Recovering Attorney 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 what is known as the "American rule," under which each party—win or lose—pays its own attorney fees incurred in litigation. Legal authority to obtain an award of attorney fees can be found in fee-shifting provisions in a statute under which a claim has been brought, a forum state's code of civil procedure, or a contract at issue.[1] Although fee requests under these mechanisms typically focus on recovering the fees that clients paid to their outside counsel of record, fee awards may be enhanced by finding authority to recover fees paid to other individuals who helped litigate a case. For example, fees may be recoverable for time spent by paralegals, law clerks, and even law students who worked on a case.[2]

In addition, courts have awarded fees for litigation work performed by in-house counsel. Such awards have been made under a range of fee-shifting statutes,[3] court rules,[4] and contracts.[5] 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.

Fee Recovery for Litigation In-House Counsel Work

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." Indeed, it has been argued that an employer-client incurs *no* added attorney 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.[6]

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. Board of Regents of Northern Illinois University*, 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: "[F]or every hour in-house counsel spent on this case defendants lost an hour of legal services that could have been spent on other matters."[7]

Likewise, in *PLCM Group, Inc. v. Drexler*, the California Supreme Court sustained an award of attorney fees for work by in-house counsel. In *PLCM*, plaintiff had brought an action on a contract, was represented by in-house counsel, and requested a fee award under the contract's fee shifting provision. Defendant objected that fees should not be awarded for time spent by in-house counsel because, among other things, in-house counsel were allegedly less independent than outside counsel. The court rejected this reasoning. It 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."[8] The *PLCM* court found no other ground on which to distinguish between in-house attorneys and outside counsel in awarding attorney fees, stating:

> We discern no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer. Both are bound by the same fiduciary and ethical duties to their clients. Both are qualified to provide, and do provide, equivalent legal services.[9]

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.

Thus, in *Travelers Indemnity Co. of Illinois v. Millard Refrigerated Services*, the court ruled that "[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."[10] 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."[11]

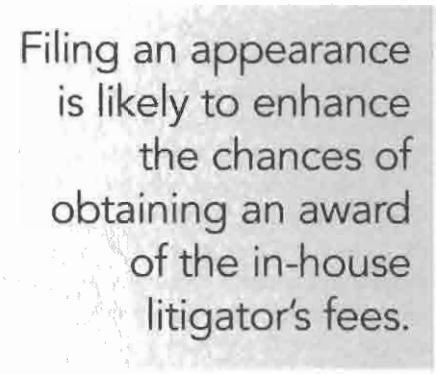
Unfortunately, there is little discussion in the cases about how to determine whether in-house counsel is acting as a lawyer or merely a "liaison" or "client representative." It appears, however, that when in-house counsel performs litigation tasks such as preparing discovery documents or deposition questions, examining witnesses, or participating in tactical decisions at trial, fees may be awarded for such services.[12] Conversely, fees will not be allowed for "time spent by in-house

counsel in the 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."[13]

Needed: Detailed Time Records

To enable the court to distinguish between reimbursable and nonreimbursable work, in-house counsel should carefully document their time spent working as an attorney on the litigation. A failure to do so creates 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."[14]

Generally, a sound practice is to keep time records that identify the time spent on each legal task and that describe each task in sufficient detail to support the contention that it relates to the litigation and was reasonably necessary.[15]



Furthermore, time records kept by in-house litigators should reflect that he or she was contributing substantive legal services, not simply acting as the client liaison or party representative. 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 Indemnity*, 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.[16] By contrast, in *El Dorado Irrigation District v. Traylor Brothers, 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."[17]

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.[18] Conversely, if in-house counsel filed no appearance, then courts are somewhat less likely to award in-house counsel's fees.[19] Ultimately, however, the presence or absence of a court appearance by itself is not likely to be dispositive.[20]

Of course, a decision to have in-house counsel file an appearance should not be guided solely by a hope to recover that counsel's fees. After all, attorneys who file appearances accept all the duties and responsibilities—to the court, to adverse parties, and to their own clients—that go with being counsel of record. On balance, however, when filing an appearance is otherwise appropriate in a particular case, doing so is likely to enhance the chances of obtaining an award of the in-house litigator's fees.

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. Nonprevailing 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 as opposed 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.[21]

One approach is reflected in *In re Stewart*, which concerned a dispute under several contracts that contained fee shifting provisions. The court stated that fees properly 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 nonattorneys (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."[22] The court took this language to mean that only those fees that the employer-client actually expended could be recovered. Accordingly, the court 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."[23] When the employer-client failed to prove those "actual costs" adequately, the court refused to award any fees.[24]

Similarly, in *Softsolutions, Inc. v. Brigham Young University*, 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.[25] Accordingly, the court adopted a "cost-plus" method to determine the fee award for litigation work by in-house counsel. Under this approach:

> Fees for in-house counsel are limited to consideration actually paid or for which the party is obligated, calculated using a cost-plus rate and taking into account (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, which may include the costs of office space, support staff, office equipment and supplies, law library and continuing legal education, and similar expenses.[26]

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."[27] 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."[28] The court questioned the approaches taken in *Stewart* and *Softsolutions*, noting that the United States Supreme Court, in *Blum v. Stenson*, had held that fee awards under the Civil Rights Attorney's Fees Awards Act of 1976, even if made to nonprofit legal organizations, should be calculated at "prevailing market rates."[29] The Seventh Circuit also 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.[30] The Seventh Circuit explained opportunity cost as follows:

> Lawyers who devote their time to one case are unavailable for others, and in deciding whether it is prudent to pursue a given case a firm must decide whether the cost—including opportunities foregone in some other case, or the price of outside counsel to pursue that other case—is worthwhile. Opportunity cost, rather than cash outlay, is the right way to value legal services.[31]

The Seventh Circuit added, "[t]he value to defendants of this lost time is, of course, the amount it would require to hire additional counsel to do the neglected work."[32]

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 provisions in statutes, court rules, and contracts to recover the attorney 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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Endnotes

1. *See, e.g.*, *In re* Stewart, No. 00-00046, 02-10020, 2004 WL 3130573, at *14–15 (Bankr. D.D.C. Nov. 10, 2004); Wash. Metro. Area Transit Auth. v. United States, 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.*, Cook v. Brown, 68 F.3d 447, 453 (Fed. Cir. 1995); El Dorado Irrigation Dist., v. Traylor Bros., Inc., No. Civ. S-03-949 LKK/GGH, 2007 WL 512428, at *7 (E.D. Cal. Feb. 12, 2007); *see also* James J. Watson, *Attorneys' Fees: Cost of Services Provided by Paralegals or the Like as Compensable Element of Award in State Court*, 73 A.L.R. 4th 938 (West 2007).

3. Bond v. Blum, 317 F.3d 385, 400 (4th Cir. 2003) (holding that fees for in-house counsel may be proper pursuant to Copyright Act); Wash. Metro. Area Transit Auth., 57 Fed. Cl. at 151 & n.5 (awarding fees for salaried in-house counsel under Uniform Relocation Assistance and Real Property Acquisition Policies Act); Travelers Indem. Co. of Ill. v. Millard Refrigerated Servs., No. 8:00CV91, 2002 WL 2005717, at *1–2 (D. Neb. Sept. 3, 2002) (awarding in-house counsel's fees pursuant to Nebraska statute); Campbell, Athey & Zukowski v. Thomasson, 863 F.2d 398, 400–401 (5th Cir. 1989) (recovery of in-house fees in contract dispute permitted under Texas statute).

4. Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1396–97 (7th Cir. 1983) (holding that courts may award in-house fees as sanction); Patel v. Am. Tel. & Tel., Inc., No. 93 C 117, 1993 WL 384569, at *2 (N.D. Ill. Sept. 27, 1993) (awarding in-house fees as sanction pursuant to federal discovery rules); B-E-C-K Constructors v. State Dept. of Hwys., 604 P.2d 578, 585 (Alaska 1979) (fees for both outside counsel and in-house counsel recoverable pursuant to rule).

5. *El Dorado Irrigation Dist.*, 2007 WL 512428, at *7 (awarding fees for in-house counsel pursuant to contract); *In re* Stotler & Co., 166 Bankr. 114, 119 (N.D. Ill. 1994) (same); *In re Stewart*, 2004 WL 3130573, at *14–15 (fees may be awarded to in-house counsel under terms of promissory note); *Softsolutions, Inc.*, 1 P.3d at 1105-07 & n.5 (awarding attorney fees to in-house counsel pursuant to contract).

6. *See, e.g.*, Burger King Corp. v. Mason, 710 F.2d 1480, 1491, 1499 & n.13 (11th Cir. 1983) (en banc) (denying recovery of fees for in-house counsel, stating prevailing party "did not have to pay out additional money for the services of its house counsel, so it cannot claim 'reimbursement' for this . . . fixed corporate expense"); Huge v. Old Home Manor, 419 F. Supp. 1019, 1021 (W.D. Penn. 1976) ("Fees for house counsel will be disallowed because of his employment on salary. . . ."); *In re* Cummins Utility, L.P., 279 B.R. 195, 207 (Bankr. N.D. Tex. 2002) (award of fees for in-house counsel denied because such expenses are part of litigant's "overhead"); *In re* Davidson Metals, Inc., 152 Bankr. 917, 923–24 (Bankr. N.D. Ohio 1993) (same).

7. *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.

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

9. *Id.*

10. Travelers Indem. Co. of Ill. v. Millard Refrigerated Servs., 2002 WL 2005717, at *1–2; *see also* FDIC v. Bender, 182 F.3d 1, 6 (D.C. Cir. 1999) (an award of fees to in-house counsel not permissible when in-house counsel acts

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29, at 158.
33. Marmer et al., *supra* note 1, at 19.
34. *Id.*
35. *Id.*
36. Jan L. Handzlik & Stephen J. Connolly, *Playing a Dual Role: In the Current Regulatory Climate, Legal Departments Must Assume a More Proactive Role in Corporate Management*, 26 L.A. LAW. 30, 32 (Oct. 2003).
37. *See* John A. Mack, *The Ethics of Workplace Investigations*, 61 BENCH & BAR OF MINN., (Feb. 2004) ("When first notified of the allegations of financial misconduct, Enron chose the law firm of Vinson & Elkins to conduct a "preliminary investigation." Vinson & Elkins was probably not the best choice to conduct the investigation, as the law firm had a 30-year working relationship with Enron, Enron's general counsel was a former partner at Vinson & Elkins, and the law firm was apparently involved in the transactions under scrutiny."); *Sarbanes-Oxley Myth* at 11, *available at* media.wiley.com/product_data/excerpt/55/04715697/0471569755.pdf ("The law firm investigating Sharon Watkin's memo (the Enron whistleblower) was rife with conflicts of interest. The firm of Vinson & Elkins was a long-term advisor to the company and, predictably, its investigation was ineffective.").
38. Handzlik & Connolly, *supra* note 36.
39. *See* Kentra, *supra* note 1.
40. Marmer et al., *supra* note 1, at 42.
41. *Id.*
42. Allied Irish Banks, plc v. Bank of Am., N.A., 240 F.R.D. 96, 104, 109 (S.D.N.Y. 2007). (applying New York law).
43. Marmer et al., *supra* note 1, at 21.
44. Duggin, *supra* note 1, at 908.
45. Kentra, *supra* note 1.
46. *Id.*
47. Marmer et al., *supra* note 1, at 23.
48. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).
49. Bar of the City of New York, *supra* note 29, at 173.
50. *Id.*
51. *See* Memorandum from Larry D. Thompson, *supra* note 2.
52. *See* Ashby Jones, *Thompson Memo Out, McNulty Memo In*, Wall Street Journal Law Blog, Dec. 12, 2006, *available at* http://blogs.wsj.com/ law/2006/12/12/thompson-memo-out-mcnulty-memo-in/.
53. *See* Memorandum from Paul J. McNulty, *supra* note 2.
54. *Id.*
55. *See id.*; *see also* Press Release, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud—New Guidance Further Encourages Corporate Compliance (Dec. 12, 2006) *available at* http://www.usdoj.gov/opa/pr/2006/ December/06_odag_828.html.
56. Kentra, *supra* note 1.
57. Allied Irish Banks, plc v. Bank of Am., N.A., 240 F.R.D. 96, 99 (S.D.N.Y. 2007).
58. Bar of the City of New York, *supra* note 29, at 173.
59. Marmer et al., *supra* note 1, at 35.

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as "mere liaison" between client and outside counsel).
11. *Bender*, 182 F.3d at 6; El Dorado Irrigation Dist., v. Traylor Bros., Inc., 2007 WL 512428, at *5; *Travelers Indem.*, 2002 WL 2005717, at *1–2.
12. *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).
13. *Scripps 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. Mangamto Co., 721 F. Supp. 604, 616 (D.N.J. 1989), *overruled on diff't grounds*, Public Interest Res. Group of N. J., Inc. v. Windall, 51 F.3d 1179, 1189 (3rd Cir. 1995).
14. *Scripps Clinic*, 1990 WL 146385, at *2.
15. *E.g.*, Jane Masey Draper, *Excessiveness or Inadequacy of Attorney's Fees in Matters Involving Commercial and General Business Activities*, 23 A.L.R. 5th 241 §2[e] (1994).
16. *Travelers Indem.*, 2002 WL 2005717, at *1–2.
17. El Dorado Irrigation Dist., v. Traylor Bros., 2007 WL 512428, at *5.
18. *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. v. Carvel Corp., 2001 WL 665227, at *2 n.1.
19. JAMA Corp. v. Gupta, Nos. 3:99-CV-01624, 3:99-CV-1574, 2008 WL 108671, at *4 (M.D. Penn. Jan. 4, 2008) (failure to file appearance supported finding that attorney was not acting in capacity as client's attorney); *Student Public Interest*, 721 F. Supp. at 616 (same); *Advest, Inc.*, 2001 WL 665227, at *2 n.1.
20. *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) (filing appearance not prerequisite to recovering fees for in-house counsel) (unpublished op.).
21. *See, e.g.*, Softsolutions, Inc. v. Brigham Young Univ., 1 P.3d at 1107 & nn.7 & 8 (collecting cases); Jerry Custis, *Shifting Costs to the Adverse Party*, Litig. Mgmt. Handbook § 7:19 (2006) (collecting cases).
22. *In re* Stewart, 2004 WL 3130573, at *16–17 (collecting cases rejecting "market rate" approach to measuring fees).
23. *Id.*
24. *Id.*
25. *Softsolutions*, 1 P.3d at 1107.
26. *Id.*
27. *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Cartage Co.*, 76 F.3d 114, 115 (7th Cir. 1996).
28. *Id.* at 117.
29. *Id.* at 115 (citing Blum v. Stenson, 465 U.S. 886, 895–96 (1984)). The *Stewart* court did not discuss *Blum*. The *Softsolutions* court acknowledged *Blum* and *Central Cartage* in passing but refused to follow their lead. *Softsolutions*, 1 P.3d at 1107 n.8.
30. *Central Cartage*, 76 F.3d at 115; *see also PLCM Group*, 997 P.2d at 519 (affirming fees awarded for in-house counsel's time based on "prevailing market" rates because, among other reasons, this approach was simpler to administer).
31. *Central Cartage*, 76 F.3d at 116.
32. Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d at 1397.

Practice Tip for Young In-House Lawyers

Guide your in-house clients down the best path. In-house lawyers are uniquely positioned to understand both the underlying legal issues and the myriad of business objectives that our clients face. If our clients merely wanted an interpretation of the law or a list of the legal constraints they face, they could obtain that from outside counsel. Instead, they have hired us to be experts at putting the legal issues into context and advising them on which path they should take. Seize the opportunity to add the value that only in-house lawyers can provide and help your clients make decisions.

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