

# Controlling Costs in Creative Services

## *Maximizing Value* in Trial Support

Douglas Filter

In a perfect world, you would have limitless resources to try your cases.

In reality, you are always constrained by time and money, either in determining a budget and getting it approved, or in renegotiating a bill that has exceeded its parameters.

Your client needs the best possible outcome under financial constraints. Constraints that may, however, impact your ability to present the best case possible. You, as a litigator, must focus on winning the case and marshalling resources to do so. This is your primary goal. Your client must pay for the services, find funds from other places in the business, answer to stockholders and/or a board of directors, determine a cost/benefit analysis for the effort, separate the emotional response to a lawsuit from business expectations. In short, the client's goals may be in conflict with yours at some point in the litigation process.

For vendor-type services, costs are predictable – a price per copied page, a fee for a transcript. For strategic services, however, like the design and preparation of demonstratives, cost can be a nebulous thing. Cost control, however, is not only practical, it improves the product by concentrating resources on work that is valuable to the case.

As a cursory matter, determining cost is easy – you define a scope of work, the resources necessary to get the job done, and set a budget. But what if you can't determine what the scope of work should entail? Several key issues are still subject to motions in limine. Summary judgement is pending on other issues. Sure, litigation thrives on variables but there are better ways to control costs than sitting on the sidelines with demonstrative and creative consulting. Why?

Trial is the culmination of all the effort and expense of litigation. Consider the sum of all costs through trial divided by your actual time before the trier-of-fact and that time starts to look incredibly valuable. In a one-week trial, your case comes down to roughly 15 hours in front of the jury. The ratio of preparation hours to presentation hours is staggering. Those presentation hours count and they are worth an investment in the best presentation possible.

Having worked on over 600 large cases and countless smaller ones in my career, with many gone to verdict many to arbitration and many others settled, I can suggest six practical tips that will help make your presentations better while keeping the cost for creative services under control.

### **First, You Need a Budget**

It seems obvious to know what you are buying, but so many litigation services start *without* a budget in place. This is especially true when the visual part is held off until the last moment. A budget approach gives consideration to the business value of the case and the strategic value of the specific case event. In other words, you and your consultants should consider what is reasonable to spend. For example, case-dispositive motions deserve more investment than those with little chance of resolving the dispute. A case with only a couple hundred thousand at risk would not be a good candidate for an animation. However, one key graphic could make the case. On the other hand, a complicated patent case with multiple applicable patents, a series of hearings including a technology tutorial for the judge, a Markman to determine control over language, a mock trial to test concepts and strategies, a series of motions and briefs, different geographical and global locations, numerous experts and an eventual month long trial could be worth hundreds of millions – even billions in exposure to the client, and therefore the technical aspects, message control and strategy will require a lot of time, work and money. In bigger cases like this example, it is even more important to set cost controls and budgets in place.

Budgets can only be made by input from both parties. The better the definition of the need, and the better the description of possible solutions, the easier it is for an experienced consultant/project manager to determine what is needed and what the cost will be. If a budget is developed by line item, and if the production effort matches those line items, then there will be no discussion at the end. However, the litigation process is ripe with surprises. New evidence comes up that either eliminates a proposed exhibit or creates a new unanticipated concept. Development and refinement of a presentation may take longer than expected. All of these nuances should be considered as part of a 'living budget'; one that can be adjusted by communicating between the consultant group, the law firm and the client coordinator who will be ultimately paying the bill.

If the proposed budget looks too high, that is a signal that a better understanding of the business value or scope of work is necessary. It is far better to prioritize the work, reduce projects and re-address the budget at this point than when the work is already underway. For well-defined tasks, there should be a narrow budget range. If a complete definition of the task is not possible, ask your consultant for a budget range based on their experience in supporting cases similar in scope.

In one environmental case, budgeted on a fast track for a two week trial beginning in two months, we developed a task and exhibit list that costed out at a quarter million dollars, including trial support in a different state. The case was pushed back a year, new issues were introduced, additional defendants were added, and the case expanded every week. I prepared a progress report every Friday for the lawyer in charge of the cost control, detailing what had been accomplished and what had been requested, as well as a new proposal for the new work. The attorney lifted my report and added it to his own, which he presented to the client committee every Monday morning. Later on Monday, I would ask for feedback and incorporate it into our action plan. At the end, there was a complete understanding and buy-in by the attorney and the client, a documented history of events, budgets and approvals, and zero write downs for a bill that had grown by a factor of 600%.

Litigations progress in steps. At a successful realization of each step, a negotiation may be possible to seek a settlement. Most cases do not go all the way to court, therefore, determining a budget that assumes work all the way through trial support can be frightening. Therefore, it makes sense to create firm budgets on a step by step basis. Determining a limit based on the value of the case would be a starting point, then the trial consultants should create a detailed estimate of each step as it is being undertaken for approval.

For example, the initial stages of securing foundation materials, perhaps visiting the scene or interviewing a key expert, and creating some visuals to strengthen a brief could be determined immediately. The second step, support for expert graphics or collating key images could be estimated later as that part of the case progresses. Each step can be estimated when the information to define that step is available. Finally, a budget for war room support and trial support should be determined no later than 4 to 6 weeks prior to trial, as separate menu items, just in case the trial settles on the evening before, or the first day.

Control is critical, no matter which method is employed. Time sheets need to be kept daily and compared against projected costs. Pre-approved expenses must be tracked. When controlling creative work against a defined budget, having daily access to rising costs is essential to anticipating potential overruns or, in the case of low productivity status - work that is not getting attention. A cost control program or spreadsheet will allow a director to communicate with his or her counterpart in the law firm to determine a cause. Was a piece of evidence eliminated? Is another argument expanded? Should a change order be submitted to budget for a new concept? Is permission to exceed necessary to produce a new argument? By communicating about these issues early, problems can be avoided, the invoices will be as expected, and write-downs will be avoided.

## Second, Determine a Rate Structure

There are many choices in determining a method of billing for work needed. Traditionally, most law firms **bill for hours worked**, plus costs. Service providers have adopted that technique because it is easy to understand and fits within the invoicing structure of most firms. A lot of clients of the law firms do not like this method, as it is difficult to manage, hard to foresee costs and can bear surprises. While it is easy to simply charge hours for doing the task as requested, and it especially makes sense for the service provider in a litigation situation when a lot is asked at the last minute and the hours in the days up to the start of a trial can go into the early morning hours each day. However, after the dust has settled and the case is over, the accountants will ask why an individual has billed 20 hours per day for several days in a row coinciding with the start of trial. Especially when those excess hours have blown the budget to smithereens.

Some firms therefore cap a working day at so many hours. Some are asked to do it retroactively. The problem may lie in the fact that the litigator has asked for revision after revision of the opening slide set, and going back and forth for dozens of drafts takes time that was not anticipated, especially at the nth hour, when the presentation should be locked down, practiced, loaded into the presentation system and the team should be getting rest.

If you have agreed to an hourly rate, using a project control document can help the exhibit manager/director to anticipate completion and help eliminate the need for working into the wee hours with a tired mind.

Some companies are offering a **'Fixed Price'** or **'Price Cap'** method of pricing.

In a **fixed price** arrangement, a task is identified and described, time and materials are considered, and a price is proposed for that task. It could be a set of exhibits for a brief; it could be a trial technician who spends each trial day loading exhibits, then sitting through trial to bring them up in order on the monitors. It could be for a few documents to be highlighted and enlarged onto stiff easel boards. This is good for predictable efforts that can be mathematically determined (preparation hours x rate), but even intangibles like creative services can be fixed. For example, a consultant can propose and accept a fee for determining case strategy and developing a certain number of exhibits. The key factor here is understanding what is needed, and what it should take to complete the task. An experienced consultant will be able to calculate that price. Then, it is a simple matter of agreeing to the work and cost, and executing. Time sheets will only be interesting for the consultant in tracking to see if the estimate was proper. The client will get no surprises.

**Capping the price** is a variation on the fixed price method, but allows the service provider to submit timesheets up to the value of the cap. If the work is less than the cap, the bill is less. If the work is greater than the cap, the price stays at the cap and the service provider assumes the excess.

Critical to fixing the fee is an understanding of what is needed, and that the work and feedback from the client to the service providers is reasonable as well. A consultant can build a presentation and certainly anticipate eight or ten drafts of the product during the refinement process, but if the client keeps asking for more and goes off on unforeseen tangents, whether the new concepts are critical to the case or not, then a new accounting should be made and a change order submitted to approve the excess work. The cap only works if the project continues to be defined by the actual work performed. It requires close communication between both parties and a clear definition of the task and the tools necessary to accomplish that task.

Your clients value predictability of cost, so a fixed-fee project budget is an excellent option. With this approach, it is important to define a scope of work so that both the consultants and trial team understand exactly what responsibilities each party has in order to meet the budget. And to determine a protocol if the scope of work changes that will allow adjustments to the fee.

### **Third, Hire a Great Consultant**

For a graphics or technology consultant to truly help, they must understand your case and objectives quickly, and be able to suggest strategies immediately. Otherwise, you just have someone who will do as they are told – an order taker and a scrivener. A good consultant has the benefit of having worked on hundreds of trials in their career—your trial team is buying that expertise and should benefit from that experience. In other words, if you haven't been receiving thoughtful ideas, recommendations, and creative approaches, you haven't been working with the right people.

How does it all happen?

It begins with direct communication with the trial team and a review of key documents to understand the issues. Once the basics are assimilated, you should receive recommendations and ideas through the drafting of storyboards, and the sharing of approaches used in similar matters. These ideas are refined collaboratively and production begins. In creative work, graphics production is time intensive; it is in this phase where costs generally spiral if not under control. If the ideas are not sufficiently refined in the first phase, it is possible to slip into a practice of constantly reworking ideas, a practice that is indulgent and costly. While it is simple to edit a brief at the last moment, making alterations to visuals is a more complicated and can rack up costs exponentially, unless anticipated. The final step is testing the materials against the message where the objective is to talk through the visuals as they'll be used in court and evaluate their clarity and persuasiveness.

### **Fourth, Take a Lesson from Hollywood**

Creative production occurs in phases. Watching filmmakers work is a great way to understand the process. They start with a script, then sketch scenes into storyboards, film the action, and cut the final images together into a concise story. From another perspective, they start with a cheap medium (words) and few resources until ideas are refined and progress to the expensive production work.

Trial presentations always benefit from the same approach.

We want to start with the words before we make the pictures. And before we make finished pictures, we want to start with a sketch. Storyboarding a 30 second animation may take a few hours while creating an animation in 3-D may take 15-20 hours. Making alterations to a storyboard is simple and efficient, while changing animation components and timing is less so. A client once asked us to review and estimate the cost of producing an animation done by another firm. It looked like a \$10,000 animation to us – about 20% storyboarding and 80% production. We were shocked to learn that they were invoiced over \$50,000 for that animation. The client never saw storyboards, still frames, or anything but a fully rendered animation. And the animation was not what was expected, not consistent with the trial strategy, and not useful.

One important practice pointer; in one case, once we had a storyboard developed with fine illustrations, it was determined that the sequence of pictures told the story just fine, that dynamic motion provided by an animation was not necessary, what was critical was having the frames available as still pictures to look at detail and explain the sequence was more practical. The frames were input into a trial presentation system, each was shown with a dissolve from one frame to another to simulate action, but they were also recreated with tags and labels in a second set. This second set was then produced on foam easel boards and left up for the duration of a two day examination of a witness to refer to consistently. By the end of the case presentation, the jurors completely understood the mechanics and our side's story, and referred to the frames in the jury room to dispute the other side's theories. By stopping at the story board stage and utilizing the media in the best way, we avoided the animation costs and were able to burn the images into the juror's minds. An animation could only be shown a few times and without key frames on easels or in presentations, could be forgotten sooner.

Don't rush into production. Test and retest your demonstratives. Advocate them from both sides. Find weaknesses and places where the other side could take advantage of your illustrations. Allowing time for this process will net you better presentations at a lower cost. Sometimes, there are extenuating circumstances and you must move production along immediately. Often, however, there is time and that leads directly to our fourth tip:

#### **Fifth, It Doesn't Pay to Delay**

Often, trial teams will delay working with a consultant in hopes of minimizing costs. In the short term, it could save some money. In the long term, however, compressing the time to prepare can cause costs to rise exponentially and with little control. How? With a little time and a lot of work to do, we are forced straight into production. In our experience, starting work within a month of trial results in 30-40% higher costs than a gradual investment in developing presentations over a six month period.

Worse, however, is that you will be missing many opportunities to visually check arguments, use persuasive graphics in hearings and briefs, check visuals with fact witnesses and experts, find foundation materials for important new arguments after discovery is closed, refine key points or describe technical matters succinctly. When there is only a few days or weeks to make your visuals, we may not achieve the depth of understanding to know your case as well, and may not be able to make the same quality of recommendations as if we have been involved from the beginning.

Here's a better approach; get the consultants involved early in your case so they understand the issues. A few early introductory meetings to get the consultants thinking about the issues and making recommendations is not expensive and could result in the development of a key argument or exhibit that may make the case. Spend in small amounts using low-budget or fixed fee projects. Use professional photography or videography to capture the physical evidence in your case. Develop a few key demonstratives to give your client a sense of how their case will look in court. Use your strongest images, whether they may be admissible or not in trial, to leverage settlements. Add visuals in your briefs to not only help the judge understand your technology or key points, but to emphasize to your opponents a commitment and intent to win.

During the process, your consultant will develop a very good understanding of your case and eliminate the need for getting-up-to-speed meetings close to trial. Even better, you can use this work product throughout the case and get more value from it.

#### **Finally, Do it Yourself? It may Cost More.**

The proliferation of PowerPoint has enabled many firms to create and build their own presentations. We think that is a great trend in some ways. PowerPoint is easy enough to use that we can now work collaboratively with trial teams and they do not need us for routine edits. This does not mean that consultants and designers are moot.

Staff that are untrained or beginners in PowerPoint tend to create slides that have inconsistencies, clutter, improper focus and sometimes unnecessary colors and effects that draw away from the message. But a staff prepared draft, including all relevant information and ordering the presentation along the lines of an argument is a great booster for a communications specialist to refine. Having both left brain and right brain approaches can strengthen a presentation much stronger than using one creator or the other.

A consultant experienced in legal visual communication brings a different outlook to the team. We are used to seeing stories in visual terms, thinking in storyboards and turning concepts into attractive graphical elements, designers are closer to speaking the media language of jurors and fact finders. In other words, we see beyond bullet points.

In one case, a client's associate spent over 60 hours developing a complex animation in PowerPoint. We had to do it over. The design wasn't consistent with the other demonstratives, the objects jumped around from

slide to slide, and the artwork was poor quality. The clip art was disjointed and inconsistent in style from one slide to another. It was distracting rather than adding support to the key points. It took us six hours to redo. Storyboarding with the client took an additional two hours. In that case, the original effort wasn't a great use of the client's money.

In another instance, an expert simply provided a slide set of a variety of her lecture posters. Each was filled with miscellaneous information not germane to the case and distracting to the message. Even though they had been published and had authority, in a moot trial practice, feedback told us that the jurors would reject the slides out of misunderstanding, confusion and dislike, rendering the testimony of the expert a waste. By practicing with the lead attorney and the expert, we refined the message to the key points, simplified the graphics and created a set of supporting slides that enhanced the testimony, validated the message and rehabilitated the expert.

An efficient approach is in collaboration with the visual team. Leverage the speed and lower billing rates of your consultants to generate the initial work product. Allow them to create the visual flow and illustrations. Then, you can refine language, make routine edits and write bullet point content directly to the graphic templates.

### **In Closing,**

The perfect world in preparing for or engaging in, litigation does not exist. But what is available are effective strategies and experienced professionals who can guide you through the process. Maximizing time and budgets through effective resource management can get you the persuasive presentations and reliable support within predicted costs.

The key is to set reasonable expectations within a framed budget up front. Engage experienced professionals to properly guide you through the process from the beginning. Take a cue from Hollywood and work intelligently through the process of developing graphics. Don't delay in an attempt to save money but do efficiently use all the time you have as a cost saving measure. Finally, engage the right personnel at the right times it will save you time, money and frustration.

Remember that the few days of trial will only be the culmination of all the effort and expense of litigation. The outcome depends on preparation, creativity, legal arguments, well prepared witnesses, perfectly developed themes and presentations, a logical story, confidence and a myriad of other factors. Consider the sum of all costs through trial divided by your actual time before the trier-of-fact. Fine tuning the presentation that will take your message to the triers or the finders of fact will be the most critical time spent in your entire case and is worth weaving into your entire presentation development schedule and budget.