *Advest, Inc. v. Carvel Corp.*, No. CV9805854015, 2001 WL 665227, at *2 (Conn. Super. Ct. May 21, 2001); *Scripps Clinic & Res. Found. v. Baxter Travenol Labs, Inc.*, Civ. A. No. 87-140-CMW, 1990 WL 146385, at *2 (D. Del. July 31, 1990).

role of the client, such as time spent keeping abreast of the progress of the litigation and advising outside counsel of the client's views as to litigation strategy."¹¹

Needed: Detailed Time Records

To enable the court to distinguish between reimbursable and non-reimbursable work, in-house counsel should carefully document their time spent working as an *attorney* on the litigation. A failure to do so runs a significant risk that fee recovery will be denied. Naturally, where the adverse party "contend[s] that in-house counsel did not actually perform litigation functions," then the "necessity for detailed records is even greater."¹²

In fact, fee petitions can rise or fall depending on whether the evidence shows the in-house attorney actively "lawyered" the case for a client. For example, in *Travelers Indemn.*, the court awarded fees where an affidavit showed that in-house counsel "participated actively" in meetings concerning the case and was not acting as a "mere" client liaison.¹³ By contrast, in *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, the court denied fee recovery for time spent by in-house attorneys who failed to "distinguish" in their time records between their work as a lawyer and their time spent as a "client representative."¹⁴

Helpful: Filing An Appearance

In deciding whether or not to award fees for in-house litigation work, courts have considered whether the in-house lawyer filed a court appearance. Naturally, an appearance weighs in favor of awarding fees.¹⁵ When in-house counsel file no appearance, courts are somewhat less likely to award in-house counsel's fees.¹⁶ Ultimately, however, the presence or absence of a court appearance by itself is not likely to be dispositive.¹⁷

Different Ways To Calculate Fees

Calculating the recoverable amount of in-house counsel fees can be problematic, especially when (as is common) the attorney is a salaried employee. Non-prevailing parties have argued that any fee award should

be limited to a proportion of in-house counsel's total salary, calculated based on the fractional number of hours counsel spent working on the case compared to time spent on all other tasks. Typically, this would result in a lower recovery than if fees were awarded for the same hours measured at "market" rates charged by outside counsel. Prevailing parties, in contrast, have urged courts to base their fee awards for in-house counsel's litigation work on market rates. Courts and commentators have grappled with these issues and taken at least two different approaches to measuring recoverable fees for litigation work by in-house counsel.¹⁸

One approach is reflected in *In re Stewart*, which concerned contracts that contained fee-shifting provisions. The court stated that fees could be awarded for the services of in-house counsel but declined to calculate those fees based on a market rate. The court expressed concern that a market rate approach would result in a windfall to the victorious litigant and an impermissible "sharing" of fees with non-attorneys (*i.e.*, the employer-client). The *Stewart* court found it significant, as have other courts, that the various contractual fee-shifting provisions at issue referred to fees "incurred" or "paid back."¹⁹ The court took this language to mean that only those fees that the employer-client actually expended could be recovered. Accordingly, it held that the prevailing party could receive only its "actual costs of the provision of services, not the market rates that the consumer of the services would have been required [to pay] had an outside firm performed the services with a profit element."²⁰

Similarly, in *Softsolutions, Inc. v. Brigham Young Univ.*, the Utah Supreme Court rejected a prevailing party's attempt to recover in-house counsel fees measured at a "market" rate. This court did not focus on the contract language, but was "convinced" that using the market-rate approach often would result in a "windfall profit" to litigants who employ in-house counsel.²¹ Accordingly, the court adopted a "cost-plus" method to determine the fee award for litigation work by in-house counsel. Under this method, fees are awarded based upon:

¹¹ *Scrapps Clinic*, 1990 WL 146385, at *1-2 (denying recovery for time spent reviewing invoices); see also *Student Public Interest Res. Group of N.J. v. Mangano Co.*, 721 F. Supp. 604, 616 (D.N.J. 1989), overruled on different grounds, *Public Interest Res. Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1189 (3rd cir. 1995).

¹² *Scrapps Clinic*, 1990 WL 146385, at *2.

¹³ 2002 WL 2005717, at *1-2.

¹⁴ 2007 WL 512428, at *5.

¹⁵ See, e.g., *Del. Valley Citizens Council for Clean Air v. Penn.*, 762 F.2d 272, 278 (3d Cir. 1984), rev'd on other grounds, 475 U.S. 546 (1986), 483 U.S. 711 (1987); *Advest, Inc.*, 2001 WL 665227, at *2 n.1.

¹⁶ See *JAMA Corp. v. Gupta*, Nos. 3:99-CV-01624, 3:99-CV-1574, 2008 WL 108671, at *4 (M.D. Penn. Jan. 4, 2008); *Advest, Inc.*, 2001 WL 665227, at *2 n.1.

¹⁷ *Advest, Inc.*, 2001 WL 665227, at *2 n.1; *City of Merced v. Am. Motorists Ins. Co.*, No. F044865, 2005 WL 387636, at *4 (Cal. Ct. App. Feb. 17, 2005).

¹⁸ See, e.g., *Softsolutions*, 1 P.3d at 1107 & nn. 7 & 8 (collecting cases); Jerry Custis, *Shifting Costs To The Adverse Party*, *Litigation Management Handbook* § 7:19 (2006) (collecting cases).

¹⁹ *In re Stewart*, 2004 WL 3130573, at *16-17 (collecting cases rejecting "market rate" approach to measuring fees).

²⁰ *Id.*

²¹ *Softsolutions*, 1 P.3d at 1107.

“(1) the proportionate share of the party’s attorney salaries, including benefits, which are allocable to the case based upon the time expended, plus (2) allocated shares of the overhead expenses[.]”²²

Other courts have disagreed with the cost-based approaches articulated in *Stewart* and *Softsolutions* and, instead, have awarded fees for in-house litigation work based on a market rate. In *Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co.*, the Seventh Circuit rejected the argument that a fee award to a successful litigant “cannot exceed . . . the attorneys’ salaries plus other actual expenses of its legal counsel’s office.”²³ Rather, it held, “the court should make an award representing the cost the victorious litigant would have incurred to buy legal services in the market, no matter how the litigant actually acquired those services.”²⁴

The Seventh Circuit reasoned that: (1) a market-rate approach “avoids the need to determine the full cost of in-house services” (a “complex inquiry”); and (2) in any case, a cost-based approach is likely to produce a figure “comparable” to a market-rate approach because the market approach reflects the “opportunity cost” incurred by companies using in-house counsel.²⁵ The Seventh Circuit fixed that “opportunity cost” as the amount it would require the company to hire additional counsel to do work neglected by the in-house counsel while he or she worked on the litigation.²⁶

Thus, if the employer-client retains outside counsel, or additional in-house counsel, to perform tasks that would have been performed by an in-house lawyer but for the litigation, then the employer-client has incurred an additional out-of-pocket cost because in-house counsel represented it in litigation. In that event, “market” rates paid to outside counsel to perform the neglected legal work may evidence an appropriate market rate on which to base an award of in-house counsel’s fees for work on the litigation.

Conclusion

Litigators depend on fee-shifting provi-

sions in statutes, court rules and contracts to recover the attorney’s fees they charged their clients. Under many fee-shifting provisions, clients can recover fees for litigation work performed by their in-house counsel. Success in recovering in-house counsel’s fees may depend on careful timekeeping that demonstrates that in-house counsel participated in prosecuting or defending the case as their client’s *lawyer*, not just as a liaison or client representative. Having in-house counsel file a court appearance (where doing so is otherwise advisable) may also help show that in-house counsel litigated the case.

Counsel also should ensure that their clients record all of their “actual costs” from having in-house counsel work on litigation – including allocable shares of benefits and overhead expenses, as well as any fees paid to outside counsel, or additional in-house counsel, who perform tasks that in-house counsel would have performed had they not worked on the litigation.

Thus, fee recovery for in-house legal work offers another avenue for prevailing parties to avoid the “American Rule” and shift some of the substantial costs of litigation onto their adversaries.

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²² *Id.*

²³ 76 F.3d 114, 115 (7th Cir. 1996).

²⁴ *Id.* at 117.

²⁵ *Id.* at 115; see also *PLCM Group*, 997 P.2d at 519.

²⁶ *Textor*, 711 F.2d at 1397.

Novack and Macey Hosted IAG International Conference

Novack and Macey LLP hosted the IAG International Conference on October 2-4, 2008. IAG is the Integrated Advisory Group International, a worldwide association of independent professional service firms, with members throughout Europe and North and South America and with members in many parts of the Middle East and Asia. Unlike many legal networks and affiliations, IAG members include not only lawyers, but accountants, tax advisers and fiduciaries, some of whom work in association with other specialists such as economists, real estate advisers or financial advisers. To maintain and enhance contacts within the network, three assemblies are held annually, each hosted by a member firm in a different city.

Novack and Macey was pleased to host the group in Chicago. Partner Mitch Marinello stated, "The unique strength of IAG is the close personal relationships and trust existing among the member firms and partners. This alliance allows our clients to benefit from the collective experience and wisdom of many of IAG's professionals throughout the world."

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Eric Macey Selected President of The Chicago-Lincoln American Inn of Court

Eric N. Macey, a founding partner of Novack and Macey LLP, has been selected President of the Chicago-Lincoln American Inn of Court. After serving three consecutive terms as Vice President and Treasurer, he assumed his new position July 1, 2008.

Organized in 1985 by United States Supreme Court Chief Justice Warren E. Burger, the American Inns of Court were designed to improve the skills, professionalism and ethics of the bench and bar. American Inns of Court actively involve more than 20,000 state, federal and administrative law judges, attorneys, legal scholars and law students. The approximately 80 members of the Chicago-Lincoln American Inn of Court meet monthly to "break bread" and hold programs and discussions in an effort to elevate levels of excellence,

professionalism and ethical awareness.

As President, Macey will provide leadership and guidance to the Inn's officers and members of the Inn. By working closely with the national office, he will ensure that the Inn adheres to the policies of its charter and other policies promulgated by the National Board of Trustees.

Miller Named One of the 40 Illinois Attorneys Under 40 To Watch

Novack and Macey LLP partner Richard L. Miller II has been named one of the "40 Illinois Attorneys Under 40 To Watch" by the Law Bulletin Publishing Company, publishers of *Chicago Lawyer* magazine and the *Chicago Daily Law Bulletin*. In this prestigious annual publication, the Law Bulletin describes Miller as "that rare commercial litigator who is a master of advocating for his clients both in the courtroom and in writing." Miller's expertise in litigating and resolving disputes is an ongoing benefit to the clients of Novack and Macey LLP.

Novack and Macey Supports ABA Judicial Intern Opportunity Program

In August 2008, Novack and Macey hosted a "Meet and Greet" breakfast for the law students enrolled in the ABA's Judicial Intern Opportunity Program. Numerous interns attended from all over the State of Illinois. The students met and spoke with many attorneys, ranging from fourth-year associates to established partners. The program was hosted by Shelby L. Drury and Kristen Werries Collier, both Of Counsel with the firm, who talked about their career paths and gave practical tips on becoming a successful associate.

The Judicial Intern Opportunity Program is a summer internship program open to minority and/or financially disadvantaged law students who want to perform legal research and writing for state or federal judges in participating cities. The program seeks to provide internship opportunities for those law students who are members of traditionally underrepresented groups in the legal profession.

Novack and Macey contributes financially to the Program and is identifying opportunities for interns like the "Meet and Greet" breakfast, to gain a better appreciation of private practice.

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