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PERSPECTIVE

Resolve large fee disputes effectively

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The legal media has reported that even elite, top-tier national law firms are no longer averse to suing clients over large unpaid legal bills in today's difficult legal marketplace.

Fee disputes are among the most bitter, contentious, emotionally charged types of litigation. The desire for vindication on both sides, combined with the economic stakes involved, can drive up the legal fees for each party in a large fee litigation well into the hundreds of thousands of dollars.

The majority of those dollars usually end up being spent in the discovery phase of a large fee case on fact depositions, document productions, motion practice, hearings and the like. Many times the parties still find a way to compromise at mediation closer to trial, but by that point 80 to 90 percent of costly discovery proceedings may have already occurred.

Conversely, early neutral evaluation, or ENE, is particularly suited for the resolution of large fee cases before fact discovery even commences, and sometimes even before a fee lawsuit or arbitration demand gets filed. We call this process "Fee Dispute ENE."

At present, it is not the customary practice among sophisticated litigants and their outside counsel to avail themselves of ENE in multi-million-dollar fee cases, notwithstanding the considerable potential savings in legal fees for both sides if discovery can be avoided, or at least minimized. Settlement at mediation closer to trial is more common.

Having a productive mediation in most types of litigated matters usually involves each side first developing some key documentary evidence through fact discovery to make a solid presentation of their position to the mediator.

Fee Dispute ENE, however, operates differently in a few important respects. First, when ENE is used retrospectively to evaluate the reasonableness of legal fees incurred in a prior underlying action, the disputed law firm's invoices from the underlying action should already be in the hands of both parties. Second, publicly-filed case documents from the underlying action reflecting the quantity, quality and complexity of the legal work performed and billed by the law firm may be accessible very early on, as well.

Thus, undertaking discovery first in a fee case may not be a prerequisite to obtaining key documentary evidence needed to support Fee Dispute ENE in the first instance. Exceptions aside, this particular advantage of the process should apply to any multi-million-dollar fee case where the neutral evaluation focuses on fee reasonableness in a prior underlying action.

For that reason, Fee Dispute ENE is viable in more than just conventional attorney-client fee disputes. It can also be used, for example, in disputes between policyholders and insurers over claimed underpaid independent counsel defense fees in an underlying action where an insurer has issued a reservation of rights or where coverage for "defense costs" is not being disputed, just their reasonableness.

To proceed with a Fee Dispute ENE, the parties will be best served by selecting an experienced, trial-savvy neutral with the capability to delve into, grasp and articulate the evidentiary strengths and weaknesses of each side's position in the fee case.

Fee Dispute ENE also allows for having a mutually-retained neutral fee expert to assist the process (loosely akin to a special master whose cost is shared by the parties), rather than each side hiring their own fee expert.

A credible, well-respected neutral fee expert could prepare an initial written report for all participants in the process. To do that, the neutral fee expert would first review the available documentary evidence from the underlying action and perhaps even interview knowledgeable representatives from each side regarding the underlying action.

After the neutral fee expert delivers the initial report, the ENE neutral could then build upon it with their own analysis, even meeting with the parties and their counsel as necessary to obtain additional information and evidence. The ENE neutral would ultimately prepare his or her own written evaluation of the merits of each side's position in the fee case and the likelihood of success at trial.

Appropriate stipulated protective orders or confidentiality agreements could cover all ENE written reports and all neutral fee expert work product to the extent the mediation privilege does not apply.

Fee Dispute ENE may require some additional "mediation" processes to move the parties toward a settlement. If that were necessary, an earlier-than-usual mediation session, covered by the mediation privilege, could be scheduled, in which event the ENE neutral would be well-positioned to pursue typical evaluative techniques to resolve the fee dispute.

In the end, a Fee Dispute ENE could combine elements of both traditional ENE and traditional mediation, blurring the line between them, with the parties helping to craft their preferred process.

Deciding whether to mutually retain and share the cost of a neutral fee expert is optional for the parties in a Fee Dispute ENE. However, combining the skill sets of a trial-savvy ENE neutral and an experienced fee expert will likely lend extra credibility to the process and increase the chances of a successful outcome.

Even if a Fee Dispute ENE did not produce an immediate settlement, it could still serve as a very early "reality check" for both sides and possibly pave the way for a negotiated settlement much sooner than a late-stage mediation, thereby still resulting in savings on legal fees for the fee litigants.

To use a baseball analogy, there may be an opportunity to resolve any multi-million-dollar fee dispute much less expensively in the "2nd inning" with pre-discovery ENE rather than in the "8th inning" at post-discovery mediation.

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