

Calif. Court Cuts Push Attys To Alter Litigation Tactics

By Erin Coe

Law360, San Diego (December 12, 2013, 10:14 PM ET) -- Longer delays in bringing cases to trial due to years of crippling budget cuts in the California courts are putting pressure on some law firms' bottom lines, and driving attorneys to tackle information sharing with opposing counsel more proactively and to take other steps to bring suits to a speedy resolution, lawyers say.

Nearly \$1 billion in budget reductions to the California Judicial Branch over the past five years have forced state courts to lay off and furlough staff, close courts and cut hours. Although \$63 million was restored to the branch thanks to the state budget that passed this year, the court system still needs an additional \$1 billion to be fully funded, according to Brian Kabateck, managing partner of Kabateck Brown Kellner LLP and former president of the Consumer Attorneys of California.

As courts struggle to operate with fewer resources, lawyers are seeing motion hearings and trial dates postponed, which is giving defendants less incentive to settle cases and increasing the financial strain on some firms — particularly small plaintiffs firms that take cases on an hourly or contingency basis, according to Kabateck.

"Hourly or contingency lawyers make a disproportionate amount of their income about 45 days before the trial date," he said. "But the longer it takes to get a case to trial, the further off that payday is. ... The delays are going to cause some firms to have to go out of business because they can't support themselves long enough."

Michael Alder, a personal injury lawyer and founder of AlderLaw PC, said he was seeing some small personal injury shops taking out loans or unloading cases onto firms like his to stay afloat in Los Angeles, where some state court trials are being scheduled for two years after a case's filing date — double the trial schedule lag of previous years.

"You're not settling cases as frequently, and that hurts your cash flow and profits quite a bit," he said. "You're putting costs into a case, but you don't get those back until the case is resolved, which means that the money you've invested is tied up for longer periods of time."

He also said the longer trial dates are allowing personal injury defendants like insurance companies to avoid taking action in cases.

"Trials are the ultimate hammer to get the defense to listen," he said. "Many carriers are sitting on these cases ... and holding onto their money as long as they can."

But Alder said the case delays have spurred his firm to take a proactive approach in litigation that has helped him resolve cases with insurers. He said he demands information early from defendants and, at the same time, provides carriers with the discovery responses, depositions, independent medical examinations and other data they need to analyze and settle the case.

“Many, many firms feel the need to hide this information from carriers, but I take the contrarian approach by providing it as quickly as I can up front,” he said. “It’s an approach that has worked great for my firm.”

In light of the court budget cuts and corporate legal departments’ own budget limitations, clients increasingly want to avoid drawn-out litigation, according to Greg Call, head of Crowell & Moring LLP’s San Francisco office. Lawyers should therefore offer a range of solutions, in and out of court, for clients to resolve disputes as efficiently as possible, said Call, who represents both plaintiffs and defendants.

“Good lawyers are thinking about what the endgame is,” he said. “They are thinking about how to get a case resolved or how to win it through a motion victory or a trial victory or through a successful mediation result.”

If delays are expected in a particular state court, lawyers may want to advise clients of other alternatives, such as filing a case in a state court with a lighter caseload, a federal court or even an out-of-state court, or taking the dispute through private arbitration, according to Call.

“The discussion between law firms and clients is much more focused these days on how to resolve a case quickly and effectively,” he said. “Firms that can provide ways to efficiently resolve matters are getting hired.”

Meanwhile, delays are making it more challenging for law firms to identify leverage points early in cases to get the faster resolutions clients want, according to Robyn Crowther, a Caldwell Leslie & Proctor PC attorney who represents plaintiffs and defendants in business litigation.

“Clients get leverage in a case when a court rules in their favor or orders the other side to comply with discovery, but it can take six months to get those kinds of rulings,” she said. “It’s more difficult for firms to position the case for clients to get it resolved in a moderate amount of time.”

For instance, Los Angeles judges are discouraging parties from filing demurrers — the state court’s equivalent to motions to dismiss in federal court — in part because they can be used as a delay tactic.

“Even cases with strong demurrers are facing reluctance from courts to consider them, and means a client may have to wait until later in the case and through discovery to tee up issues of law,” she said.

But these challenges have led her to advise clients with only the strongest motions that it may be worth spending the money on a demurrer, she said. And because budget cuts have made it harder for courts to control the discovery process, lawyers on opposite sides are looking for ways to work together.

“We’re picking our battles a little differently,” she said. “And [these delays are] forcing lawyers who want to advance a case to work more cooperatively.”

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