

ANATOMY OF A LAWSUIT

A Client's Analysis and Discussion of a Multi-Million Dollar Federal Lawsuit

Ronald H. Gruner
President
The Vallex Fund

January 8, 2008
Revision 1.0

©Cartoonbank.com



"You have a pretty good case, Mr. Pitkin. How much justice can you afford?"

TO THE READER

This study is based on an actual multi-million dollar federal lawsuit litigated during 2004 through 2006. As the CEO of the plaintiff company I was involved in case strategy, served as a witness, and approved the legal bills. Although intensely involved at times, my other responsibilities kept me from truly understanding many of the issues driving the case and the resulting costs for both us and the defendants. Now retired, I have that time and have used at least some of it to conduct a quantitative and qualitative analysis of the lawsuit.

Why? Because, simply put, being an engineer I am curious as to how things work, and how they might be improved. And few would argue that our country's approach to civil litigation could not be improved. For many reasons it is often a very inefficient process. Yet very few laypersons involved in litigation, whether senior executives or private individuals, understand why litigation is so often complex, inefficient and expensive.

The purpose of this paper is to put a representative lawsuit "under a microscope" not only to study its anatomy, but also to help understand the ecosystem civil lawsuits occupy that so often make them frustrating, time-consuming and expensive. It is best read with its companion paper, [*A Call for Legal Entrepreneurship*](#), which expands on the legal ecosystem discussing law's transition from a profession to a business, issues with self-regulation and in particular how more entrepreneurship within the *process* of law will improve the *practice* of law.

This is a long and at times tedious paper. For readers not having the time or inclination to read the entire paper the following guidelines should help to make selective reading more productive:

To Understand...	Read...	Pages...
How individual lawyers billed for their services.	<i>Hourly Billings</i>	3-6
How annual rate increases and time tracking practices affected lawsuit costs.	<i>Impact of Annual Rate Increases and Time Tracking</i>	6-8
How various professional level billings contributed to the lawsuit cost.	<i>Hourly Billings: by Professional Level</i>	8-10
The specific costs and issues surrounding the lawsuit's major work products.	<i>Work Product Analysis</i> - <i>Complaint</i> - <i>Discovery</i> - <i>Expert Reports</i> - <i>Settlement</i>	17-18 31-34 34-36 37-88
An example of how discovery disputes become so expensive, time-consuming and frustrating.	<i>Case Study of a Discovery Dispute</i> - <i>Court Docket with Commentary</i> - <i>The Dispute as a Microcosm of Today's Discovery: Lessons Taken</i>	20-28 28-30
How the lawsuit compared to law firm financial metrics.	<i>Industry Metrics Analysis</i>	40-43
How the cost of the lawsuit's work products might compare to those in the business world.	<i>Comparative Analysis</i>	44-51
The lawsuit's total costs and the two factors which contribute to the high cost of litigation.	<i>Summary</i>	52-54

As the reader you may wish to contribute to the discussion. We urge you to do so and would appreciate your thoughtful perspectives, criticisms and suggestions regarding the issues herein. You may submit these at...

<http://www.VallexFund.com/Forum>

The Vallex Fund is an investment firm investing exclusively in the legal marketplace. Our firm's mission is to encourage, finance and support entrepreneurs focused on helping to make legal services more efficient, effective and broadly available when needed. Additional information is available at [VallexFund.com](http://www.VallexFund.com).

Ron Gruner
The Vallex Fund
January 8, 2008

CONTENTS

INTRODUCTION	1
HOURLY BILLINGS.....	3
WORK PRODUCTS	13
INDUSTRY METRICS	40
COMPARATIVE ANALYSIS.....	44
SUMMARY	52
APPENDICES	
<i>A. Expense Categorization</i>	A-1
<i>B. Expense Allocation</i>	A-5
<i>C. Billing Records</i>	A-7
<i>D. Civil Docket</i>	A-8
<i>E. Sources</i>	A-14

INTRODUCTION

Much has been written regarding the costs and issues surrounding litigation today, yet few concrete case studies are available. This paper investigates these costs and issues based on an analysis of a federal lawsuit typical of 98 percent of all federal lawsuits – it terminated prior to trial. We believe the lawsuit is typical of many and hence a good candidate for careful study.

The analysis and discussion in this paper, while critical at times, is not a criticism of the individuals or their firms representing the Plaintiffs. Nor of the Defendants' lawyers who provided their clients a strong defense both in strategy and execution. And certainly not a criticism of the judges who worked so diligently to sort out the complex, conflicting arguments made by the litigants with only a tiny percentage of the resources of those available to the litigants. No, the problems and issues identified are not specific to individuals or firms, but are, in our opinion, systemic, deeply-rooted weaknesses of the U.S. civil litigation system.

The lawsuit was filed in federal court in March, 2004 by Direct Report Corporation (the "Plaintiff") which operates under the name of Shareholder.com. Shareholder.com provides a family of shareholder communication services designed to help public companies communicate with their investors. I founded the company in 1992 and served as its president until January, 2006 when the company was acquired by The Nasdaq Stock Market. The defendants were a major competitor. Neither a discussion of the lawsuit's issues or the identification of the Defendants would contribute to the analysis and have not been included. The lawsuit's civil docket is available as a matter of public record.¹ The lawsuit was terminated in January, 2006 by mutual agreement of the Plaintiff and Defendants.

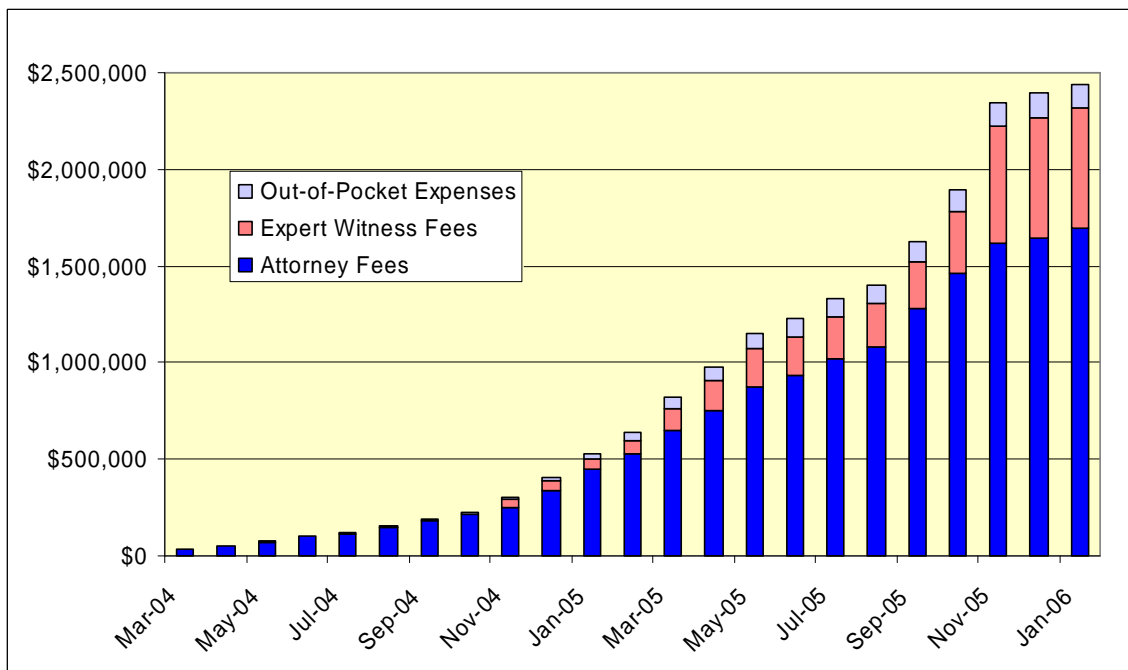
The case was moderately complex. It involved counterclaims by the Defendants, an amended claim by the Plaintiff, the deposition of eighteen witnesses, discovery and analysis of computer files, email and other documents, multiple court motions to compel discovery, outside expert analysis of financial damages and computer files, and three rounds of settlement talks. Two additional factors complicated the case: i) At the time the Plaintiff filed the lawsuit, the Defendant company had recently been acquired by another company resulting in indemnification issues between the Defendant and the acquiring company, and ii) Near the end of the case the law firm representing the Plaintiff merged with a firm representing one of the Defendants which required the Plaintiff and Defendant to each retain new law firms due to the conflict-of-interest arising from the merger.

Figure 1, "Cumulative Legal Expenses," graphs expenses as the lawsuit progressed. The Plaintiff's total expenses during the lawsuit were \$2,443,068 and consisted of \$1,697,322 in attorney fees, \$619,946 in expert witness fees and \$125,800 in law firm out-of-pocket expenses. These expenses may be small by federal lawsuit standards but they were very significant to the Plaintiff as a small company.

Our approach to the analysis was to ground it on the most concrete data we had available, the monthly invoices submitted by the law firms and expert witnesses over the two year period of the

lawsuit. These billings, excepting certain expert witnesses, were itemized by task and included the hours and amount charged, the work performed and the individual performing the work.

Figure 1: Cumulative Legal Expenses



From these invoices we constructed a detailed database that documented the thousands of individual tasks performed during the lawsuit ranging from attending federal court hearings to photocopying documents. For each task the responsible individual was identified and the hours and amount billed documented. A total of 3,281 allocations, each defining a specific task, were made against 1,631 hourly billings records. The methodology is described in Appendix A, “Expense Categorization.” The detailed billing records are provided in Appendix C, “Billing Records.”

Using this detailed database as the foundation we then analyzed the lawsuit’s (i) hourly billings by individual, professional level and task, (ii) resulting work products which comprised the lawsuit – claims, discovery, expert reports and settlement, (iii) estimated profitability and how that profitability ranks relative to industry financial metrics, and (iv) compared costs relative to a theoretical ideal. We conclude this section with a summary of our factual findings, leaving our observations and conclusions for the paper’s final section.

For clarity, when referring to this paper or its underlying analysis we reference ourselves in the first person as “we.” When referring to the lawsuit’s participants, we reference them as “the Plaintiff” and “the Defendants.”

HOURLY BILLINGS

We first tabulated hourly billings by individual. Over 95 percent of the \$1,697,322 total hourly billings were generated by ten individuals: two senior partners, two junior partners, four associates and two paralegals. Table 1, “Hourly Billings by Individual,” provides dollar-ranked details for these ten individuals.

Table 1: Hourly Billings by Individual

Individual and Firm	Dollars	Hours	Dollars per Hour	Billing Days	Average Hour/Day	8+ Days	Percent 8+ Days
1 - Senior Partner A	305,117	597	511	237	2.5	15	6.3%
2 - Associate A	301,202	1,310	230	241	5.4	59	24.5%
3 - Senior Associate A	258,724	878	295	264	3.3	20	7.6%
4 - Junior Partner B	250,005	595	420	97	6.1	32	33.0%
5 - Junior Partner A	146,439	341	430	213	1.6	2	0.9%
6 - Senior Partner B	138,305	199	695	88	2.3	2	2.3%
7 - Paralegal A	79,459	663	120	153	4.3	6	3.9%
8 - Associate B	54,143	187	290	44	4.2	8	18.2%
9 - Senior Associate B	50,663	147	345	55	2.7	2	3.6%
10 - Paralegal B	42,541	224	190	53	4.2	3	5.7%
11 - 47 Others	70,726	346	204	186	1.9	2	1.1%
Total	1,697,322	5,486	309	1,631	3.4	151	9.3%

The lawsuit spanned 101 weeks from the first hourly billing on February 25, 2004 through its termination January 31, 2006. During that time an average of 3.36 lawyers worked on the lawsuit each of the 485 work days it covered (101 weeks less holidays) generating an average 11.3 billable hours (5,486 / 485) and \$3,500 in billings (\$1,697,322 / 485) each day. These expenses do not include out-of-pocket expenses such as travel and photocopying or expert witness fees, which will be discussed later.

Near the end of the case the Plaintiff’s law firm merged with a firm representing one of the Defendants which required each party to retain new law firms due to the conflict-of-interest arising from the merger. In this paper we call the Plaintiff’s first firm “Law Firm A,” and their second “Law Firm B.” The Plaintiff engaged Law Firm A for 20 months from late February, 2004 through the end of September, 2005 when they resigned from the case. Law Firm B began a transition in mid-August, 2005 and assumed the lawsuit from October 1, 2005 through January 31, 2006 when the case terminated.

Firm A’s Senior Partner generated the largest total billings, \$305,117, billing 237 days at an average of 2.5 hours and \$1,287 per day. An associate at Firm A billed the most hours, 1,310 hours, spread over 241 days with 59 days, 24.5 percent, over eight hours in length. Her average day was 5.4 hours and \$1,250 per day. The Firm B Junior Partner billed the longest average days, 6.1 hours per day, the most days, 33 percent, over eight hours and the highest daily expense at \$2,577 per day.

The senior partners at Firms A and B each worked an average of 2.5 hours and 2.3 hours per day respectively, a slight difference of twelve minutes. On the other end of the billing scale, the

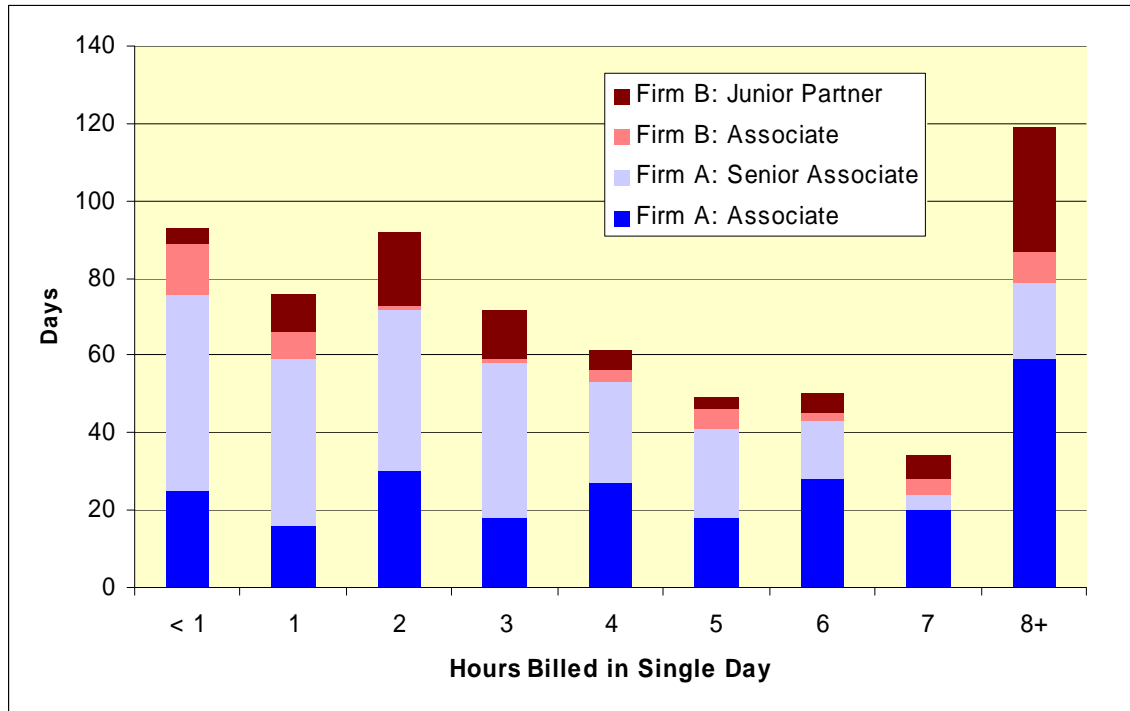
highest billing paralegals at Firms A and B each worked an average of 4.3 and 4.2 hours per day, an even smaller difference of six minutes per day. In the middle, the highest billing senior associates at the two firms each worked 3.3 and 2.7 hours per day, or within 36 minutes. These similarities are intriguing. Today “partners are expected to fine-tune leverage and utilization with the goal of maximizing profits. For many firms, attention to detail on such things as staffing mix has brought hundreds of thousands of dollars to the bottom line.”² Are these billing similarities examples of fine-tuning to the point that law firms allocate their staffs, from partners to paralegals, nearly identically, or they just statistical coincidences?

During the lawsuit, 151 billing days, 9.3 percent, exceeded eight billed hours. What consumed these long days? The actual invoice entries below [with redactions] illustrate how the Plaintiff’s law firms documented their longest days:

Firm A Senior Partner	04 Mar 2005	11.3 hrs	\$5,819.50
Review documents and outline in preparation for deposition of [Defendant Witness]; conference with [Firm A Attorney] regarding strategy; conference with [Client Attorney, Client] regarding [Defendant Witness] issues; take deposition of [Defendant Witness]; conference with [Firm A Attorneys] regarding [Defendant Witness] deposition developments, further questions/issues.			
Firm A Associate	28 Sep 2005	13.8 hrs	\$3,243.00
Draft motion to compel; organize document review; meeting with [Expert] regarding statistical analysis; letters to [Opposing Attorney] and [Opposing Attorney]; organize file transfer.			
Firm A Senior Associate	12 Jul 2005	13.3 hrs	\$4,189.50
Continue review of documents in preparation for [Defendant Witness] deposition; continue draft of deposition outline; conduct deposition of [Defendant Witness]; conference with client regarding same; conference with [Firm A Attorney] regarding same.			
Firm B Junior Partner	10 Nov 2005	18.25 hrs	\$7,665.00
Travel to New York; meeting with expert; review of expert materials for expert report.			
Firm A Junior Partner	29 Mar 2005	8.5 hrs	\$3,697.50
Defend deposition of [Plaintiff Witness]; travel back to Boston.			
Firm B Senior Partner	01 Nov 2005	11.0 hrs	\$7,645.00
Review [Expert 1] and [Expert 2] reports; meeting at [Expert 2 in Chicago].			
Firm A Paralegal	13 Jul 2005	10.5 hrs	\$1,260.00
Attend to [Defendant Witness] deposition follow-up matters; prepare materials for 7/14 mediation per [Firm A Attorney].			
Firm B Associate	28 Sep 2005	14.3 hrs	\$4,147.00
Reviewing email for production at [Law Firm A]. Reviewing docket and pleadings.			
Firm B Associate	12 Oct 2005	9.6 hrs	\$3,312.00
Attended [Plaintiff Witness] deposition; assisted [Firm B Attorney] with document-related issues for same.			
Firm B Paralegal	17 Oct 2005	8.8 hrs	\$1,672.00
Reviewed [Defendant] production in order to identify customer contracts. Provided documents requested by [Firm B Attorney]. Arranged for copying of documents related to [Plaintiff Witness]. Office conference with [Firm B Attorney] regarding outstanding tasks. Telephone conference with copy vendor. Telephone conference with docket clerk regarding Motion for Leave to File Sur-Reply. Reviewed PACER docket in order to identify outstanding motions. Provided documents requested by [Client Attorney]. Created timeline of events surrounding the alleged intrusions.			

Although every top-billing individual worked two or more eight-plus hour days, 78 percent of these long days were billed by four attorneys. Figure 2, “Hours Billed in a Single Day,” graphs the hourly billing pattern for these four lawyers. The number of eight-plus hour days is striking.

Figure 2: Hours Billed in Single Day



As a group the four lawyers billed \$864,073, just over half the total hourly billings of \$1,697,322. Together they worked 119 days over eight hours with those long days averaging 10.4 billed hours. See Table 2, “Lawyers Billing Long Days.”

Table 2: Lawyers Billing Long Days

	Firm A		Firm B		Total
	Associate	Sr. Associate	Jr. Partner	Associate	
Total Hours:	1,310	878	595	187	2,970
Total Fees:	301,202	258,724	250,005	54,143	864,073
Total Days:	241	264	97	44	646
8+ Hours Days:	59	20	32	8	119
Percentage 8+ Hour Days	24.5%	7.6%	33.0%	18.2%	18.4%
Average 8+ Hours:	10.1	9.8	11.6	10.1	10.4
Max Hours:	13.8	13.3	18.3	14.3	18.3

The Firm B Junior Partner put in the longest day at 18.3 billed hours. A third of his days were over eight hours, averaging 11.6 billed hours when working over eight hours. The Firm A

Associate worked 241 days with 24.5 percent of those days over eight billed hours. As a group, 18.4 percent of the days worked were over eight hours averaging 10.4 hours.

These long days must have been exhausting given the intensity of legal work. Consider also that a typical day includes approximately two hours of un-billable time for meals, personal needs and other non-client related activity making their actual day even longer.³

From the client’s perspective, consistently long hours raise the issue of effectiveness. If a lawyer is 100 percent productive the morning after a good night’s sleep, how productive is she the last hour of a twelve hour day, or after eighteen hours? If working long days back-to-back, how does productivity the second or third day compare with the first?

Impact of Annual Rate Increases and Time Tracking

It is an amusing irony that many law firms when taking on a new client, particularly an unsophisticated one, provide only a simple engagement letter defining the work to be done and the associated costs. In contrast to the detailed contracts they develop for others, their letter agreement typically commits the firm to very little. Issues such as rate increases, time tracking practices and out-of-pocket costs are often not specified. Yet, these costs can be substantial.

Consider annual hourly rate increases. Table 3, “Law Firm A Rate Increases,” documents Law Firm A’s 2005 actual rate increases for each of their five highest billing individuals.

Table 3: Law Firm A Rate Increases

Firm A	Dollars per Hour		2005		
	2004	2005	Hours	Impact	Annualized
Senior Partner	500	515	441	6,617	8,822
Associate	200	235	1,119	39,162	52,215
Senior Associate	280	315	372	13,024	17,365
Junior Partner	420	435	220	3,303	4,404
Paralegal	115	120	643	3,214	4,285
Total	1,515	1,620	2,795	65,318	87,091

As a group, hourly rates increased seven percent with associate rates increasing \$35 per hour, or as much as 17.5 percent. In 2005 the five individuals billed 2,795 hours through September 30 when the firm left the case due to their merger. This resulted in an actual fee increase, starting the first day of the new year, of \$65,318 for the nine months of 2005. This represents a weighted (by 2005 hours worked per lawyer) average increase of 9.1 percent. Had they continued on the case, the annualized expense increase for 2005 would have been \$87,091. Assuming similar rate increases annually, these annual increases compound so the total cost increase over a four year lawsuit would have been well \$280,000 for these five individuals alone.

A firm’s approach to time tracking also affects costs. A senior partner billing \$600 per hour is generating fees at the rate of ten dollars a minute. A five minute phone call or email costs fifty dollars – if it is billed at five minutes. But time tracking practices vary by law firm and even individuals within a firm. Many firms bill by tenths of an hour, six minute, increments. Others

use increments as high as fifteen minutes. So a \$600 per hour lawyer taking a single phone call during the day might bill anything from \$60 to \$150 for the five minute call.

Our analysis of time tracking practices suggests that time tracking granularity seems to decline as the individual's hourly billing rate increases. Paralegals and associates were diligent in billing in six minute increments. Furthermore, their billings were distributed fairly evenly across the 60 minute span. Figures 6 and 7 illustrates Firm A Paralegal and Associate billing practices. The charts graph the days each hourly increment is billed. For example, Firm A Paralegal billed 153 days total. Fifteen days he billed a whole-hour amount (e.g. 1.00, 2.00, 3.00...), eleven days he billed a tenth of an hour residual (e.g. .10, 1.10, 2.20...) and so forth.

Figure 3: Firm A Paralegal

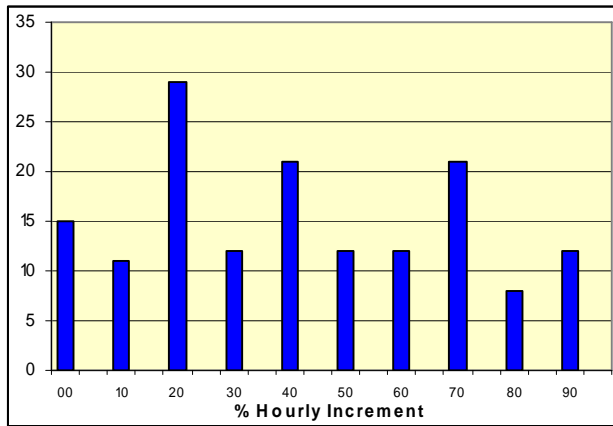
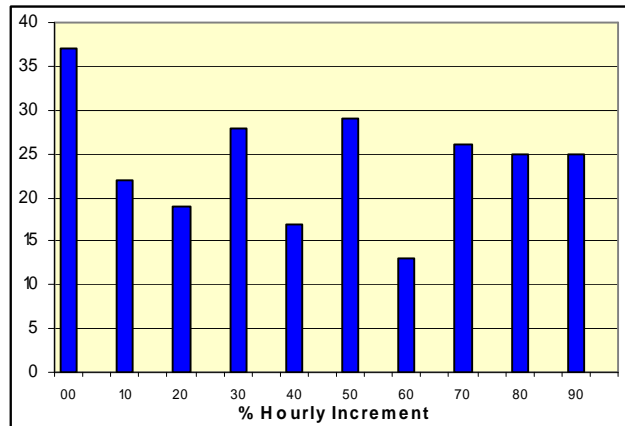


Figure 4: Firm A Associate



Both billings are fairly well distributed in tenth-hour increments although the Associate shows a tendency to bill on the whole-hour (00).

Contrast the above billing practices with Figures 8 and 9 showing the billing practices for Firm A and Firm B Junior Partners. Firm A Junior Partner billed 213 days with 130 of those days, 61 percent, billed either on the whole or half-hour. Firm B Junior Partner only billed fifteen minute increments with a distinct upward distribution across the hourly increments.

Figure 5: Firm A Junior Partner

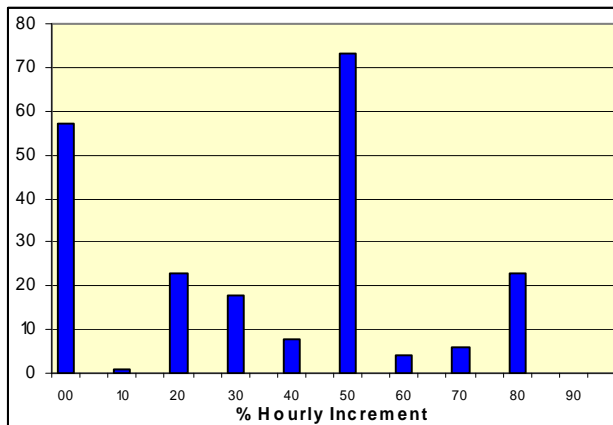
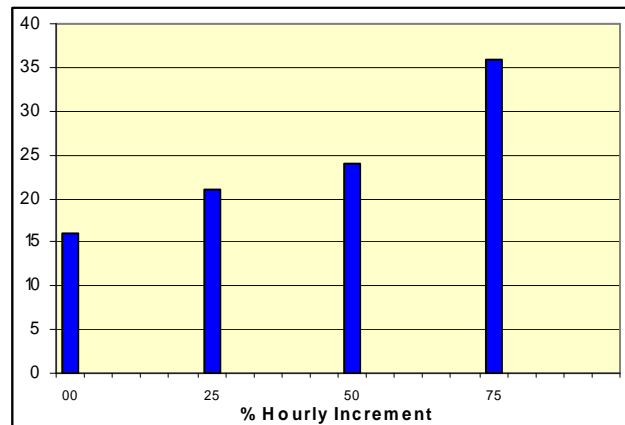


Figure 6: Firm B Junior Partner



In contrast to the undisputed effect of annual rate increases, can we draw any conclusions from these inconsistent billing practices? No. These billing are we assume absolutely accurate. Firm A Junior Partner may schedule her day in half hour increments. Firm B Junior Partner may be hesitant to bill on full hour intervals, so rounds down to 75 percent of an hour. Lawyers, fatigued by the tedium of entering time allocations, will naturally develop their own styles.

Clients should be aware though, as an article in *U.S. Business Litigation*, commented “Rounding up can easily inflate a bill by 15% to 30%, if not more, depending on how frequently and to what extent it is used. Rounding up when done to the nearest whole-hour, as seen in some invoices, can result in gross overstatement of the fees incurred.”⁴

Hourly Billings: by Professional Level

Let’s now group individuals into professional levels and review their billing patterns. Table 4, “Hourly Billings by Professional Level,” segments billings for Law Firms A and B including Law Firm B’s transition period (August – September, 2005) prior to assuming the case.

Table 4: Hourly Billings by Professional Level

	Law Firm A	Law Firm B		Total
	Feb/04 - Sep/05	Transition	Oct/05 - Jan/06	
Hourly Fees				
Senior Partners	307,098	62,029	76,276	445,403
Jr. Partner & Sr. Associates	159,382	48,907	202,020	410,309
Associates	581,285	19,439	94,016	694,740
Paralegals	101,661	3,668	41,542	146,871
Total	1,149,426	134,042	413,854	1,697,322
Hours				
Senior Partners	600	89	110	799
Jr. Partner & Sr. Associates	371	116	481	968
Associates	2,278	64	298	2,640
Paralegals	839	20	219	1,079
Sub-total	4,089	290	1,108	5,486
<i>Leverage</i>	6.82	3.26	10.1	6.87
Dollars per Hour				
Senior Partners	511	695	695	557
Jr. Partner & Sr. Associates	429	421	420	424
Associates	255	303	316	263
Paralegals	121	182	190	136
Average	281	463	374	309

Not including the expert witnesses, 47 individuals submitted hourly bills during the lawsuit: five senior (equity) partners whom we assume are partnership owners, seven junior partners and senior associates, 19 associates and 16 paralegals. The four professional levels and their associated rates are:

Senior Partners (5)	\$500 - \$695
Jr. Partner & Sr. Associates (7).....	\$350 - \$499
Associates (19).....	\$200 - \$349
Paralegals (16)	\$ 95 - \$199

The impact of leverage as discussed earlier is clear from Table 4. Senior Partners billed 799 hours while all others billed a total of 4,687 hours (968 + 2,640 + 1,079) for a 6.87 leverage ratio. Firm A’s leverage is 6.82 (4,089 / 600) which may be more representative. These calculations assume that only senior partners are equity partners – partners with an ownership interest – while all others, including Junior Partners, are not.

Had the case progressed into the pre-trial and trial phases it is possible the leverage ratio would have decreased. Likely not. The earlier phases, involving the filing and defending of the complaint and discovery, were rich in work requiring associates and paralegals: legal research, motion writing, document review, deposition preparation and so forth. Trials and their preparation are intense though and likely to consume considerable effort and expense.

Across the entire lawsuit, the average billing rate was \$309 per hour. Average hourly fees ranged from \$121 for Firm A Paralegals to \$695 per hour for the Firm B Senior Partner. Firm A billed 4,089 hours during their 20 month period and Firm B billed 1,108 hours during their four month engagement; an average of 204 hours per month for Firm A and 277 hours for Firm B. Firm A’s average per hour rate was \$281 while Firm B’s was \$374 per hour. During their six-week transition period Firm B billed \$134,042 and 290 hours. Their average billing rate during the transition was \$463 per hour.

Except for Junior Partner and Senior Associates, Firm B was considerably more expensive per hour than Firm A. An argument can be made for higher Senior Partner fees due to more experience, better skills or other value the client might receive. But it is our opinion as a client that it seems hard to justify paying Firm B 24 percent more for basic associate work and 57 percent more for paralegal work much of which is clerical in nature and priced at an annualized rate of nearly \$400,000.

The combination of more hours per month and higher hourly billing rates resulted in Firm B billing an average of \$103,464 per month versus \$57,471 for Firm A. Was the Plaintiff receiving \$46,000 more a month in value from Firm B? Although they did excellent work, that’s very hard to say. As we will discuss in the Experts section later in the analysis, Firm B was intensely involved with the financial and technical experts to complete the filing deadline. On the other hand, Firm A filed and defended the original complaint, conducted a complex discovery and court-mandated settlement effort during their engagement.

To better understand how the Plaintiff’s firms managed high workloads we analyzed hourly billings during each firm’s peak three month period. See Table 5, “Peak Billing Months.”

Table 5: Peak Billing Months

2005	Dollars	Hours	Dollars per Hour
Firm A			
March	120,133	371	324
April	101,087	406	249
May	118,934	431	276
Total	340,153	1,208	282
Firm B			
September	116,650	252	462
October	181,633	523	347
November	153,587	376	408
Total	451,869	1,152	392

During March, April and May of 2005 Firm A was conducting intense document and deposition discovery as well as filing and defending multiple court pleadings. During September Firm B was transitioning onto the case. Through October and November they were conducting depositions and working with the expert witnesses to assure the reports were thorough and completed on time. During these peak months, the two firms’ average hours varied by less than five percent, another billing similarity as we have noted before. Firm B was considerably more expensive due to their 39 percent higher $((392 - 282) / 282)$ average hourly fees.

It may have been possible to predict this significant rate differential. The American Lawyer’s annual “Am Law 200” survey tracks several useful financial metrics including Revenue per Lawyer. If we compare the two firms’ Revenue per Lawyer found in the 2006 Am Law 200 survey⁵ (based on 2005 results) with the firms’ hourly billing rates found in Table 4 (excluding the Firm B transition), we find a remarkably close correlation. The ratio of the two firms’ Dollars per Hour is nearly identical to the ratio of their Revenue per Lawyer derived from the survey. See Table 6, “Correlation of Dollars per Hour and Revenue per Lawyer.”

**Table 6:
Correlation of Dollars per Hour
and Revenue per Lawyer**

	Firm B	Firm A	Ratio
Dollars per Hour (Table 4)	374	281	1.331
Revenue per Lawyer (Am Law 200)	770,000	574,227	1.341

Clearly, a law firm’s hourly billing rates, their policies regarding billable hours and their staff’s productivity all have a significant effect on client costs. Professionals justify high billing rates on their experience, productivity and resulting value to the client – an assertion that is often difficult for clients to confirm.

Hourly Billings: by Task

The final stage of our hourly billing analysis was to allocate the work defined in the billing statements into specific tasks as a precursor to studying the lawsuit from a work product perspective. As discussed in Appendix A, 3,281 allocations, each defining a specific task, were made against 1,631 hourly billings records. The results are available in Appendix C, “Billing Records.” The twelve task categories were:

Hearings	Meetings with the court and directly related work
Pleadings	Work related to Plaintiff and Defendant court filings
Research	Legal research including case law and statutes
Discovery	Plaintiff and Defendant fact discovery except depositions
Depositions	Deposition conduct and defense and directly related work
Experts	Communication with expert witnesses and review of their work
Opposition.....	Communication with opposing counsel except court and settlement
Client.....	Communication with the client except court and settlement
Settlement	Settlement meetings and directly related work
Internal	Plaintiff’s counsel internal meetings and communications
Administration	Paralegal tasks such as filing, copying, binding and hand delivery
Other	All other non-allocated hourly expenses

Table 7, “Hourly Billings by Task and Individual,” totals both hours and dollars by task and individual. On the left the twelve individual tasks are grouped into six high-level categories which are then ranked by dollars spent in each category. Not included are out-of-pocket expenses and expert witness fees.

The table provides insight into the expenses of conducting a lawsuit. As is typical for most lawsuits, Discovery, including documents and depositions, was the costliest category at \$483,968 and 1,446 hours.

Pleadings and Legal Research naturally group as most pleadings submitted to the court include legal citations obtained through legal research. Total hourly billings for these two tasks ranked third at \$297,099 and 1,019 hours.

Expert Witness Support by the Plaintiff’s lawyers consumed 457 hours at an average cost of \$445 per hour for a total cost of \$203,303, ranking fourth in spending. These costs only include lawyer fees and not those for the experts themselves. These expenses will be discussed as part of our Work Product analysis. At \$445 per hour, Expert Witness Support was the most expensive task by a good margin on an hourly basis.

Administrative tasks including clerical, database and other paralegal tasks were the fifth most expensive category at \$130,663 and 983 hours. Finally, Settlement, Other and Hearings tasks totaled \$103,425 and consumed a total of 286 hours.

Table 7: Hourly Billings by Task and Individual

	Senior Partner	Associate	Senior Associate	Junior Partner	Junior Partner	Senior Partner	All Others	Total	
	A	A	A	B	A	B	A & B	Hours	Dollars
Discovery									
Documents	60	311	162	95	57	39	197	921	294,455
Depositions	105	125	125	59	83	2	26	525	189,513
Total	165	436	287	154	141	41	223	1,446	483,968
Communications									
Internal	155	150	101	53	54	35	80	628	237,314
Opposition	66	149	86	24	44	0	41	411	137,216
Client	82	45	46	33	30	13	7	256	104,334
Total	303	344	232	110	128	48	128	1,295	478,864
Pleadings & Research									
Pleadings	35	282	162	44	37	18	65	643	197,190
Legal Research	8	126	114	1	2	1	126	377	99,909
Total	43	408	276	44	38	19	191	1,019	297,099
Expert Witness Support	35	21	25	253	22	70	31	457	203,303
Administration	-	6	4	-	-	-	973	983	130,663
All Other									
Settlement	32	69	19	21	5	14	-	159	58,244
Other	12	24	29	12	4	7	20	109	38,205
Hearings	7	3	5	-	2	-	1	18	6,977
Total	51	96	53	33	11	21	21	286	103,425
Total Hours	597	1,310	878	595	341	199	1,566	5,486	1,697,322
Total Dollars	305,117	301,202	258,724	250,005	146,439	138,305	297,531		

It is interesting that Communications – meetings, telephone, email and letters – including those: i) internal to the law firm, ii) with the opposing attorneys and iii) with their client was a close second in spending totaling \$478,864 and 1,295 hours. Communications between the Plaintiff’s lawyers and the Defendants’ consumed 411 hours. 628 Hours were expensed by their lawyers for communicating among themselves. In contrast, only 18 hours were spent attending court hearings.

If lawyers were as taciturn as judges, litigation would be much cheaper.

WORK PRODUCTS

The previous analysis has focused solely on the hourly fees charged by the Plaintiff's law firms. We now begin our analysis of all expenses which totaled \$2,443,068 and consisted of \$1,697,322 in lawyer fees, \$619,946 in expert witness fees and \$125,800 in law firm out-of-pocket expenses. We have analyzed lawyers' hourly fees in the prior sections. Let's look briefly at expert witness and out-of-pocket fees before focusing on our work product analysis.

Expert Witness Expenses

Both sides of a lawsuit often employ outside experts to analyze and render credible, and presumably independent, opinions on matters of *liability* and *damages*. A civil lawsuit requires that the plaintiff prove both liability and damages. Establishing liability requires proving that the defendant committed an act which injured the plaintiff in some way. Damages then relates to the degree of injury, usually expressed as a financial amount for which the plaintiff seeks compensation.

In late 2004 the Plaintiff engaged two large, well-known litigation-support firms to prepare expert reports on the liability and damages aspects of their case. Later the Plaintiff also retained an experienced industry executive with no expert witness experience to prepare a causation report. The purpose of the causation report was to link the Defendants' acts alleged in the liability report with the Plaintiff's financial injury claimed in the damages report. The cost of the causation report, under \$10,000, was trivial relative the expense of the liability and damages reports. Table 8, "Expert Witness Fees and Hours," summarizes the expenses and hours billed by the expert witness firms. The two firms invoiced a total \$619,949 for 2,205 hours of work. As a group, their average hourly rate was \$281 per hour.

Table 8: Expert Witness Fees and Hours

	Dollars	Hours	Dollars per Hour
Technical Experts (Liability)	156,243	434	360
Financial Experts (Damages)	463,702	1,772	262
Totals	619,946	2,205	281

Out-of-Pocket Costs

The law firms invoiced their "out-of-pocket" costs for services typically acquired externally. Table 9, "Law Firm Out-of-Pocket Expenses," tabulates these expenses, most of which are self-explanatory. Professional Services included additional clerical support, the industry expert mentioned earlier and other non-testifying experts. Regarding photocopy expenses, the invoices did not specify how many copies were actually made, but at ten cents a copy, \$28,102 would make 281,000 copies – an astonishing number in today's electronic age and a stack of paper 94 feet high. Court Reporter expenses were for stenographers and transcripts taken during depositions and also included a videographer in one instance. Computer Research expenses were for Lexis/Nexis and Westlaw, on-line databases, used for legal research.

Table 9: Law Firm Out-of-Pocket Expenses

Professional Services	\$ 33,149
Photocopies	28,102
Court Reporter	25,970
Computer Research	22,407
Travel, Meals & Related	8,200
Postage, Fax & Express Delivery	5,661
Telephone	1,163
Court Fees	1,148
Total	\$125,800

Overview of Work Products

Having laid the groundwork we now focus on the work products actually produced during the conduct of the lawsuit, namely:

- Filing, amending and defending a *complaint* against the Defendants.
- Conducting fact *discovery* to obtain all information available regarding the issues surrounding the lawsuit.
- Developing *expert reports* to provide informed, objective opinions regarding the liability and damages of the lawsuit.
- Conducting *settlement* negotiations.

Since these work products tended to flow in sequence as the lawsuit progressed we also partitioned the analysis into four time periods named after the primary work product within each period: Complaint, (Fact) Discovery, Expert Reports and Settlement. Although each time period was focused on one primary task, these tasks overlapped considerably across periods. In particular, settlement negotiations extended over the life of the lawsuit with the majority of the spending actually occurring during the Discovery period.

These efforts involved hourly fees that were either: i) clearly and directly applicable (e.g. “Review draft of damages expert report.”) or, ii) supportive (e.g. “Meet with legal team to discuss case issues.”). Similarly, out-of-pocket expenses were generally either clearly direct such as Court Reporter fees for recording depositions or supportive such as photocopy support. We allocated the supportive expenses on a pro rata basis relative to the direct expenses. So, for example, if during a particular period 70 percent of the direct expenses were discovery related and 30 percent settlement related, 70 percent of the supportive expenses would be allocated to discovery and 30 percent to settlement. See Appendix B, “Direct and Allocated Expenses,” for a discussion of the methodology and specific allocations for each work product.

For the entire lawsuit, the direct expenses charged by the Plaintiff’s attorneys were \$811,510, or 33.2 percent of total expenses. The Plaintiff’s outside expert witnesses charged \$619,946 in fees, or 25.4 percent. Supportive expenses at \$1,011,612 represented 41.4 percent of total expenses. The total time billed for attorneys, legal experts and paralegals was 7,691 hours, nearly 1,000

work-days at 1,900 billable hours per year. Table 10, “Direct, Expert and Allocated Expenses” summarizes these various expenses by work product and time period.

Table 10: Direct, Expert and Allocated Expenses

	Complaint Feb – Oct 2004	Discovery Nov – Sep 2005	Experts Oct - Dec 2005	Settlement Jan 2006	Sub-total	Total
Complaint						
Direct Expenses	40,025	-	-	-	40,025	
Allocated Expenses	100,150	-	-	-	100,150	
Total	140,175	-	-	-		140,175
<i>Hours</i>	<i>453</i>	<i>-</i>	<i>-</i>	<i>-</i>		<i>453</i>
Discovery						
Direct Expenses	34,176	379,116	90,831	5,815	509,938	
Allocated Expenses	41,879	579,111	62,576	19,091	702,658	
Total	76,055	958,227	153,407	24,906		1,212,596
<i>Hours</i>	<i>238</i>	<i>3,040</i>	<i>415</i>	<i>76</i>		<i>3,771</i>
Expert Reports						
Direct Expenses	-	49,515	152,151	1,637	203,303	
Expert Expenses	-	243,596	376,350	-	619,946	
Allocated Expenses	-	61,083	83,353	1,868	146,304	
Total	-	354,194	611,854	3,505		969,553
<i>Hours</i>	<i>-</i>	<i>1,186</i>	<i>1,905</i>	<i>9</i>		<i>3,101</i>
Settlement						
Direct Expenses	3,043	43,722	-	11,479	58,244	
Allocated Expenses	3,729	48,841	-	9,930	62,500	
Total	6,772	92,563	-	21,409		120,744
<i>Hours</i>	<i>22</i>	<i>292</i>	<i>-</i>	<i>53</i>		<i>367</i>
Total						
Direct Expenses	77,244	472,353	242,982	18,931	811,510	
Expert Expenses	-	243,596	376,350	-	619,946	
Allocated Expenses	145,758	689,035	145,929	30,889	1,011,612	
Total	223,002	1,404,984	765,261	49,820		2,443,068
<i>Hours</i>	<i>714</i>	<i>4,519</i>	<i>2,321</i>	<i>139</i>		<i>7,691</i>

The Complaint period, from February through October, 2004, was occupied with the preparation of the Plaintiff’s initial and amended complaints, disputes over jurisdiction, the Defendants’ motions to dismiss, stays of discovery and counterclaim filings and early settlement negotiations. During this phase 714 hours were billed by the Plaintiff’s attorneys for \$223,002 in total fees, or \$312 per hour which includes out-of-pocket expenses. Average monthly costs were \$24,778.

The Discovery period, from November, 2004 through September, 2005, was occupied with the bulk of discovery including interrogatories, document requests and depositions. Eighteen depositions were taken by the litigants during this period. In addition to the effort devoted to actually collecting discovery information significant effort was devoted during the period to the analysis of the information actually collected. Also retained were two expert witness firms, one to focus on the technical analysis of evidence and the other to calculate the extent of the

Plaintiff's alleged financial damages. Near the end of the period settlement talks were again held, this time mediated by a federal judge.

As the Discovery period was concluding the Plaintiff's original law firm agreed to merge, pending partnership approval, with another law firm that also represented one of the Defendants. Once approved, ethical considerations would then require that both firms resign from the case requiring the Plaintiff and Defendant to retain new law firms. The Plaintiff and Defendant immediately retained new firms. The Plaintiff provided a six week overlap for their original and replacement firms starting in August to facilitate the transition. The merger of the two firms was finalized in late September at which point their new law firm began representing them which it did through the remainder of the lawsuit. This transition unquestionably increased the Plaintiff's costs for which they were later reimbursed by Law Firm A.

Together, the Plaintiff's attorneys and expert witnesses billed 4,519 hours or \$1,404,984 in total fees. Average monthly costs climbed significantly to \$127,726.

The Experts period extended three months from October through December, 2005. Three expert reports were submitted in mid-November dealing with: i) a liability analysis based on computer files, ii) a causation analysis, and iii) a financial damages analysis based on financial statements. During this short period the Plaintiff's attorneys and expert witnesses together billed 2,321 hours and \$765,261. Average monthly costs nearly doubled to \$255,087.

Taken together, expenses associated with Discovery and Expert Reports represented nearly 90 percent of the lawsuit's total cost. Approximately 6,872 hours were consumed in these efforts.

The Settlement period occurred during January, 2006 shortly after the submission of the expert reports in November. During that time legal work also continued on discovery, the expert reports and trial preparation in the event a settlement could not be reached. A total of 139 hours were billed for the month. Total expenses for the month were \$49,820.

We next examine each Work Product.

Complaint

Table 11, “Complaint Expenses,” documents the \$140,175 in expenses and 453 hours associated with filing, defending and amending the initial complaint.

Table 11: Complaint Expenses

	Complaint	Discovery	Experts	Settlement	Sub-total	Total
Direct Expenses						
Pleadings	36,846				36,846	
Hearings	2,792				2,792	
Court Fees	387				387	
Sub-total	40,025					40,025
Allocated Expenses						
Legal Research	51,577				51,577	
Document Management	7,102				7,102	
Communications	34,793				34,793	
Unclassified	6,678				6,678	
Sub-total	100,150					100,150
Total	140,175					140,175
Hours						
Direct	122				122	
Allocated	331				331	
Total	453					453

As is often the case, the Defendants upon being served the complaint filed a Motion to Dismiss and Stay Discovery coupled with a Memorandum in Support of Motion to Dismiss and Stay Discovery. This was then followed by a legal minuet starting with Plaintiff’s Opposition re. Motion to Dismiss and Motion to Stay Discovery followed by Defendant’s Motion to Dismiss for Lack of Jurisdiction and their Memorandum in Support of Motion to Dismiss followed by Plaintiff’s Memorandum in Opposition re. Motion to Dismiss for Lack of Jurisdiction followed by Defendant’s Counterclaim against the Plaintiff followed by Plaintiff’s Motion to Dismiss Defendants’ Counterclaims and their Memorandum in Support re. Motion to Dismiss Defendants’ Counterclaims followed by Defendant’s Opposition re. Motion to Dismiss Defendants’ Counterclaims followed by Plaintiff’s Answer to Counterclaim Defendants’ Amended Counterclaims.

This process continued for nearly six months and generated \$40,025 in direct expenses for preparing legal pleadings and attending court hearings. The majority of the expenses, over \$100,000, though were allocated as supportive efforts including legal research which cost nearly \$52,000 for hourly billings and on-line database access fees. In addition, \$34,793 was spent for attorney communications-related expenses involving the Plaintiff’s attorneys communicating among themselves, with the Defendants’ attorneys and with Plaintiff’s management.

Once it was clear that the case was going forward, brief settlement talks were held which were unsuccessful.

Although Discovery and Settlement efforts started during the Complaint phase, we allocated 100 percent of the Legal Research expenses to Complaint since a review of the invoices indicated legal research during this period was focused almost exclusively on Complaint related issues. Discovery and Settlement expenses together represented 48 percent of the direct spending during the period. Hence we allocated the balance, 52 percent, of Document Management, Communications and Unclassified supportive expenses on a pro rata basis to Complaint. See Appendix B, "Direct and Allocated Expenses," for specific allocations.

Discovery

During Discovery, both parties sought information from the other side through interrogatories, document requests and depositions. Discovery efforts occurred in all phases of the lawsuit, however the majority of discovery expenses, 74 percent, were incurred during the Discovery phase which extended over eleven months starting November, 2004.

The purpose of the discovery process is to provide all parties with the same information so that the facts of the case are understood and, ideally, agreed upon. Discovery has been described a "search for the truth." In reality, as numerous studies have documented discovery is far too often an intense effort to keep the entire process as unrevealing, time-consuming and expensive as possible. This results in multiple discovery requests, motions to compel document discovery, extend discovery, impound documents, contempt and sanctions, subpoenas and motions to quash subpoenas, protective orders and numerous other court pleadings.

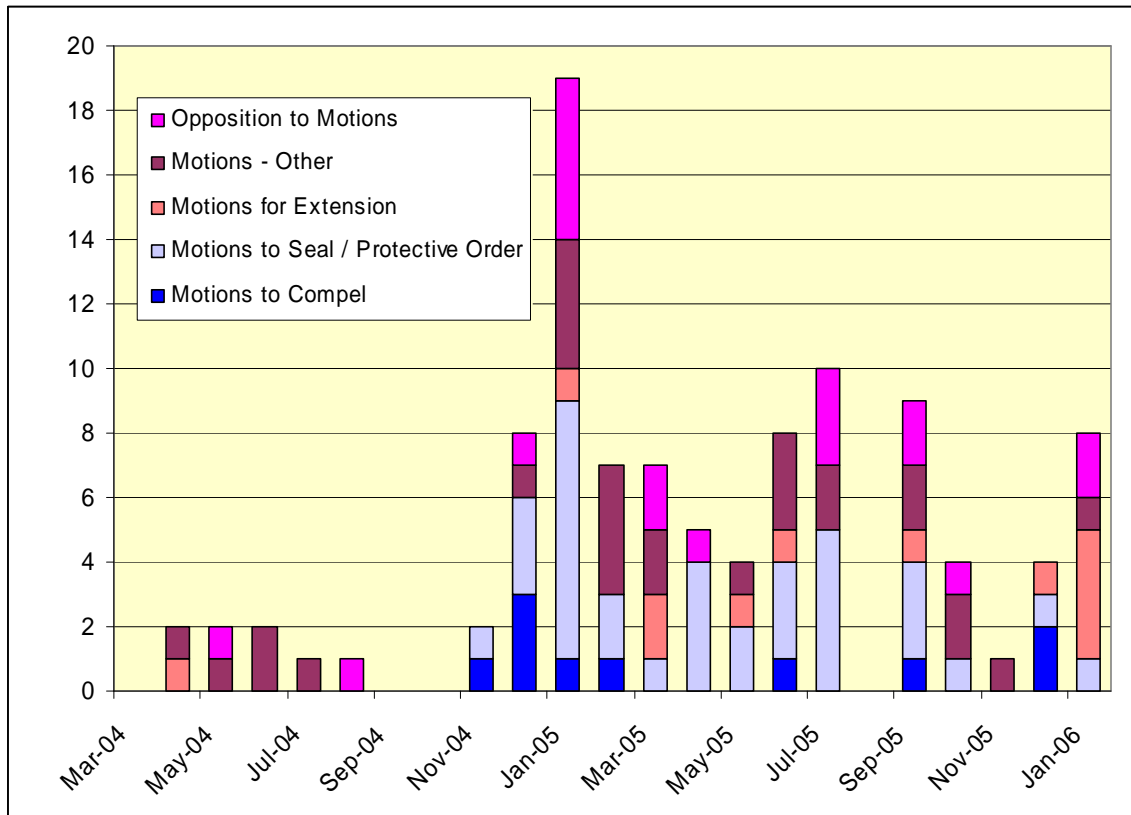
The sequence starts with one litigant requesting information from the other side. Requests for all documents concerning a specific topic is a typical example. In practice, at this early stage the respondent has a great deal of flexibility as to how to respond and may provide the requested information in full, in part, or not at all. The respondent may claim the effort to provide the requested information is overly burdensome or disproportionately expensive to produce with respect to the financial value of the case, for example. Common objections are that the request is *Overbroad; Vague; Not reasonably calculated to lead to the discovery of admissible evidence; Unduly burdensome.*⁶

If the requestor believes after repeated requests that the information provided is insufficient their recourse is to file a Motion to Compel with the court. However, before the motion may be filed Supreme Court Rule 201(k) requires that "every motion with respect to discovery shall incorporate a statement that after personal consultation and reasonable attempts to resolve differences the parties have been unable to reach an accord." Attorneys generally interpret this ruling as the need to "fully brief" the issue before submitting the motion. This process typically requires three rounds of formal, written communication between the opposing attorneys: the first by the requestor to document why the respondent's response to the discovery request is insufficient, the second by the respondent to reply, and the third again by the requestor to rebut the respondent's reply. Once this exchange is complete, the motion and often a supporting memorandum may be filed with the court. This motion then sets off another round of legal exchanges in opposition.

Eventually, the process terminates with a court order either granting or denying the motion in whole or in part. In our experience, this is a difficult process for the court. Often the opposing arguments rest on arcane technical or financial reasons as to why the information can or cannot be produced. The court, versed in the law but not necessarily financial and technical expertise, must then sort through these complex, highly partisan arguments. Often the decision is to split it down the middle. Knowing this beforehand, opposing attorneys often take their arguments to the extreme trying to move the mid-point closer to their desired outcome. If the motion is granted, the respondent either may appeal the ruling or is otherwise presumably compelled to comply. Once again in practice the respondent often does not, perhaps providing a small amount of additional information and fresh reasons why all the information cannot be produced. At this point, the entire process often starts over and continues until either one of the litigants runs out of money, the court eventually intervenes or the case settles.

The result is that the discovery process is inherently expensive. Discovery battles greatly increase the expense of litigation. Consider Figure 7, “Motions and Oppositions,” which graphs the 104 court pleadings filed primarily during the Discovery phase. See Appendix D, “Civil Docket.” These pleadings were supported by 24 detailed and highly researched Memoranda either in Support (18) or Opposition (6) of the motion. Not surprisingly, these disputes led to extensive time delays requiring twelve Motions for Extension of Time during the two years of the lawsuit, about one every two months.

Figure 7: Motions and Oppositions



Case Study of a Discovery Dispute

To help understand how these numerous court pleadings contributed to expense and time delays during Discovery we now analyze a specific discovery battle. We have selected a discovery dispute that involved perhaps the most common document in companies today – email.

Our analysis is based on the public documents contained in the lawsuit's civil docket⁷ available through PACER (Public Access to Court Electronic Records). PACER, a service of the United States Judiciary, allows individuals to obtain case and docket information from Federal courts via the Internet. Each entry below includes document excerpts as well as the filing date, a description and the document's number in the case's civil docket. The dispute starts with the Plaintiff's request for documents.

29 Jul 2004 Plaintiff's First Set of Requests for Production of Documents ---

The Plaintiff makes 27 specific requests for the Defendants to provide documents and other tangible things relevant to the lawsuit including request 13, "[Defendant's] communications with potential clients between the intrusion date and December 30, 2002."

25 Oct 2004 Stipulated Protective Order Docket # 37

The court approves a protective order requested by both the Plaintiff and Defendant's attorneys to protect confidential information. It states that "Any litigation materials may be designated by any producing person as 'CONFIDENTIAL' or 'Highly confidential'." The order defines "Highly Confidential Information" as any "(a) information that is highly proprietary, (b) a trade secret or other confidential research or development, (c) information of or concerning clients or prospective clients, (d) information that a non-party has entrusted to a Producing Party with an expectation of confidentiality, or (e) information that, if disclosed, would put the Producing Party (or non-party) at a competitive disadvantage." This broad definition gives the litigating attorneys tremendous flexibility in what they define to be highly confidential information.

Once designated as Highly Confidential clients cannot see it; the document may only be disclosed to outside legal counsel, outside experts and consultants, the Court, the document's author and its addressees, and copying and computer services for the purposes of copying or indexing documents.

29 Nov 2004 Plaintiff's Motion to Compel Production of Documents Docket # 38

Five months after filing its request for documents, the Plaintiff had received few documents concerning communications with potential clients. After the Plaintiff's attorneys had "conferred with Defendant's counsel and were unable to resolve the issues presented in this motion" they filed a motion with the court requesting that the "Court compel [Defendants] to produce documents responsive to Request No. 13 of [Plaintiff's] First Set of Requests for the Production of Documents and Things."

29 Nov 2004 Plaintiff's Memorandum in Support of the Motion to Compel Docket # 86

SEALED based on Plaintiff's request to seal the document in Docket # 39 stating "Impoundment is necessary due to the Defendant's 'Confidential' designation of its Supplemental Interrogatory Answers, which are discussed within and attached as an exhibit to Plaintiff's Memorandum."

13 Dec 2004 Defendants' Opposition to Motion to Compel Docket # 87

SEALED based on Defendant's request to seal the document in Docket # 41 stating "Impoundment is necessary because defendants' Opposition contains references to, and attaches excerpts from,

transcripts of deposition that must be treated as ‘Highly Confidential’ under the terms of the Stipulated Protective Order (attached as Exhibit A).”

Since both the Plaintiff’s supporting memorandum and the Defendant’s opposition were sealed, only attorneys and their designated third-parties could review the arguments made for producing and withholding the requested documents. The clients could not participate in this process.

5 Jan 2005 Joint Motion to Extend Discovery Phase Docket # 60

The litigants jointly file, and the Court approves, a 60 day extension to the fact discovery phase of the lawsuit. This is one of twelve extensions requested during the lawsuit. Although fact discovery was originally scheduled by the Court to conclude February 1, 2005 very little discovery had actually occurred at the time of the request for an extension. During 2005 additional time extension motions are filed on March 3, March 17, May 13, June 30, September 16 and December 30.

31 Jan 2005 Plaintiff’s Reply Brief in Support of Motion to Compel Docket # 97

SEALED. The Plaintiff files what is in effect an additional supporting memorandum to their motion since “Defendants raise new issues in their opposition to [Plaintiff’s] motion...Furthermore, facts developed in discovery conducted after the filing of [Plaintiff’s] initial brief support [Plaintiff’s] arguments...”

10 Feb 2005 Court Hearing on All Motions Held Before Federal Magistrate Judge ---

The Court hears oral arguments on 13 motions filed by the litigants including Docket # 38, Plaintiff’s Motion to Compel. The Judge issues a written opinion (Docket #85) regarding certain of these arguments on March 1, 2005 and entered into the Civil Docket record the next day, March 2.

28 Feb 2005 Plaintiff’s Second Set of Requests for Production of Documents ---

The Plaintiff’s make their second document request for an additional 48 items including request 80 “[Plaintiff’s] communications with the potential clients identified in Appendix B from the intrusion date to the present.”

02 Mar 2005 Court Order on Plaintiff’s Motions Docket # 85

The Court issues orders on three Plaintiff’s motions including Docket # 38, Plaintiff’s Motion to Compel. In the order the Judge summarizes the issues surrounding Docket #38, writing:

“[Plaintiff’s] motion to compel focuses on one document request to which the defendants have not responded to [Plaintiff’s] satisfaction. Specifically, [Plaintiff] seeks, in its document request number 13, ‘[Defendant’s] communication with potential clients between the intrusion date and December 30, 2002.’ The defendant’s initial response was a refusal to produce any documents on the basis that the request was, *inter alia*, overly broad, burdensome and sought documents that were not relevant or reasonably calculated to lead to the discovery of inadmissible evidence. Since that time the defendants have offered to provide certain information to [Plaintiff], but [Plaintiff] remains unsatisfied.

“The parties disagree about the extent of the communications that the defendants should be provided; they disagree about the time period those communications should cover; and they disagree about the number of clients about whom the defendants should be required to produce communications. [Plaintiff] has identified 110 clients whose information [Plaintiff] believes [Defendant] misappropriated, and who left [Plaintiff] and became clients of [Defendant]. The defendants assert, however that some of those clients terminated their contracts with [Plaintiff] before the date of the alleged intrusions, and that other clients left [Plaintiff] more than six months after the last alleged intrusion date.

“Despite these assertions, the defendants have offered to produce all communications with the 110 companies identified by [Plaintiffs] that are contained in an internal database known as Focus. [Plaintiff’s] response to this offer is that the database is likely to only include communications involving administrative issues, and will not provide the insight [Plaintiff] seeks into how [Defendant] made use of [Plaintiff’s] proprietary

information in marketing toward potential clients. [Plaintiff] also avers that producing only the database might exclude other communications between individual [Defendant's] employees and potential clients.

"In addition to offering the database, however, the defendants have also stated that if after reviewing the communications contained in the database, [Plaintiff] would like additional documentation concerning specific communications, the defendants would conduct further searches for other documents. [Defendant's] Opposition to [Plaintiff's] Motion to Compel Production of Documents (Defendant's Opposition), Ex. G.

"[Plaintiff] has offered no legal authority to support its position, and the defendants only provides support for their general assertions that discovery is not boundless, and that a court has discretion to tailor discovery. By failing to provide legal support for their respective positions, the parties leave this Court to make its decision on the basis for which position appears more reasonable. This Court agrees with [Plaintiff] that [Defendant's] communications with former [Plaintiff's] clients are relevant. It also finds, however, that the offers made by the defendants, as outlined above, is a satisfactory response to [Plaintiff's] request. Therefore, this Court DENIES [Plaintiff's] motion to compel to the extent that it seeks information beyond what the defendants have offered, and ORDERS the defendants to produce all communications with the 110 companies identified by [Plaintiff] that are contained in the Focus database. Additionally, should [Plaintiff] so desire additional information, after reviewing the Focus database, the defendants are ORDERED to conduct further searches for the documents, at their own expense. (The Court notes that the defendants offered to search for further documents, if [Plaintiff] should so desire, that the search be conducted at [Plaintiff's] expense. Defendant's Opposition, Ex. G. The defendants, not [Plaintiff], must bear the cost.)"

**20 Jun 2005 Plaintiff's Motion to Compel Defendants to Conduct Searches
Of Defendant's Electronic back-up Tapes**

Docket # 139

After reviewing the Defendant's Focus database for the 110 clients the Plaintiff requests additional information from the Defendants, specifically the emails which were originally requested on July 29, 2004. Unable to obtain agreement, the Plaintiff files another Motion to Compel, in this case asking that the Defendants conduct searches of their email back-up tapes. The motion states:

"[Plaintiff] moves to compel [Defendants] to conduct searches of [Defendant's] electronic back-up tapes. On March 1, 2005 this Court ordered the defendants to conduct searches of back-up tapes containing electronic information from 2002 for communications between [Defendant] and its potential clients. The same principles motivating the Court's March 1, 2005 decision also require that the defendant's search the back-up tapes responsive to [Plaintiff's] other document requests. Electronic information generated in 2002 is crucial to [Plaintiff's] case, and it can only be found on the back-up tapes. Further, this Court has already recognized that restoring and searching the back-up tapes will not be unduly burdensome for the defendants. Finally, the defendants have admitted that once the back-up tapes are restored to conduct searches for documents responsive to a single request, it is no more burdensome to conduct additional searches for documents to other requests.

"For these reasons, and for reasons set forth in [Plaintiff's] memorandum in support of this motion, which is being filed separately under seal today, [Plaintiff] respectfully requests that the Court order the defendants to restore and search the back-up tapes for (1) [Defendant's] communications with its potential clients and (2) information responsive to [Plaintiff's] other document requests."

Note that this motion in asking that the Defendant search the back-up tapes for "information responsive to [Plaintiff's] other document requests" is an expansion of the original motion filed July 29, 2004. That motion requested only documents related to "[Defendant's] communications with potential clients between the intrusion date and December 30, 2002."

**20 Jun 2005 Plaintiff's Memorandum in Support of Motion to Compel Defendants
To Conduct Searches of Defendant's Electronic Back-up Tapes**

Docket # 192

SEALED based on Plaintiff's request to seal the document in Docket # 140 stating that "The memorandum discusses and attaches excerpts of defendant's Focus database that have been designated 'Highly Confidential' under the Stipulated Protective Order of this case."

**12 Jul 2005 Defendants' Opposition to Motion to Compel Defendants
To Conduct Searches of Defendant's Electronic Back-up Tapes**

Docket # 191

SEALED based on Defendant's request to seal the document in Docket # 153 stating "Impoundment is necessary because the Opposition contains references to, and attaches copies of, documents produced by defendants that have been designated as 'Highly Confidential' under the terms of the Stipulated Protective Order (attached as exhibit A)."

Once again, only attorneys had access to the arguments being made for and against producing the requested documents. Although the client could infer some of the earlier arguments from the public court order (Docket # 85) filed in March, they did not know on what basis the Defendants refused to provide a search of the email back-up tapes.

From Mid-July through early-September, 2005 most discovery efforts were deferred while court-mandated mediation sessions were conducted. After the sessions failed to produce an agreement discovery resumed mid-September.

**22 Sep 2005 Defendants' Supplemental Opposition to Motion to Compel Defendants Docket # 162
To Conduct Searches of Defendant's Electronic Back-up Tapes**

In response to Plaintiff's motion to compel the Defendant to search their email backup tapes (Docket # 192), the Defendants file a supplemental opposition with the Court in which they argue (emphasis is theirs):

"4. As was detailed at great length in Defendant's original Opposition to the current motion to compel, the restoration and searches that [Plaintiff] demands would take months for defendants to complete, would require the defendants to incur massive expense, and would be **unlikely to produce any responsive material whatsoever**.

"8. ... As defendants have confirmed, the tapes contain a gigantic amount of information, most of which would be completely irrelevant. As noted above, each of the 478 tapes at issue contains, on average, approximately 35 gigabytes of data. If that amount of data were printed out as plain text of full sheets of paper, the printed output would fill **seven million pages, or 2,000 bankers boxes**. Berriman Aff. ¶5. Four-hundred and seventy-eight such back-up tapes – the amount involved in [Plaintiff's] motion – would contain **3,000,000,000 pages**. *Id.* at ¶17.

"9. ... At prevailing market rates for e-discovery projects, the cost of electronic production of the complete collection plaintiff seeks would **exceed \$30 million**. *Id.* at ¶18.

"11. Unfortunately, given the new information regarding costs, even the first step involved in the restoration of all 478 tapes (known as 'cataloging') would be prohibitively expensive given that the process is unlikely to identify any responsive information. *Id.* at ¶19. While this cataloging process would produce indices – themselves massive – reflecting what the tapes contain, according to [Defendant's outside expert's] proposal, this cataloging process would cost \$119,500. *Id.* Moreover, this figure does not include the hundreds of hours of attorney time it would take to review the indices after they are generated to determine what if anything may be responsive."

The affidavit cited in the opposition which estimated the \$30 million expense was provided by the "Senior Counsel and Executive Manager of Litigation Technology" at the Defendant's lead law firm. He used itemized cost quotations (e.g. Catalog and Restore per Tape -- \$450) provided by an outside e-discovery firm as the basis for his \$30,000,000 estimate. The independent firm did not make the \$30 million estimate. Interestingly, in their proposal's first paragraph the outside firm states "While we are frequently asked to estimate projects with huge datasets, our analysis typically reduces the number of backup tapes that are ultimately restored. For instance, we recently analyzed a dataset of 7,000 backup tapes but ended up restoring, researching and reviewing data from only 300 tapes." This capability was not mentioned in the Defendant's supplemental opposition.

**12 Oct 2005 Plaintiff's Response to Defendant's Supplemental Opposition Docket # 176
To Plaintiff's Motion to Compel Defendants to Conduct Searches
Of Defendant's Electronic Back-up Tapes**

Responding to the Defendant's Supplemental Opposition estimating \$30 million to restore and print the contents of the email backup tapes, the Plaintiff's attorney writes:

“C. The Defendants have Misdemeaned the Relevant Tasks and Used that Misdemeanation to Misrepresent the Cost and Burden of Producing These Relevant Documents.”

The defendants suggest that [Plaintiff] has asked that the contents of the back-up tapes be printed and reviewed. They state that any such activity would require that billions of pages of documents, filling thousands of bankers boxes, be printed and reviewed at a cost of \$30,000,000. [Plaintiff] has made no such request. The task the defendants describe is wholly unnecessary. The steps needed to search for and produce the relevant documents are as follows:

- (1) The tapes are delivered to a vendor.
- (2) The vendor catalogs the tapes, and using computerized means, extracts only the e-mails from the relevant time period. (If as defendants suggest, all emails from that period have been over-written, the project will be at an end.)
- (3) The subset of extracted e-mails is then searched by computerized means. Only those e-mails that contain identified search terms (for example, e-mails that contain the name of one of the relevant clients) are selected.
- (4) All duplicates are identified (again by computerized means) and removed.
- (5) The selected documents are reviewed for privilege. Privileged documents are logged; the remaining documents are produced.

[Plaintiff] believes the vendor's fee for performing the retrieval and extraction process above will be about \$140,000 – one-half of one percent of the cost hypothesized by the defendants.

“[Plaintiff] is prepared to put its money where its mouth is. In order to cut through the prolonged discovery dispute, [Plaintiff] will select the vendor (This will permit [Plaintiff] to control the cost of the vendor's services.) (subject to objections by the defendants directed to the independence of the vendor.) and will bear the cost of the vendor, thus relieving the defendants of the 'burden' about which they complain. Neither [Plaintiff] nor the vendor will view the contents of the selected documents until they have been reviewed for privilege by the defendants.”

The Plaintiff was comfortable proposing to pay for the retrieval of the emails based on a firm quotation they had obtained from a respected outside vendor. The vendor's estimate was consistent with the \$119,500 cost documented in the Defendant's affidavit for cataloging the tapes. Furthermore, it was clear from the vendor that once having cataloged the emails, the incremental cost of conducting additional searches as per the Plaintiff's June 20, 2005 motion was inconsequential.

27 Oct 2005 Letter from Defendants' Lead Attorney to Plaintiff's Lead Attorney ---

Responding to the Plaintiff's proposal to conduct the back-up search at their own expense, the Defendant's lead attorney writes to the Plaintiff's in an effort...

“to reach an agreement to undertake the proposed searches without waiting for the Court's assistance. Accordingly, we propose that if [Plaintiff] will withdraw its motion to compel dated June 20, 2005 on this subject (the 'Motion'), [Defendants] will agree to submit the backup tapes to a third-party vendor to conduct searches, pursuant to the terms set forth below.

“As a preliminary matter, [Plaintiff's] Responses seems to indicate that [Plaintiff] has previously requested the production of 'all of [Defendant's] communications with the 110 identified clients **and** (emphasis his) all of [Defendant's] internal communications regarding those specific clients.' This is, in fact, inaccurate. [Plaintiff] has previously and consistently demanded the production of [Defendant's] communications **with** (emphasis his) the 110 identified clients during 2002. [Plaintiff's] Document Request No. 13 – the subject of the Motion – requests '[Defendant's] communications with potential clients between the intrusion date [January 17, 2002] and December 30, 2002.' See Plaintiff's First Set of Requests for Production of Documents and Things at 5. Likewise, in its first motion to compel on this subject, [Plaintiff] demanded discovery of communications between [Defendant] and the identified 110 clients during the 2002 timeframe. See [Plaintiff's] Memorandum in Support of its Motion to Compel Production of Documents, dated November 29, 2004 at 4. Most importantly, the Motion to Compel to which [Plaintiff's] Response relates also demands a search of the [Defendant's] backup tapes for communications between [Defendant] and the 110 identified customers during 2002. See [Plaintiff's] memorandum in Support of its Motion to Compel [Defendants] to Conduct Searches of [Defendant's] Electronic Backup Tapes, dated June 20, 2005 at 7.

“There is thus no basis for [Plaintiff] to further expand its Document Request No. 13, four months after filing its motion to Compel and one month after the close of fact discovery, to include internal communications or any documents outside the 2002 timeframe. We request that [Plaintiff] immediately modify its Response and accompanying proposed Order to make them consistent with Shareholder’s underlying Motion to Compel.”

“Subject to the above clarification, Defendants make the following proposal, addressing below each of the numbered paragraphs in ‘[Plaintiff’s] Proposed Resolution of This Issue’ at pages 4 and 5 of [Plaintiff’s] Response:

- (1) [Plaintiff’s] proposed vendor must be identified in advance of the execution of any agreement to resolve this matter, to allow Defendant’s an opportunity to conduct any necessary diligence.
- (2) Agreed.
- (3) The parties shall agree in advance on the search terms to be used to select potentially relevant e-mails. These searches must be limited to e-mails between [Defendant] and the 110 previously identified customers during 2002. In addition, the searches shall be limited by custodian to all members of the [Defendant’s] sales force and Management Team during the relevant period.
- (4) Agreed.
- (5) The vendor shall deliver the resulting set of emails to Defendant’s counsel in electronic form so that counsel may identify any e-mails that are categorically irrelevant, nonresponsive, and/or privileged. Any documents to be withheld on the basis of privilege will be placed in a privilege log for production to counsel for [Plaintiff]. Any documents to be withheld on the basis of irrelevance or nonresponsiveness will be placed on a relevance log by category for production to counsel for [Plaintiff]. The parties will have the option of submitting any disputes as to the items contained in those logs to a Discovery Master who will be jointly retained by the parties.
- (6) Defendants will then produce to [Plaintiff] the set of e-mails selected pursuant to the steps above, except for those that were withheld as privileged, irrelevant, or nonresponsive.

“We are prepared to enter into this agreement with the understanding that [Plaintiff] will bear the cost of cataloging and restoring the e-mails, running the computerized searches to identify the relevant e-mails, removing the duplicate e-mails, and delivering the documents to us as described in Paragraph (5). Defendants will in turn bear the cost of the attorney and the paralegal time that will be involved in review and production of these e-mails, as well as creation of appropriate logs.”

The Defendants state their willingness to allow the email searches to proceed with certain restrictions and to be paid for by the Plaintiff. However, as a pre-condition they require that Plaintiff drop its request to broaden the scope of the search to emails beyond those between Defendant and the identified 110 clients.

31 Oct 2005 Conference Call Between Plaintiff and Defendants’ Attorneys ---

The litigating attorneys hold a “telephonic meet and confer” in an attempt to resolve the dispute. The issue of cost having been resolved, the issue of scope remains. The Plaintiffs wish to include in their email search “information responsive to [Plaintiff’s] other document requests.” The Defendants wish to limit the search to Request No. 13 of the July 29, 2004 document request. Agreement is not reached.

1 Nov 2005 Defendant’s Surreply to Plaintiff’s Response to Defendant’s Supplemental Opposition to Plaintiff’s Motion to Compel Defendants to Conduct Searches of Defendant’s Electronic Backup Tapes Docket # 181

Unable to reach agreement, Defendants file an additional response (a “surreply”) to Plaintiff’s October 12, 2005 response to Defendants opposition to Plaintiff’s motion filed June 20, 2005 to compel the search of backup email tapes. They write, in part:

“8. On October 12, 2005 new counsel for [Plaintiff] filed a Response to Defendants’ Supplemental Opposition to [Plaintiff’s] Motion to Compel. In these papers, [Plaintiff] attempts to significantly expand the scope of their underlying Motion to Compel (and [Plaintiff’s] Document Request 13 underlying that Motion to Compel) by stating that it previously requested the production of ‘all of [Defendant’s] communications with the 110

identified clients and (emphasis theirs) all of [Defendants] internal communications regarding those specific clients' during any time period. See [Plaintiff's] Response to Defendants' Supplemental Opposition to [Plaintiff's] Motion to Compel [Defendant's] to Conduct Searches of [Defendant's] Electronic Backup Tapes, dated October 12, 2005, at 2.

"9. However, [Plaintiff] has never previously requested a search of [Plaintiff's] archival back-up tapes for all of [Defendant's] internal (emphasis theirs) communications regarding those 110 identified clients, nor has it previously requested any documents outside of the 2002 timeframe...

“
CONCLUSION

“Subject to the clarification set forth above and for all of the reasons set forth in greater detail in their previous briefing of this matter, Defendants respectfully request that [Plaintiff's] Motion to Compel be denied.”

27 Dec 2005 Court Order on Plaintiff's Motion to Compel Defendants Docket # 208
To Conduct Searches of Defendant's Electronic Back-up Tapes

The Court issues its order on the Plaintiff's motion filed as Docket # 139, writing in total:

“On June 25, 2005 [Plaintiff] filed a motion to compel [Defendants] to conduct searches of the defendants electronic back-up tapes. That motion followed a March 1, 2005, Order ('Order') from this court directing the defendants to produce to [Plaintiff] 'all communications with the 110 companies identified by [Plaintiff] that are contained in {the defendants'} Focus database.' Order at 6. The Order also stated that if after reviewing the Focus database [Plaintiff] desired additional information, the defendants were to conduct further additional searches. *Id.* at 7. The defendants produced the required information, [Plaintiff] reviewed it, and then, perhaps predictably, asked the defendants to conduct further additional searches as directed by the Order. The defendants resisted, leading, ultimately to the current motion to compel.

“Since [Plaintiff] filed the motion to compel, the parties have made significant progress toward resolving this particular discovery dispute. They have agreed to hire a third-party vendor to conduct the searches of the defendants' electronic back-up tapes, but one sticking point remains: the scope of the search. [Plaintiff's] original request for information on the 110 identified clients sought only [Defendant's] communications with those clients and the current motion to compel initially sought only that as well. Now, however, as the defendants point out, [Plaintiff] seeks not only back-up tape communications between [Defendant] and the 110 identified clients, but all of [Defendant's] internal communications regarding those clients as well. In [Plaintiff's] response to the defendants' supplemental opposition to the motion to compel, [Plaintiff] states that it 'has requested the production of all [Defendant's] back-up tape communications with the 110 identified clients and all of [Defendant's] internal communications regarding those specific clients...' [Plaintiff's] Response to Defendants' Supplemental Opposition to [Plaintiff's] Motion to Compel [Defendants] to Conduct Searches of [Defendant's] Electronic backup Tapes at 2. {Plaintiff} appears to be expanding the scope of its original request, which [Plaintiff] can not now do. The search of the electronic back-up tapes must therefore be limited to back-up tape communications *with* the 110 identified clients and need not include [Defendant's] internal communications regarding those clients.

“To the extent that [Plaintiff's] motion to compel seeks information on the electronic back-up tapes the motion is ALLOWED IN PART but only as to [Defendant's] communications with the 110 identified clients. Furthermore, allowance of the motion is contingent upon the parties' agreement to hire a third-part vendor to conduct the search. If the remaining details of the agreement to hire the third-party vendor can not be resolved by the parties, they should so inform the Court. SO ORDERED.”

20 Jan 2006 Defendants' Motion for Clarification of Order on Plaintiff's Docket # 217
Motion to Compel Searches of Defendant's Electronic Backup Tapes

The Defendants file a motion for clarification of the court's December 27, 2005 order. After presenting background information and their arguments, the Defendants write:

“8. As such, Defendants seek the Court's confirmation that its December 12, 2005 Order compels the searches of the [Defendant's] backup tapes pursuant to the culmination of the parties' negotiations regarding this matter. As the Court noted, it has resolved the 'one sticking point' – the scope of the searches – in its Order. With the Court's resolution of this issue, the Order implicitly endorses the remainder of the Defendants' October 27, 2005 modifications to [Plaintiff's] October 12, 2005 Response.

“
CONCLUSION

“9. For all the foregoing reasons, Defendants respectfully request that the Court confirm that the backup tape searches should be conducted pursuant to the following conditions: (1) the searches shall be conducted at

{Plaintiff's] expense; (2) the searches shall be conducted by a vendor that is identified and agreed upon in advance by the parties; (3) the searches shall only be for the emails with the 110 identified clients during 2002; (4) the parties shall agree in advance on any necessary search terms and the searches shall be limited to only relevant custodians; and (5) the vendor shall deliver to Defendants' counsel the resulting set of emails in electronic form so the Defendant's counsel may identify any emails that are to be withheld on the basis that they are nonresponsive (*i.e.* outside the scope of the Court's Order) or privileged, and describe any privileged documents on a privilege log."

20 Jan 2006 Joint Motion to Extend Time to File Objections to the Magistrate Docket # 218
Judge's Recent Orders Regarding Various Discovery Issues

Anticipating that they will object to certain of the Magistrate Judge's recent orders, both parties

"...hereby jointly move for an extension of time in which both parties may file objections to [the Magistrate Judge's] recent orders on various issues to January 27, 2006."

As the case began with a request for a time extension on April 6, 2004, so it ended.

31 Jan 2006 A settlement was reached and the case was dismissed. Docket # 221

* * *

The preceding discovery battle is a good example of why the discovery process is so often slow, expensive and ineffective. What the Plaintiff considered a simple and reasonable request – provide emails between the Defendant and 110 specific clients during 2002 – turned into a major battle that consumed hundreds of thousands of dollars in expense and, had the emails actually been produced, nearly two years of effort. Furthermore, once finally produced the emails' usefulness would have been drastically reduced since so much of discovery had already taken place. The opportunity to question witnesses during depositions regarding evidence that may have been uncovered in the emails was likely lost, for example.

Typically there are several, or even many, of these discovery battles going on simultaneously during a lawsuit. This obstructive process can easily take several years to complete and is a primary reason that lawsuits are so expensive. It is unfortunately a common and well-understood tactic taken: i) by a larger opponent to wear down a smaller opponent, ii) to attempt to conceal damaging information, or iii) to delay the progression of the lawsuit for as long as possible in the hope circumstances may somehow change to improve the case's outcome. See the numerous references in Appendix E particularly Brazil, Schiltz, Bogus, Beckerman, Wagner and Langbein.

Under American law, discovery is based on an adversarial approach. The theory is that the adversaries themselves are most capable of providing and unearthing the facts of the case. The reality is that litigants often block, delay and obfuscate the transfer of information as much as legally possible, and occasionally beyond that. Although individual litigants hope to gain an advantage, over the long term this approach increases the cost of litigation for all clients.

In most matters our courts are quite efficient. Consider how quickly during the Complaint phase the court resolved legal issues regarding dismissal, jurisdiction and counterclaims. These issues are well understood. Little nonsense is abided. But when asked to adjudicate complex technical

issues with which they are unfamiliar, lacking precedent and badgered by conflicting, partisan and extreme arguments, the court is often less effective.

The Dispute as a Microcosm of Today's Discovery: Lessons Taken

But this is the reality of our American system of discovery and there is much to be learned from the preceding discovery battle which in many respects was a true microcosm of today's discovery process.

First, the Defendants' lead law firm clearly did an excellent job protecting the disputed emails. The discovery process is by its nature iterative. One piece of evidence leads to another which often leads to yet another thus requiring successive discovery requests. Standard defense strategy is to attempt to break or at least delay this chain. As it became clear that the Plaintiff would gain access to the emails originally requested, following standard defense strategy the Defendants moved to block additional email searches. The Plaintiff believed this to be a restriction to their discovery rights to obtain full disclosure of relevant material.

By the time the case settled, this particular discovery battle had been underway for nearly a year and a half costing the Plaintiff considerable time and expense. Yet, the Plaintiff was arguably no closer (based on anticipated objections as per Docket # 218) to obtaining the original emails, much less other possible evidence farther down the chain, than they were when they started. Studying the Defendants' court filings, their strategy appeared to be based on two elements:

- **Audacity:** Early in the dispute the Defendants made the counter-proposal that they produce their internal client database, Focus, rather than the requested emails. It being understood that emails starting perhaps around 2000 have served as critical evidence in a number of high-profile cases, this struck us as a bold move; analogous perhaps to a taxpayer being audited by the IRS proposing that he provide a personal financial spreadsheet rather than the requested bank records. Once this approach had run its course, the Defendants then claimed that the Plaintiff's search request would cost \$30 million. As technologists this struck the Plaintiff's management team as astonishing. Finally, the Plaintiff was willing to attempt to break the impasse by paying for the search at cost of approximately \$140,000.
- **Persistence:** The Defendants never let up in their resolve. They initially declined to provide the emails due to burden, breadth and relevance. They then successfully proposed Focus, the Defendant's internal database, as an alternative. When the Plaintiff again sought the emails after reviewing the Focus records, they asserted it would cost \$30 million. When expense was made a non-issue by the Plaintiff's offer to pay for the search, they made the scope of the search the issue. When the Court on December 27, 2005 ALLOWED IN PART the Plaintiff's motion to search the backup tapes, they requested (i) tight constraints on the search process including advance agreement on the search terms, (ii) a decision from the Court that searches of the Defendant's internal emails would not be allowed, and (iii) a time extension to file objections to the court order. Had the case not settled, and once the email search was finally underway, it seems reasonable to assume the Defendant's would have disputed the terms under which the

Plaintiff-paid email retrieval was being conducted. By the standards of the discovery process in our courts today, they provided a highly-commendable defense.

Second, courts struggle at times to adjudicate discovery disputes. Under our form of common law courts look to legal precedence in forming their opinions. When that is lacking courts tend to seek compromise, sometimes uncomfortably. In its first opinion, Docket #85, the court stated “[Plaintiff] has offered no legal authority to support its position, and the defendants only provides support for their general assertions that discovery is not boundless, and that a court has discretion to tailor discovery. By failing to provide legal support for their respective positions, the parties leave this Court to make its decision on the basis for which position appears more reasonable.” Even in 2005, electronic discovery was still fairly new. Many judges were not acquainted with the technology. One party claimed it was monumentally expensive to search backup tapes, the other disputed this. The court had little basis for evaluating these claims.

Our judicial system is asked to adjudicate discovery disputes in fields that range from aerospace to zoology simply by trying to sort out the extreme arguments of partisan attorneys. Under this system, it is our opinion that the the parties that tend to prevail are those that (i) more clearly, consistently and reasonably present their position, or (ii) present a compromise proposal. In this dispute, approach (ii) was the prevailing strategy. In its first decision (March 2, 2005), the judge accepted the Defendants’ proposal to substitute the Focus database for the client emails, and in its second (December 27, 2005), she accepted the Plaintiff’s proposal to pay for the email search.

Third, the system suffers badly from lack of accountability. As lay persons the Plaintiff’s management found it astonishing that the court, after ordering in its March 2, 2005 decision that “the defendants are ORDERED to conduct further searches for the documents, at their own expense,” did not reprimand the Defendants when they apparently did not follow the order. Furthermore, after allowing another extended dispute in which the Defendants claimed, a year after the original document request, an expense to search the email backup tapes of \$30 million while the Plaintiff claimed it would cost only \$140,000, the court accepted the Plaintiff’s \$140,000 proposal and their offer to pay themselves. This was after the court had earlier ordered the Defendants to conduct the search “at their own expense.”

Yet even these incredibly disparate estimates – \$140,000 versus \$30 million – did not seem to raise an eyebrow with the court, these kinds of widely disparate arguments apparently tending not to be unusual.

Finally, as numerous legal scholars have noted there are few incentives for attorneys to conduct discovery efficiently. Every motion, opposition, supplemental memorandum and court hearing is an opportunity to generate billable hours. And why not? Clients and the courts seem to accept the interminable delays and resulting high expense of discovery. Even the American Bar Association which has taken strong positions on “the tyranny of the billable hour and the relentless focus on the bottom line”⁸ has little to say on minimizing litigation expense and time delays. Their code of conduct, “Model Rules for Professional Conduct,” *Rule 3.2 Expediting Litigation*, simply states “A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.” Sixteen words, leaving ‘reasonable efforts’ undefined. In

contrast the ABA's *Rule 7.5 Firm Names and Letterheads* requires 174 words to regulate the naming of law firms.

Our legal system gives attorneys tremendous flexibility during discovery. Unfortunately, this flexibility often seems abused. A litigant not wishing to provide an item of evidence can delay nearly indefinitely by filing objections and oppositions which the court dutifully accepts. An aggressive attorney's ability to block requests or alternatively go on extended "fishing expeditions" seems to be limited only by audacity and persistence. Reasonable latitude is required during discovery certainly, but when that latitude is taken to be a license to block information by any means necessary, or overwhelm the opponent with frivolous requests, the court needs to have the skills to identify such unproductive behavior and the resolve to then rule with a strong hand, or a deft touch as Federal District Court Judge Sam Sparks used in his poetic order terminating a six year deposition dispute:

Stallions can drink water from a creek without a ripple;
The lawyers in this case must have a bottle with a nipple.

Babies learn to walk by scooting and falling;
These lawyers practice law by simply mauling.

Each other and the judge, but this must end soon
(Maybe facing off with six shooters at noon?)

Surely lawyers who practice in federal court can take
A deposition without a judge's order, for goodness sake.

First, the arguments about taking the deposition at all,
And now this -- establishing their experience to be small.

So, let me tell you both and be abundantly clear:
If you can't work this without me, I will be near.

There will be a hearing with pabulum to eat
And a very cool cell where you can meet.⁹

Discovery: Expense Analysis

Table 12, “Discovery Expenses,” calculates Discovery expenses for the lawsuit to be approximately \$1.21 million, or 49.6 percent of the lawsuit’s total cost. A total of 3,771 billable hours were consumed conducting Discovery.

Table 12: Discovery Expenses

	Complaint	Discovery	Experts	Settlement	Sub-total	Total
Depositions:						
Direct Expenses						
Deposition	4,868	151,244	33,400	-	189,513	
Court Reporter	-	20,948	5,022	-	25,970	
Sub-total	4,868	172,192	38,422	-	215,482	
Allocated Expenses						
Motions	-	57,964	6,059	-	64,024	
Legal Research	-	17,626	2,971	-	20,597	
Document Management	872	39,515	4,228	-	44,616	
Communications	4,273	114,334	9,470	-	128,077	
Unclassified	820	15,102	1,629	-	17,552	
Sub-total	5,966	244,542	24,357	-	274,865	
Total Deposition	10,834	416,734	62,779	-		490,347
Documents:						
Direct Expenses						
Document Discovery	29,308	206,924	52,409	5,815	294,455	
Allocated Expenses						
Motions	-	79,304	9,508	12,454	101,266	
Legal Research	-	24,115	4,662	1,607	30,384	
Document Management	5,251	54,063	6,634	797	66,745	
Communications	25,725	156,425	14,859	3,703	200,713	
Unclassified	4,937	20,662	2,556	530	28,686	
Sub-total	35,914	334,569	38,219	19,091	427,793	
Total Documents	65,221	541,493	90,628	24,906		722,249
Total Discovery	76,055	958,227	153,407	24,906		1,212,596
Hours						
Direct						
Direct	101	1,077	249	19	1,446	
Allocated						
Allocated	137	1,963	166	58	2,324	
Total	238	3,040	415	76		3,771

Discovery expenses are segmented into Deposition and Document Discovery expenses. Deposition expenses were approximately \$490,000. During the lawsuit eighteen depositions were taken, ten by the Plaintiff and eight by the Defendants representing an average cost per deposition slightly over \$27,000. Under current Federal Rules of Civil Procedure actual depositions are limited to one seven-hour day for each witness. Hence, total deposition costs approached \$4,000 for each hour a witness was actually deposed.

We did not analyze the different costs associated with taking versus defending a deposition. Generally taking a deposition is more expensive than defending one. The former requires questions be prepared beforehand in detail, a senior attorney to conduct the deposition, a court reporter to transcribe the deposition, possibly a videographer to record a critical deposition, and the resulting transcripts reviewed. Defending a deposition primarily requires that a lawyer prepare the witness by discussing the issues and evidence the deponent will likely encounter as well as attend the deposition.

In general, the analysis allocated the supportive expenses -- Motions, Legal Research, Document Management, Communications and Unclassified -- across Depositions and Document Discovery on a pro rata basis based on their direct expenses during each phase. See Appendix B, "Direct and Allocated Expenses," for specific allocations.

Document Discovery expenses were approximately \$722,000, or sixty percent of total Discovery expenses. \$294,445 or about 41 percent of the Document Discovery expenses were direct, the remaining expenses, \$427,793 were allocated.

Remarkably, dispute-related expenses totaling \$545,060 were actually larger than the \$509,937 (\$215,482 + \$294,455) in direct expenses spent for providing, obtaining and analyzing the deposition and document evidence. Table 13, "Discovery Dispute Expenses," documents the expenses associated with these discovery battles.

Table 13: Discovery Dispute Expenses

	Complaint	Discovery	Experts	Settlement	Total
Motions & Research					
Pleadings	-	132,490	15,400	12,454	160,344
Court Hearings	-	4,017	167	-	4,185
Court Fees	-	761	-	-	761
Legal Research	-	41,741	7,633	1,607	50,981
Sub-total	-	179,009	23,201	14,061	216,271
Attorney Communications					
Internal	15,380	133,796	11,033	1,076	161,286
With Opponent	5,142	81,594	7,344	753	94,833
With Client	9,069	51,882	4,523	1,846	67,319
Out-of-Pocket	407	3,488	1,428	28	5,351
Sub-total	29,998	270,759	24,328	3,703	328,789
Total	29,998	449,768	47,529	17,764	545,060

During the lawsuit, over \$216,000 was spent preparing legal pleadings, attending court hearings and conducting legal research during Discovery. Nearly \$330,000 was spent by the Plaintiff's attorneys to confer among themselves, with their legal opponents or with the client, largely on dispute issues.

By far the most complex, time-consuming and expensive were the Motions to Compel the opposing side to produce specific items of evidence which had been denied during Discovery.

Ten such motions were filed by the Plaintiffs and Defendants. As the court made rulings on these motions, usually granting them in whole or in part, evidence was slowly produced. At that point, Motions to Seal or request Protective Orders were often filed to disallow anyone other than lawyers from viewing the evidence. A total of 35 of these protective motions were filed during the lawsuit.

Although often justified during a lawsuit between fierce competitors, motions to seal and protective orders are also used to block evidence from being viewed by the client's management for other reasons. Sometimes simply because the evidence is embarrassing but more often because management, since they know their business better than anyone else, are often best able to interpret the evidence. By limiting access, the opposition forces the other side to employ attorneys and outside experts exclusively for interpreting the evidence thereby increasing costs, delaying the lawsuit and reducing the possibility that the evidence will be fully utilized. See the numerous references already cited for support and elaboration.

Unfortunately, shielding critical information within a lawsuit is not unusual. As noted in an American Bar Foundation study "An example of a more subtle form of harassment was provided by a lawyer who observed that 'a nice way to tie up the other side' is to secure a protective order which limits the number of people within the structure of the corporate client with whom opposing counsel can share information and discuss the case. Such orders, according to this respondent, can impair an attorney's capacity to prepare for trial and can force him to spend time and money trying to justify a modification."¹⁰

Finally, since Discovery is still largely a paper-based effort, Document Management continues to be a significant expense. During Discovery, \$111,361 (\$44,616 + \$66,745 from Table 12) was spent in administrative expenses for organizing, copying, binding and indexing documents and their databases.

At the point the lawsuit was settled, two disputed depositions (not including expert witnesses) remained to be taken. Had the lawsuit continued, total deposition costs would likely have been in the range of \$525,000 to \$550,000. Also, although many documents had been exchanged at the lawsuit's termination, both sides were still actively fighting discovery battles for critical documents or other evidence. Several of these disputes had been on-going for over a year. Had the lawsuit continued, it is very possible that Document Discovery expenses would have exceeded \$1 million, perhaps significantly.

Expert Reports

In early 2005 the Plaintiff engaged two large, national litigation-support firms to investigate and prepare expert reports on the liability and damages aspects of their case. Later they also retained an experienced industry executive with no expert witness experience to prepare a causation analysis report.

After reviewing the evidence and their attorneys' requirements, the Plaintiff's attorneys reported in an email that the technical experts responsible for the liability report estimated "that the full engagement (expert analysis, preparation of the report, deposition time) will cost between \$50K and \$75K."¹¹ Similarly, as we understood it the financial experts preparing the damages report projected their pre-trial costs in the \$75,000 range. The industry executive's report was estimated to be under \$10,000. The total pre-trial cost for outside experts was projected in the \$125,000 to \$175,000 range.

Since any communication the experts had with the client was discoverable – the opposition could request this sensitive information as part of their discovery process – the client was not allowed to discuss status or review any interim results directly with their experts. This communication was done almost entirely by their lawyers, protected under attorney work-product privilege.

The Plaintiff was however forwarded the firms' monthly invoices for payment and within a few months began to have serious concerns about rising costs. Although the Plaintiff's management team were not experts in a legal sense, as managers of a successful business they definitely understood technical and financial analysis. It was becoming clear to them from the invoices that expenses were running significantly ahead of projections. They repeatedly expressed their concerns with their attorneys and finally in frustration put both firms on hold in May, 2005.

The Plaintiff was particularly concerned with the financial experts working on the damages report. They had already billed \$82,294 by the end of May with much more work remaining to be done as best as they could determine. Their attorneys encouraged them though to accept the cost over-runs and move ahead which, after much discussion, they elected as the best course.

As Table 14, "Total Expert Report Expenses," documents, by the end of the Discovery phase the Plaintiff's total Expert Report expenses, including allocations and attorney expenses, were \$354,194. The technical experts appeared to have stabilized their earlier budget over-runs, but the financial experts had billed a surprising \$194,329, nearly double their original estimate.

Although \$354,194 in expert-related expenses had already been incurred during the Discovery phase, expenses exploded during the Experts phase from October through December, 2005.

As the deadline drew closer, the Plaintiff discovered that several critical parts of the work done to-date required rework. Shortly before the liability report was to be submitted, for example, an attorney who fortunately had a technical background discovered a flaw in the database developed by the technical experts upon which their analysis was based. This necessitated a crash effort to rework the technical analysis and report. The result was that the technical experts billed an

additional \$100,382 during October and mid-November. (\$6,594 was billed by a non-testifying technical expert.)

Table 14: Total Expert Report Expenses

	Complaint	Discovery	Experts	Settlement	Sub-total	Total
Direct Expenses						
Attorneys	-	49,515	152,151	1,637	203,303	
Technical Experts	-	49,268	106,976	-	156,243	
Financial Experts	-	194,329	269,374	-	463,702	
Total	-	293,111	528,501	1,637		823,249
Allocated Expenses						
Legal Research	-	5,770	13,535	452	19,758	
Document Management	-	12,937	19,259	224	32,420	
Communications	-	37,431	43,138	1,042	81,611	
Unclassified	-	4,944	7,421	149	12,514	
Sub-total		61,083	83,353	1,868		146,304
Total	-	354,194	611,854	3,505		969,553
Hours						
Direct	-	124	328	4	457	
Expert Witnesses	-	854	1,351	-	2,205	
Allocated	-	208	226	6	439	
Total	-	1,186	1,905	9		3,101

Also, a few weeks before their report was due the financial experts stated (or perhaps re-stated) that significant additional work was needed. Part of the additional work was based on new evidence that had recently become available from the Defendants that needed to be incorporated into the final report. The experts recommended that an additional statistical analysis also be conducted. The Plaintiff's management resisted this additional work strongly but once again relented. At that point, they had little choice other than to switch experts and petition the court for a major delay which would certainly have been fought by the Defendants and very possibly denied by the court. Even had they switched, their opponents may have attempted to argue during the trial that the switch was motivated by a recalcitrant expert who refused to provide the favorable opinion they sought thereby undermining the new expert's report and credibility.

To complete their report the Plaintiff's financial experts billed \$269,374 during the final three months of 2005. Their new attorneys (Law Firm B) also charged \$152,151 and 328 hours during the same period for managing the experts. The only non-professional expert witness completed his report well under his \$10,000 budget.

The total cost for generating the expert reports, including allocations for legal research, document management, communications and unclassified expenses, was \$969,553 – far above the original costs estimated a year earlier. A total of 3,101 hours were billed including 2,205 by the experts and 896 by the Plaintiff's attorneys for working with the experts.

Excepting the causation report whose cost was minimal, the product of these expenses was two reports. The liability report was a 16 page document with additional supporting material. It was signed by the firm’s founder and managing partner. The damages report was 20 pages plus supporting documents. It was signed by two Ph.D experts in finance and statistics. Both reports were competent but unremarkable. The damages report contributed to the case in clearly establishing the Plaintiff’s claimed financial damages. The liability report was largely an independent confirmation of the in-house technical analysis the Plaintiff had conducted earlier.

If we assign the lawyers’ direct expenses (\$203,303 from Table 14) and the allocated expenses (\$146,304) on a pro rata basis to the experts’ expenses, we can estimate the actual costs of each expert report as follows in Table 15, “Expert Report Total Costs”:

Table 15: Expert Report Total Costs

Liability Report	
Technical Experts	\$156,243
Allocated Expenses	88,111
Total	244,354
Damages Report	
Financial Experts	463,702
Allocated Expenses	261,496
Total	725,199
Total	\$969,553

The two reports totaling 36 pages, a considerable portion of which was author biography and methodology, cost nearly one million dollars.

Had the case continued, the Plaintiff would have seen significant additional expert-related expenses for reviewing the Defendants’ expert reports, responding to the Defendants’ issues regarding their reports, amending their reports, providing and obtaining depositions, pre-trial preparation and trial testimony.

Settlement

During the lawsuit, three rounds of settlement talks were held concluding in the termination of the lawsuit in January, 2006. Table 16, “Settlement Expenses,” documents the expenses associated with these efforts. Approximately \$121,000 was spent in settlement-related expenses nearly evenly divided between direct fees charged by the Plaintiff’s attorneys and allocated expenses for document management, communications and unclassified expenses.

Table 16: Settlement Expenses

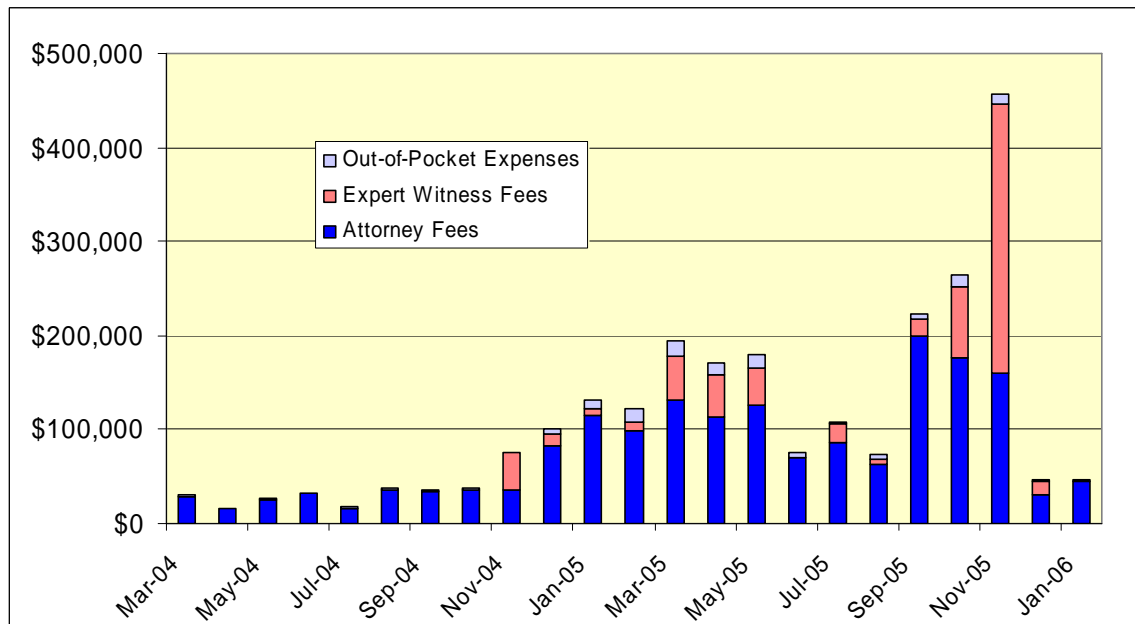
	Complaint	Discovery	Experts	Settlement	Sub-total	Total
Direct Expenses						
Attorneys	3,043	43,722	-	11,479		58,244
Allocated Expenses						
Document Management	545	11,423	-	1,573	13,542	
Communications	2,671	33,052	-	7,310	43,033	
Unclassified	513	4,366	-	1,046	5,924	
Sub-total	3,729	48,841	-	9,930		62,500
Total	6,772	92,563	-	21,409		120,744
Hours						
Direct	10	124	-	25	159	
Allocated	12	168	-	28	208	
Total	22	292	-	53		367

Although settlement talks were held near the end of the Complaint phase no agreement was reached. It was too early. The Plaintiff was expectant that evidence gathered during discovery and the experts’ reports would significantly strengthen their negotiating position. The Defendants, perhaps, felt the same for their position. Less than \$7,000 was spent on these early negotiations.

Three-quarters of the Plaintiff’s total settlement-related costs, over \$92,000, occurred near the end of the Discovery phase when two court-mandated sessions, one in July and the other in September, were held. Although the two sessions, presided over by a federal judge, totaled less than ten hours much effort and expense were expended in their preparation including reviewing evidence, preparing damage estimates, discussing negotiating strategy, preparing a detailed case book, and scheduling the meetings. These extensive preparations are estimated to have consumed about 260 billable hours and \$75,000 in expenses, about eighty percent of the total Settlement-related expenditures during the Discovery phase.

By the end of the Experts phase in late 2005 most of the facts of the case were well understood. Although several long-running discovery battles were still being fought, the vigor and expense with which these battles were being pursued suggested the evidentiary value of the documents being sought. However, the upsurge in expenses during this time and in particular the inability to predict or control them was a serious concern. See Figure 8, “Lawsuit Cash Burn.” Although the Plaintiff believed they had a strong case, the outcome was certainly not assured and they, as the client paying the bills, were assuming all the financial risk.

Figure 8: Lawsuit Cash Burn



Equally if not more importantly on January 10, 2006 The Nasdaq Stock Market announced its intentions to acquire the Plaintiff. Naturally, after the acquisition NASDAQ would want the company’s management focused on building the business, not preoccupied with an expensive and distracting lawsuit. Likewise the Defendants would be facing with NASDAQ a much more formidable opponent than the current Plaintiff, Shareholder.com. So both parties were motivated to terminate the lawsuit. In addition, both the Plaintiff and the Defendants conducted the negotiations outside of their legal teams. As a result, the final discussions moved quickly, successfully and were relatively inexpensive.

By mutual agreement the lawsuit terminated on January 31, 2006.

Additional Comments

Our analysis was based on expenses as billed to Shareholder.com. At the conclusion of the lawsuit the Plaintiff asked their attorneys and experts to reduce their invoices submitted during the Experts phase based on: i) their much higher than projected billings, and ii) the high costs associated with changing law firms at a critical time in the lawsuit. Although not all parties agreed to do so, several firms did and provided discounts totaling approximately \$150,000.

The analysis did not include the Plaintiff’s internal expenses for supporting the lawsuit in the analysis. These expenses included approximately \$66,000 for legal fees paid a retired corporate counsel to serve as their acting general counsel to help manage the lawsuit.

Also not included in the analysis were the Plaintiff’s management and board expenses and opportunity costs. The Plaintiff’s attorneys billed approximately 256 hours for client

communications during the lawsuit. For each hour the Plaintiff's management conferred with their attorneys, we conservatively estimate an additional four hours spent gathering discovery information, preparing material for the experts, reviewing legal documents and other sundry tasks. Consequently, we estimate that the lawsuit consumed about 1,280 hours (12 hours per week) of total management time and perhaps \$160,000 in direct costs. It is not possible to estimate the opportunity costs other than to say a lawsuit, at least in a small company, consumes a great deal of intellectual and emotional energy that could generally be applied to more productive efforts.

INDUSTRY METRICS

The preceding analysis has considered the lawsuit from the client’s perspective, but what about the law firm and more broadly, the legal industry? How would the lawsuit compare to the financial metrics against which the industry measures itself? Surprisingly, we can take a somewhat educated guess at these questions. But it is just a guess and caution is highly advised interpreting the results.

Every year, industry trade organizations and publications conduct several comprehensive surveys of law firms. *The American Lawyer* magazine’s Am Law 200 survey is one of the most respected. The survey ranks the top 200 law firms by Gross Revenues as well as Revenues per Lawyer, Profit per Partner and Value per Lawyer, defined rather crassly as the number of lawyers it takes “to put \$10 million in the pockets of the firm partners.”¹²

If, for the lawsuit, we calculate Revenues per Lawyer (RPL) and Profits per (Equity) Partner (PPP) and then compare these figures with the survey results, we can develop an understanding of the lawsuit’s financial merits from the legal industry’s perspective. Both of these metrics though are annual figures for an entire law firm. How then can we relate our single lawsuit against such metrics? By simply positing: i) an imaginary law firm exclusively employing the lawsuit’s staffing and then, ii) normalizing the lawsuit’s billed hours to represent the total annual hours for the typical law firm. The result is a theoretical law firm whose annual hourly billings are proportional to the lawsuit. This approach is valid because both industry metrics, revenues per lawyer and profits per partner, are ratios. We are simply taking the ratios for the lawsuit and annualizing them to compare with industry figures.

Table 17: Lawsuit Revenue per Lawyer

	Firm A	Firm B	Firms A&B
Hours			
Senior Partners	600	199	799
Other Lawyers	2,649	959	3,608
Paralegals	839	239	1,079
Total	4,089	1,397	5,486
Hourly Fees			
Senior Partners	307,098	138,305	445,403
Other Lawyers	740,667	364,381	1,105,048
Paralegals	101,661	45,210	146,871
Total	1,149,426	547,896	1,697,322
Out-of-Pocket Fees	100,923	24,877	125,800
Total Revenues	1,250,349	572,773	1,823,122
Lawyer-Years	1.728	0.615	2.343
Revenue per Lawyer	723,701	930,816	778,094

Let’s first calculate Revenue per Lawyer as presented in Table 17. Over their involvement, Law Firm A billed 4,089 total hours and \$1,250,349 in fees. During 2004 and 2005, the industry average for annual billing hours for large law firms was about 1,800 hours per senior partner and 1,900 hours per associate. Therefore Law Firm A consumed an estimated 1.728 lawyer-years (600/1,800 + 2,649/1,900). We then obtain the firm’s annualized metrics by dividing its actual

figures by 1.728 yielding Revenue per Lawyer of \$723,701. Likewise, Law Firm B’s Revenue per Lawyer works out to \$923,816, and for both firms combined, \$778,094.

How does the Revenue per Lawyer for the lawsuit compare with other Boston law firms? Based on the 2005 American Lawyer Am Law 200 Survey, Law Firm A’s Revenue per Lawyer is about 1.8 percent above the Boston average of \$712,016. Law Firm B exceeds any Boston firm at nearly 31 percent over the average. See Table 18, “Boston Law Firms Ranked by 2005 Revenue per Lawyer.”

Table 18: Boston Law Firms Ranked by 2005 Revenue per Lawyer

Firm	Revenue per Lawyer
Firm B Lawsuit Revenue per Lawyer	930,816
Ropes & Gray	840,361
Fish & Richardson	805,556
Bingham McCutchen	790,667
Choate, Hall & Stewart	770,000
Goodwin Procter	749,097
Firm A Lawsuit Revenue per Lawyer	723,710
Brown Rudnick Berlack Israels	715,000
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo	588,235
Foley Hoag	575,000
Edwards Angell Palmer & Dodge	574,227

We can also estimate the lawsuit’s Profit per Partner. This calculation is much more speculative than that for Revenue per Lawyer as it requires several critical assumptions, namely the firm’s:

- Equity partners. Many law firms now use a multi-tier partner system in which a senior partner class, equity partners, hold the ownership of the firm and receive a significant portion of the firm’s profits. A junior partner class, non-equity partners, is typically paid a share of the firm’s profits but on a lower per-capita basis. The purpose of this structure is to recognize senior attorneys as “partners” while maximizing profits per equity partner. Since many firms do not disclose the number of actual equity partners, for our calculations, we will assume only attorneys with an hourly billing rate of \$500 or more are equity partners.
- Expenses. Profits equal revenues less expenses. We know revenues as total billings, but the firm’s actual expenses – compensation and overhead – are unknown. For our analysis we will assume the “Rule of Three” that many law firms tend to follow in which hourly billing rates are set such that an individual’s compensation and overhead expenses are each one-third of their hourly billing rate. The remaining third are partnership profits. We assume equity partners are not paid a salary, receiving their compensation solely through partnership earnings. Finally, we conservatively assume that out-of-pocket expenses are billed at cost, earning no profit.
- Annual billing hours. As we did for Revenue per Lawyer we assume that Senior (Equity) Partners bill 1,800 hours per year and all others, 1,900 hours per year.

Based on these assumptions, Table 19, “Lawsuit Profit per Partner,” estimates the lawsuit’s Profits per Partner for Law Firm A to be \$1,455,432 and for Firm B, \$2,068,949. The combined Profit per Partner for both firms across the entire lawsuit is \$1,608,149.

Table 19: Lawsuit Profit per Partner

	Firm A	Firm B	Firms A & B
Hours			
Senior (Equity) Partner	600	199	799
All Others	3,488	1,198	4,687
Total	4,089	1,397	5,486
Hourly Fees			
Senior Partner	307,098	138,305	445,403
All Others	842,328	409,591	1,251,919
Total	1,149,426	547,896	1,697,322
Out-of-Pocket Fees	100,923	24,877	125,800
Total Revenues	1,250,349	572,773	1,823,122
Expenses			
Senior (Equity) Partner			
Salary	-	-	-
Overhead	102,366	46,102	148,468
All Others			
Salary & Bonus	280,776	136,530	417,306
Overhead	280,776	136,530	417,306
Out-of-Pocket Expenses	100,923	24,877	125,800
Total Expenses	764,841	344,039	1,108,880
Profit			
Revenues	1,250,349	572,773	1,823,122
Expenses	(764,841)	(344,039)	(1,108,880)
Total	485,508	228,734	714,242
Senior Partner Years	0.33	0.11	0.44
Profit per Partner	1,455,432	2,068,949	1,608,149

Ranked against other Boston law firms, the lawsuit was highly profitable. See Table 20, “Boston Law Firms Ranked by 2005 Profits per Partner.” This is not surprising given the high leverage, 6.82 for Firm A and 10.1 for Firm B, employed during the case. As our earlier analysis showed, junior attorneys worked long hours performing legal research, conducting discovery, filing motions, managing expert witnesses and so forth. As a small company with modest ongoing legal requirements the Plaintiff paid standard rates for its legal services. In contrast, larger, more sophisticated corporate clients with long-term relationships would typically be able to negotiate lower billing rates.

Litigation is one of law’s most profitable practice areas. As *The American Lawyer* joked in their 2006 Am Law 100 issue, “Teach a firm to fish, and it will eat for a day. Teach a firm to sue, and it will eat forever. At least for this decade.”¹³ Pity the clients paying.

**Table 20: Boston Law Firms
Ranked by 2005 Profits per Partner**

Firm	Profit per Partner
Firm B Lawsuit Profit per Partner	2,068,949
Firm A Lawsuit Profit per Partner	1,455,432
Goodwin Procter	1,245,000
Bingham McCutchen	1,220,000
Ropes & Gray	1,080,000
Choate, Hall & Stewart	965,000
Fish & Richardson	905,000
Brown Rudnick Berlack Israels	860,000
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo	835,000
Foley Hoag	605,000
Edwards Angell Palmer & Dodge	600,000

High leverage and high hourly rates generate high profits. Paralegals, associates and junior partners billed nearly seven hours for every senior partner hour billed. And each of those hours were expensive. Consider the hourly billing rates in Table 21.

Table 21: Comparative Hourly Billing Rates
(Assumes 1,800 billable hours for judges)

	Law Firm	Actual Hourly Rate	Implied Annual Salary
Senior Partner	B	695	Profit Sharing
Junior Partner	A	430	272,333
Senior Associate	B	345	218,500
Associate	A	295	186,833
Paralegal	B	190	120,333
U.S. Judiciary		Implied Hourly Rate	Actual Annual Salary (2005)
Chief Justice, Supreme Court		347	208,100
Federal District Judge		270	162,100
Federal Magistrate Judge		249	149,132

Today, as Table 21 illustrates, major law firms bill associates at rates exceeding the implied hourly rates of Federal District Judges. Senior Associates bill at rates comparable to the Chief Justice of the United States Supreme Court. Senior Partners earn far more. Of course, unlike law firm partners, the Supreme Court's Chief Justice is spared politely listening to clients grumble over high legal fees.

COMPARATIVE ANALYSIS

Litigation is a very inefficient means for resolving business disputes. In our case, the issues underlying the lawsuit were not particularly complex. Other than the ability to examine computer records, they did not require an understanding of advanced science, mathematics or economics. Our liability and damage claims could have been summarized in a short memo. Had both parties been willing to do so, reasonable people acting in good faith could likely have discussed the issues, found common ground and negotiated a settlement in a few days. Yet for the Plaintiff alone, the lawsuit consumed over 7,000 hours and \$2.4 million before it settled. Had the case gone to trial, it is possible that cost would have been doubled.

Our experiences were not unique. The formality and structure of the legal process alone necessarily makes litigation expensive. Beyond that, costs can escalate due discovery battles, insufficient project and cost management, high hourly rates, and many other factors. How did these factors affect costs? We can only estimate. But even a very rough estimate should be helpful towards understanding litigation economics.

Our approach is simple. First calculate what we consider to be reasonable target costs for each work product. Do this wherever possible based on standard business approaches. Then compare these “index costs” with actual costs. The differences may yield insights into the comparative costs of legal versus business practices. Caution interpreting the results is highly advised though as we are comparing actual costs incurred in a hard-fought legal battle with a theoretical ideal.

Comparative Analysis: Expert Reports

The Expert Reports cost \$969,553, or 40 percent of the lawsuit’s \$2,443,068 total. The liability report documented a technical analysis of computer logs expanding on earlier work done by the Plaintiff’s chief technology officer. The damages report calculated alleged financial losses. Similar technical and financial analysis is conducted in business. Is it possible to estimate what these reports would have cost had they been done within a business context? Not precisely, of course, but an estimate can be made as documented in Table 22, “Estimated Report Costs.”

As a business project the first step would typically be to solicit quotations for the work to be performed from consultants either inside the company or outside. We estimate that, based on our 35 years of industry experience, competent consultants would charge approximately \$20,000 and \$30,000 to complete a first draft of the liability and damages reports, respectively. We next allocate management time and expense to define, organize and manage the process for which we have allocated 40 hours and \$10,000. This effort should then produce quality, first-draft reports at a total estimated cost of perhaps \$60,000. Typically, the first draft yields insights which merit a major rewrite. Consequently, we have assumed a major rewrite for both reports yielding an expected total cost of \$90,000. This would be the budgeted cost against which we would manage the project. However, the prudent manager would then add a contingency factor to allow for the worst-case scenario. We have assumed a 100 percent contingency yielding a total estimated cost of \$180,000.

Table 22: Estimated Report Costs

	Liability	Damages	Total
First Draft Reports			
Hours	160	240	
Burdened Hourly Rate	\$125	\$125	
Sub-total	\$20,000	\$30,000	\$50,000
Management Oversight			
Hours	16	24	
Burdened Hourly Rate	\$250	\$250	
Sub-total	\$4,000	\$6,000	\$10,000
Total	\$24,000	\$36,000	\$60,000
Review and Rewrite	\$12,000	\$18,000	\$30,000
Budgetary Total	\$36,000	\$54,000	\$90,000
Contingency Factor	x 2	x 2	x 2
Core Cost	\$72,000	\$108,000	\$180,000

Our estimates assume the work is being done by a small team of motivated, highly-competent people. Not only does this reduce communication costs, the team’s high productivity usually far outweighs any increased compensation costs.

If we take the worst-case costs of \$72,000 and \$106,000 as the experts’ fees and then allocate attorney fees on a pro rata basis based on the actual costs incurred we derive a target, or index, cost for the development of the expert reports as calculated in Table 23.

Table 23: Expert Reports Index Cost

	Index Cost	Pro rata based on Table 15
Liability Report		
Technical Experts	\$72,000	
Allocated Lawyer Expenses	40,603	[= 88,111 x (72,000 / 156,243)]
Total	112,603	
Damages Report		
Financial Experts	106,000	
Allocated Lawyer Expenses	59,777	[= 261,496 x (106,000 / 463,702)]
Total	165,777	
Index Cost	\$278,380	

Our estimated index cost of \$278,380 is far below the \$969,553 actual cost of the reports. What were the reasons? It is our opinion that there were four:

1. **Cost-plus Orientation:** The mindset in law is largely that of a “cost-plus” business. Consequently, many lawyers arguably do not closely manage experts since they pass the bills on to the client, and those bills compared to their own may not seem particularly unreasonable. Nor can clients typically manage experts directly since any communication the clients have with their experts is discoverable in contrast to their lawyers whose work is cloaked under work-product confidentiality. Clients also have

little negotiating leverage with their experts once they have been retained. Changing experts during litigation is not only expensive but also gives the opposition opportunity to question the change and perhaps claim the final expert opinion was “shopped.”

2. **Leveraging Junior People:** Many expert witness firms seem to have adopted the law firm leverage model whereby senior experts largely delegate the actual work to junior staff members. It was our experience that the expert firms were even more leveraged than our law firms with the equivalent of their associates doing ninety percent or more of the work.
3. **High Legal Rigor Requirement:** Finally, legal reports, to a degree greater than that in normal business, must withstand highly critical scrutiny in the opposition’s efforts to undermine the report’s credibility and conclusions. The report must be carefully reasoned, each step highly defensible when challenged during sworn testimony. This increases costs since assumptions must be justified, methodology explained, sources referenced and weaknesses anticipated.

Together these factors were responsible for two moderately-complex reports costing nearly one million dollars. The Plaintiff considered these costs very high. We summarize in Table 24.

Table 24: Expert Reports Actual vs. Index Costs

	Reasons for Actual Cost	Actual Cost	Index Cost	Ratio
Expert Reports	1. Cost-plus Orientation 2. Leveraging Junior People 3. High Legal Rigor Requirement	\$969,553	\$278,380	29%

Comparative Analysis: Discovery

Expenses related to Fact Discovery were \$1,212,596 or just under 50 percent of the \$2,443,068 total. Discovery is uniquely a legal process making it much more difficult to base our analysis on standard business practices. Fortunately depositions are a well-defined effort. In the lawsuit there were 18 total, each limited to a maximum of seven hours by Federal Rule 30(d)(2). We will start there.

Of the 18 depositions, ten were by the Plaintiff and eight by the Defendants. Each deposition consists of three steps: preparation, the deposition itself and post-deposition analysis. The steps vary by whether the deposition is being taken or defended. Defending a deposition requires that the issues on which the deponent may be questioned be researched, that the deponent be prepared, that a lawyer be present during the deposition, and afterwards that post-deposition analysis be conducted. Taking a deposition is similar except no deponent is prepared, of course. In both cases, the actual deposition was limited to seven hours. Starting with these steps as the core process, we estimate the following expenses in Table 25:

Table 25: Estimated Core Deposition Expense

	Taking	Defending	Total
Hours			
Preparation	8	4	
Deponent Preparation	-	4	
Deposition	10	10	
Post-Deposition Analysis	8	4	
Total per Deposition	26	22	
Number of Depositions	x 10	x 8	18
Total Hours	260	176	436
Hourly Rate (Table 7)	x \$361	x \$361	x \$361
Total Lawyer Fees	\$93,860	\$63,536	\$157,396
Court Reporter (Table 12)	25,970	-	25,970
Core Expense	\$119,830	\$63,536	\$183,366

The average hourly rate of \$361 is derived from Table 7, “Hourly Billings by Task and Individual” (\$189,513/525). The estimated costs of \$183,366 are for the depositions alone and do not include costs associated with discovery motions and related expenses. We consider these along with communications and document management expenses separately. Our \$183,366 estimated expense is 85 percent of the \$215,482 direct expense calculated for depositions in Table 12, “Discovery Expenses.”

Next we consider document discovery. Unfortunately, we do not know the amount of information exchanged during document discovery. Much of the exchange was confidential and limited to lawyers only. Table 12 documents direct expenses for document discovery as \$294,455. Since we have little basis for estimating costs, we accept this amount as the core document discovery costs.

Together, our estimated core cost for depositions and document discovery is \$518,253, about 43 percent of the total \$1,212,596 discovery expense. The remaining 57 percent, \$694,343, was supportive expenses for motions, legal research, document management, communications and unclassified tasks. How would one compare these discovery efforts to a business equivalent?

The answer probably lies with the 12 Motions for Extension of Time that were filed during the lawsuit starting with the first on April 6, 2004, three weeks after the original complaint was filed. The presiding judge in her original scheduling order filed June 17, 2004 called for fact discovery (i.e. depositions and documents but not experts) to be completed by February 1, 2005. Yet when the case settled January 31, 2006 fact discovery had not been completed and in that month alone additional motions were filed requesting time extensions. Assuming these motions were granted (as nearly all others were) our best estimate is that fact discovery would have closed within a few months. Let's assume April 1, 2006.

Had the lawsuit met the judge's original schedule, fact discovery would have required approximately 33 weeks (June 17, 2004 – February 1, 2005). Instead it had already consumed 85 weeks at settlement and likely would have consumed approximately 93 weeks (June 17, 2004 – April 1, 2006) had the case continued.

These discovery time periods are probably our best proxy for the difference of a legal versus business approach. If a 33 week discovery period is defined as 100 percent efficient, then a 93 week period may be considered as 35 percent (33/93) efficient. Certainly the shorter the time period, the less time is available for overhead such as motions, legal research and staff meetings. If we pro rate the \$694,343 in supportive expenses by 35 percent, we have \$243,020 as an estimated core expense for discovery's supportive expenses.

Together, the estimated core expenses for depositions, document discovery and supportive tasks total \$720,841, 59 percent of the \$1,212,596 actually spent. We discussed the causes for many of these additional costs earlier in *Case Study of a Discovery Dispute*. Summarizing, the following factors in our opinion contributed to the high costs of discovery:

1. **Insufficient Judicial Oversight:** Judicial oversight naturally suffers when the Bench's technical, legal and clerical resources are limited relative to their case load or the resources of litigants who can overwhelm the court with opposing arguments.
2. **Lack of Precedent:** Our legal principles are based on a historical succession of judicial decisions. New technologies lack precedent. Lacking precedent the courts struggle to sort out complex, partisan arguments from opposing lawyers resulting in slow and sometimes what to the client appear to be arbitrary judicial decisions.
3. **Overuse of Confidentiality:** Protective orders and confidentiality are justified when competitive issues are involved, but often are used to shield useful or simply embarrassing information from opposing litigants. This can significantly limit the client's understanding of critical issues and consequently his management of the case.
4. **Weak Efficiency Ethic:** Legal ethics focus on confidentiality, conflicts, decorum, competence, fairness and the respect for rights. The ethic to constantly improve efficiency, so common in business, is not nearly so strong in law.

5. **The Billable Hour:** High hourly rates (e.g. \$190 for paralegals to manage copies, \$695 for partners even while traveling), the pressure to leverage associates and law’s increasing focus on profits per partner all contribute to the high cost of legal work.

We summarize our Discovery analysis in Table 26.

Table 26: Discovery Actual vs. Index Costs

	Reasons for Actual Cost	Actual Cost	Index Cost	Ratio
Depositions		\$215,482	\$183,366	85%
Documents		\$294,455	\$294,455	100%
Motions and Related		\$702,659	\$243,020	35%
Total Discovery	1. Insufficient Judicial Oversight 2. Lack of Precedent 3. Overuse of Confidentiality 4. Weak Efficiency Ethic 5. The Billable Hour	\$1,212,596	\$720,841	59%

Comparative Analysis: Complaint and Settlement

Relative to Expert Reports and Discovery, expenses for the Complaint and Settlement efforts were small together totaling \$260,919 or 11 percent of the \$2,443,068 total.

Complaint expenses were \$140,175 which included filing the initial complaint, defending it and unsuccessfully opposing counterclaims filed by the Defendant. The primary inefficiency during the Complaint phase was due to the propensity for both sides to file motions or oppositions to motions regardless of the probability for success. With competent lawyers on both sides, most of these efforts were unsuccessful. Good lawyers do not file weak court pleadings when strong opposition is sure to oppose and likely defeat it. But the practice is prevalent because (i) it is relatively inexpensive, (ii) occasionally yields results, and (iii) starts the litigation off with a few well-thrown punches, often for the client’s benefit who is urging his attorney to “get tough.”

The Plaintiff’s original complaint was filed March, 2004. Through the end of March only 90 total hours had been billed, or 20 percent of the 453 total hours billed for Complaint efforts through October, 2004. How much of the remaining 80 percent of the expense incurred from April through October was truly productive effort? Very difficult to say but perhaps best answered with a risk/reward question. Had the Plaintiff’s management in early April estimated i) additional complaint-related costs to oppose the opposition to be approximately \$112,000 (80 percent of \$140,175) and, ii) the probability of success to be low, say under 25 percent, would they have proceeded? Likely not. This assumes the Defendants do a similar analysis, because if they file a motion to dismiss the Plaintiff must oppose it.

The Defendants, however, were successful both in eliminating a few elements of the Plaintiff’s original complaint and also filing counterclaims. So these efforts were justified. Yet most efforts for both litigants were unsuccessful and simply increased costs. Based on this reasoning, we assume that a third of the 80 percent in expenses incurred after the original complaint were

productive. This yields Complaint-related expenses of 47 percent ($20 + (80/3)$) which we round to 50 percent given the imprecision of our estimate for an estimated Complaint index cost of \$70,088.

Regarding Settlement, actual expenses were \$120,744 distributed over a year and a half. However, 77 percent of those expenses were incurred supporting court-mandated settlement discussions in mid-2005. In some respects the sessions resembled a mini-trial. During the two sessions when litigants met with the mediating judge as many as six total attorneys were present representing both litigants. Significant effort was devoted to preparing position papers, a case book and supporting files as well as simply attempting to schedule all parties which consumed weeks.

Yet the decision whether to settle was clearly being driven by the clients themselves, both of whom were present and already well understood the basic issues in the case. So in retrospect much of the expense associated with the formality and broad lawyer participation could have been avoided – it simply did not matter.

As a means of estimating a Settlement index cost let's again, in retrospect, ask a risk/reward question. Knowing the likelihood of settlement to be low (Several key aspects of discovery had not been completed and, in particular, the Plaintiff was scheduled to submit their expert reports in less than three months. The Defendants would likely delay any settlement until seeing those reports.), would the Plaintiff authorize \$92,563 to be spent for court-mediated settlement discussions? No. How much? Maybe 20 partner hours plus another 20 associate hours for preparation. That would total \$14,820 ($20\text{hrs} \times \$511 + 20\text{hrs} \times \230 using hourly rates from Table 1, "Hourly Billings by Individual"). If we assume the other settlement-related expenses, \$28,181, were appropriate, we have a total Settlement index cost of \$43,001 which, again in consideration of the imprecision of our estimates, we round up to \$45,000, 37 percent of the actual expense.

Comparative Analysis: Total Lawsuit

Consolidating our results in Table 27, “Lawsuit Actual vs. Index Cost” we estimate the lawsuit’s total index cost to be \$1,114,309, or 46 percent of the actual costs.

Table 27: Lawsuit Actual vs. Index Cost

	Reasons for Actual Cost	Actual Cost	Index Cost	Ratio
Complaint	Limited Risk/Reward Analysis	\$140,176	\$70,088	50%
Discovery	Lack of Judicial Oversight Lack of Precedent Overuse of Confidentiality Weak Efficiency Ethic The Billable Hour	1,212,596	720,841	59%
Expert Reports	Cost-plus Orientation Leveraging Junior People High Legal Rigor Requirement	969,553	278,380	29%
Settlement	Limited Risk/Reward Analysis	120,744	45,000	37%
Total		\$2,443,068	\$1,114,309	46%

The Index Cost is theoretical, an ideal very much open for disagreement. It assumes each element of the lawsuit is executed optimally, reducing the total hours consumed in the ideal case. However, once we estimated those ideal hours, they were multiplied by the hourly rates of the actual lawsuit to derive the index cost. Were those actual rates optimal? In a truly competitive market, would a responsible client pay \$190 an hour for paralegals to administer photocopying? Or \$695 an hour for a partner’s travel time? Perhaps not, but estimating ‘optimal’ hourly rates is far more difficult than estimating the cost of a financial report, or simply eliminating formality expenses associated with settlement. So we retained the actual rates. Had we used lower hourly rates to calculate our index costs, our comparative ratios would have been significantly reduced.

Even at 46 percent of the actual costs, litigation is expensive. Had the case continued additional work would have been required prior to trial including the resolution of discovery disputes, expert depositions, expert report revisions and pre-trial motions. These expenses would likely have increased pre-trial index costs to \$1.5 million, or more.

SUMMARY

Every reasonable effort was made to conduct our analysis as accurately and objectively as possible. Underpinning the analysis were the law and expert firms' monthly invoices submitted over the two year period of the lawsuit. The law firms' invoices contained 1,631 hourly billing records which were allocated into 3,281 specific tasks. Although the expert firms' invoices were less precise, a similar approach was taken. These tasks were then analyzed from multiple perspectives including costs by attorney, law firm, work product and lawsuit phase. When possible we attempted to supplement the raw statistics through comparisons, ratios and industry metrics.

We close our study with a summary followed by a brief discussion of the factors contributing to what many believe to be civil litigation's primary weaknesses.

Overall Costs

- The Plaintiff's total lawsuit expenses were \$2,443,068 consisting of \$1,697,322 in attorney fees, \$619,946 for expert witnesses and \$125,800 for out-of-pocket expenses. A total of 7,691 hours were billed, 5,486 by lawyers and 2,205 by experts.
- Complaint-related expenses were \$140,175 and 453 hours. Discovery expenses were \$1,212,596 and 3,771 hours. Expert Report expenses were \$969,553 and 3,101 hours. Settlement-related expenses were \$120,744 and 367 hours.
- Together Law Firms A and B billed 799 hours for Senior Partners and 4,687 hours for all others, a 6.87 leverage ratio.
- Expenses for Discovery and Expert Reports were 90 percent of the lawsuit's total cost billing 6,872 hours.

Comparative Analysis and Cost Factors

- Our Comparative Analysis estimated the lawsuit's index cost at \$1,114,309 versus the actual cost of \$2,443,068, about 46 percent. The Expert Reports' development had the highest comparative costs in the lawsuit. The Comparative Analysis estimated an index cost of \$278,380. The actual cost was \$969,553, or 3.4 times higher.
- 104 Court pleadings were filed by the litigants during the lawsuit including 12 Motions for Extension of Time, about one every two months. \$297,099 was spent by the Plaintiff directly for Pleadings and Hearings.
- During Discovery, dispute-related expenses were \$545,060, larger than the \$509,937 spent for actually producing and reviewing the evidence itself.
- 9.3 Percent of all days billed exceeded eight billed hours. Two attorneys billed 25 and 33 percent of their days over eight hours. The longest day billed was 18.3 hours.
- Communication costs for meetings, telephone and email totaled \$478,864 and 1,295 hours. Communications with the opposing lawyers consumed 411 hours. 628 Hours were expensed by our lawyers communicating among themselves. In contrast, only 18 hours were spent attending court hearings.
- Photocopy expenses were \$28,102, sufficient to generate a stack of paper 94 feet high at ten cents a copy. Legal research totaled \$122,316: \$99,909 in fees for 377 billed hours and \$22,407 for on-line database services.

- In several instances billing granularity seemed to decrease as hourly rates increased. Several partners billed quarterly or even half hour increments.
- An hourly rate increase for five lawyers increased actual costs \$65,318 in the first nine months of 2005.

Comparative Law Firm Costs

- The senior partners at Firms A and B each billed an average of 2.5 hours and 2.3 hours per day respectively, a difference of twelve minutes. The highest billing paralegals at Firms A and B each averaged 4.3 and 4.2 hours per day, a difference of six minutes. The highest billing senior associates at the two firms billed 3.3 and 2.7 hours per day, within 36 minutes of each other.
- Billing rates during each law firm's three highest billing months averaged \$282 for Law Firm A and \$392 for Firm B. Total time billed over the three month period were 1,208 hours for firm A and 1,152 hours for firm B, a difference of less than five percent.
- Law Firm A and B's average billing rate was \$281 and \$374 per hour, respectively. Hourly rates ranged from \$121 for Firm A Paralegal to \$695 for Firm B Senior Partner.
- *The American Lawyer's AmLaw 200 survey* may be useful in predicting law firm billing. The ratio of the two law firms' average hourly rate during the lawsuit (1.331) is nearly identical to their revenue per lawyer ratio (1.341) from the same year survey.
- The lawsuit's estimated annualized Profits per Partner for Law Firms A and B were \$1,455,432 and \$2,068,949, respectively. Ranked against Boston law firms, the lawsuit appears to have been highly profitable for the law firms.

Of course, the unanswered question is given the Plaintiff's high costs over the nearly two years of the law suit, was it worth it financially? That question unfortunately must remain unanswered.

The Core Issues: Efficiency and Accountability

Our experiences in the litigation just studied, by most accounts, were not unique. Indeed, we were fortunate to have had our specific lawyers and experts representing us. Nearly inevitably though, it seems that those involved in civil litigation have harsh comments regarding litigation's high costs, long delays and poor accountability.

Why is our system of civil litigation so poorly regarded by so many people? Much, maybe most, of the dissatisfaction is based on impatience with the restrictions, procedures and limitations of the law itself.¹⁴ Lawyers, as the personification of the law for many people, have been blamed for these deficiencies for centuries going back at least to the Middle Ages: the condemnation of lawyers at the Papal Legate Council of London in 1237, Shakespeare's infamous quote "The first thing we do, let's kill all the lawyers" in *King Henry VI*, Massachusetts farmers scorning lawyers as "the pests of society" during Shays' Rebellion, the Jacksonian ethic of an elite and predatory bar and that "every man can be a lawyer."¹⁵

However, in business litigation much of the dissatisfaction is based simply on what business people consider the legal system's disregard of two of its most cherished values: efficiency and accountability. Consider a few of the issues discussed in the last section:

- *Efficiency.* Nearly a million dollars was spent developing two expert reports totaling 36 pages. Deposition expenses for 18 witnesses were \$490,347, or about \$3,900 per deposition hour. \$545,060 was spent on motions over disputed information. Twelve hours of court-mandated settlement discussions cost \$93,000. In today's age of electronic documents, \$33,763 was spent on copying and distributing paper documents.
- *Accountability.* The court originally scheduled eight months for discovery; at the lawsuit's termination discovery had been ongoing for 22 months with much more required. The court was presented with two fantastically disparate email-recovery cost estimates (\$30 million versus \$140,000) and yet neither litigant was chastised for submitting irresponsible estimates. Unannounced hourly rate increases for five attorneys alone increased expenses over nine months by \$65,316.

Our nation's approach to civil litigation is based on an adversarial system in which courts delegate the "search for the truth" to partisan attorneys. Unfortunately, our civil law system allows, even encourages, attorneys to attempt to gain advantage through delay, obfuscation, intimidation and manipulation during discovery, measures hardly conducive to fact-finding. Law firms are under pressure to generate strong financial results; ever-growing profits per partner are a prerequisite for attracting and retaining talent in today's big firms. Financial pressures coupled with abuses of hourly billing inflate costs.

The sad result is that much of nation's system of justice is available only to those with the financial resources to purchase it. For those cases that do commence, few go to trial; in 2005 only two percent of federal cases filed actually reached trial^{16,17} yet the Seventh Amendment to our Constitution guarantees civil cases the right to trial by jury. For those few cases that actually reached trial, many were extremely expensive and long delayed. And as William Gladstone observed a century ago, "Justice delayed, is justice denied."

No, the many issues we have discussed are not specific to individuals or firms, but are deeply-rooted, systemic weaknesses of the U.S. civil litigation system. These issues are discussed in more detail in [A Call for Legal Entrepreneurship](#) available at VallexFund.com/download/.



APPENDICES

Appendix A Expense Categorization

Law Firm Hourly Tasks

Accurately allocating the various expenses billed by the Plaintiff’s law firms and expert witnesses into meaningful categories was a critical step in our analysis. We first segmented the work performed on an hourly basis by the law firms into twelve categories, specifically:

Law Firm Hourly Tasks

Hearings:	Meetings with the court and directly related work
Pleadings:	Work related to Plaintiff and Defendant court filings
Research:	Legal research including case law and statutes
Discovery:	Plaintiff and Defendant fact discovery except depositions
Depositions:	Deposition conduct and defense and directly related work
Experts:	Communication with expert witnesses and review of their work
Opposition:	Communication with opposing counsel except court and settlement
Client:	Communication with the client except court and settlement
Settlement:	Settlement meetings and directly related work
Internal:	Plaintiff’s counsel internal meetings and communications
Administration:	Paralegal tasks such as filing, copying, binding and hand delivery
Other:	All other non-allocated hourly expenses

The most subjective part of our analysis was the categorization of the services documented in the invoices into the above twelve categories. In general, this categorization process fell into one of three cases. The first case was that for which the categorization was unambiguous, for example:

11/09/2005	[Attorney]	Review materials for expert reports	15.25	\$6,405.00
------------	------------	-------------------------------------	-------	------------

Here the task, “Review materials for expert reports,” clearly falls into the Experts category and 100 percent of the 15.25 hours and \$6,405.00 fee were so allocated.

The second case required judgment as to how the billing should be allocated typically across two or more categories. This block-billing, the bundling of descriptions, was common occurring in about 60 percent of the hourly records even though American Bar Association guidelines recommend against the practice.¹⁸ “It is disapproved because it allows a lawyer to conceal the time spent on each task and prevents the determination of whether individual tasks were performed within reasonable period of time.”¹⁹ Generally though deconstructing these bundled tasks was fairly straightforward based on knowledge of the tasks and time requirements for at least some of the described services, for example:

12/28/2005	[Attorney]	Telephone conference with [name] re. strategy and status; review of pleadings re. outstanding discovery matters; telephone call with client re. status and strategy.	2.75	\$1,155.00
------------	------------	--	------	------------

In this case we were the participant in the second phone call and estimated the call to have lasted approximately 15 minutes. The first call was made to a person who we knew to generally be both succinct and cost conscious and so estimated his call also to have been 15 minutes. In all cases, our allocations across categories were made in ten percent increments of the hours billed. So twenty percent of 2.75 hours billed (33 minutes) were allocated to the Client category and the remaining eighty percent (2.2 hours) to Pleadings since the review dealt with court documents rather than actual discovery documents.

However, the third cases were often much more difficult. In these cases, generally involving three or more allocations, it was not easy to categorize the services. This is a typical example:

06/14/2004	[Attorney]	Review and edit Defendants motion to dismiss and motion to stay discovery; research federal case law regarding same; assist with preparation of hearing binder; conference with opposing counsel regarding hearing of motion to dismiss; draft email to [name] and [name] regarding same.	4.60	\$1,288.00
------------	------------	---	------	------------

This billing involves five separate activities easily characterized by category but difficult by time allocated. In these cases, particularly those billing three or more hours, our approach was to first allocate the minimum ten percent to those tasks which likely took that or less time. For the billing above, those tasks would be “conference with opposing counsel...” and “draft email to [name] and [name]...” where the email recipients were two senior attorneys. Thus the Opposition and Office categories were each allocated 27.6 minutes (10 percent of 4.6 hours) leaving eighty percent of 4.6 hours, or 3.68 hours, to remaining. We then allocated twenty percent, or just under an hour, to Research for “research federal case law regarding [motion to dismiss and motion to stay discovery].” Obviously, this is an educated guess – but with today’s legal databases, could it possibly take more time to research precedent for such common motions? Finally, we allocated the remaining sixty percent, 2.76 hours, to Pleadings since the two remaining tasks dealt with the preparation of court documents.

A total of 3,281 allocations, each defining a specific task, were made against 1,631 hourly billings records. Of the total records, 660 (40%) fell under a single category, 506 (31%) under two categories, 287 (18%) under three categories, 145 (9%) under four categories and 33 (2%) under five or more categories. Although tedious and time-consuming, care was taken to make the categorizations as accurately as possible since the results formed the foundation for the remaining analysis. Certainly, the 71 percent of records falling under one or two categories suggests the majority of expenses should easily have been accurately categorized.

Law Firm Out-of-Pocket Expenses

Next, we segmented the law firm fees billed as out-of-pocket expenses. By comparison with their hourly fees this was straightforward and unambiguous. With very few exceptions, these charges were clearly categorized on the monthly invoices. A typical statement being June, 2004:

Computer research	\$ 677.86
Express delivery	82.06
Food services	7.50
Hand delivery	16.25
Photocopying	330.40
Postage	4.47
Telecopier	126.50
Telephone	38.48
Travel & related expenses	154.40
Total Current Charges	<u>\$1,437.92</u>

Since the naming of the charges changed both over time and across law firms, we organized the out-of-pocket expenses into the following eight categories:

Law Firm Out-of-Pocket Expenses

Professional Services
Photocopies
Court Reporter
Computer Research
Travel, Meals & Related
Postage, Fax & Express Delivery
Telephone
Court Fees

Expert Witness Expenses

The expert witness hourly and out-of-pocket expenses were allocated into their own, single category since in most cases there was insufficient invoice detail to make a meaningful allocation. One firm simply provided a monthly accounting of the total hours and fees charged by each expert, for example:

...
[Expert]	167.00	\$54,275.00
[Expert]	63.75	18,487.50
[Expert]	198.50	41,685.00
[Expert]	91.50	13,725.00
...
Total Services	796.20	<u>\$192,854.50</u>

The invoice then provided a listing of the high-level work performed by the firm during the month...

- | | |
|-----|---|
| 1. | Review and analysis of client billings, discount, and financial statement data received from Shareholder.com. |
| 2. | Review of documents received from [Defendant]. |
| | ... |
| | ... |
| | ... |
| 26. | Job Administration |

Similarly, out-of-pocket charges billed by the expert witnesses were difficult to categorize such as the following example from October, 2005:

Meals	\$ 439.01
Travel	286.00
Misc. Reimbursable Expenses	10,215.47
Expenses	<u>\$10,940.48</u>

The expert witness fees, totaling \$619,946 for the case, should not be confused with the Experts category under Law Firm Hourly Tasks. These law firm tasks relate to attorney/expert communications and their review of the experts' work.

Law Firm Hourly Billing Rates

Finally, we categorized the law firm billings by hourly billing rates. These hourly rates ranged from a low of \$95 per hour for paralegal work to a high of \$695 for senior attorneys. We segmented these rates into four categories:

Law Firm Hourly Rates

Attorney 1	\$500 - \$695
Attorney 2	\$350 - \$499
Attorney 3	\$200 - \$349
Paralegal	\$95 - \$199

Attorneys billing at the Attorney 1 rate were senior partners of the law firm. Attorneys billing at the two lower rates were generally junior partners, associates or attorneys practicing as *of counsel*, non-partner senior attorneys.

We did not categorize the expert hourly rates due to insufficient billing detail.

The categorization results for lawyer hours, out-of-pocket expenses and experts' fees are documented in Appendix C, "Billing Records."

Appendix B Expense Allocation

The analysis described in Appendix A resulted in 1,631 lawyers' hourly billing records being segmented into 12 task categories totaling 3,281 discrete tasks. These tasks were exclusively those billed hourly by the law firms. Those expenses along with expert report and out-of-pocket expenses were then segmented into two classes: direct and allocated.

Expenses were assigned as *direct* when clearly identifiable with a specific work product such as "Review material for expert reports." The remaining expenses were defined as *allocated* since their relation to a specific work product was unclear, "Office conference with [Firm B Attorney] regarding outstanding tasks," for example. All expert expenses were defined as direct. Table B-1, "Total Direct and Allocated Expenses," summarizes the results of this segmentation:

**Table B-1
Total Direct and Allocated Expenses**

	Direct	Allocated	Total
Dollars	1,431,456	1,011,612	2,443,068
Hours	4,389	3,302	7,691
Dollars / Hour	326	306	318

The next step was to assign the \$1,011,612 in allocated expenses to specific work products within each time phase. This was, in general, done on a pro rata basis and as such was, of course, an estimate. For example, if during a particular period 70 percent of the direct expenses were discovery related and 30 percent settlement related, 70 percent of the allocated expenses would be assigned to discovery and 30 percent to settlement. In certain cases, allocated expenses were assigned totally to a specific work product. This was done when it could be deduced that the expense related solely to that work product. The total allocation of motions and legal research to the Complaint work product during the Complaint time period is an example.

Table B-2, "Allocation Assignments," documents the specific allocation assignments for each work product and time period. Note that percentages in the table are rounded to the nearest integer. Consequently the work product expenses calculated in the analysis may differ by as much as a half-percentage point.

**Table B-2,
Allocation Assignments**

	Complaint	Discovery	Experts	Settlement
Allocated Expenses (\$1,011,612)				
Motions	\$ -	\$ 137,268	\$ 15,567	\$ 12,454
Legal Research	51,577	47,511	21,168	2,059
Document Management	13,771	117,938	30,121	2,595
Communications	67,462	341,243	67,466	12,056
Unclassified	12,948	45,075	11,606	1,725
Total	\$ 145,758	\$ 689,035	\$ 145,929	\$ 30,889
<i>Assignment Percentages</i>				
Complaint				
Motions	100%	0%	0%	0%
Legal Research	100%	0%	0%	0%
Document Management	52%	0%	0%	0%
Communications	52%	0%	0%	0%
Unclassified	52%	0%	0%	0%
Discovery: Depositions				
Motions	0%	42%	39%	0%
Legal Research	0%	37%	14%	0%
Document Management	6%	34%	14%	0%
Communications	6%	34%	14%	0%
Unclassified	6%	34%	14%	0%
Discovery: Documents				
Motions	0%	58%	61%	100%
Legal Research	0%	51%	22%	78%
Document Management	38%	46%	22%	31%
Communications	38%	46%	22%	31%
Unclassified	38%	46%	22%	31%
Expert Reports				
Motions	0%	0%	0%	0%
Legal Research	0%	12%	64%	22%
Document Management	0%	11%	64%	9%
Communications	0%	11%	64%	9%
Unclassified	0%	11%	64%	9%
Settlement				
Motions	0%	0%	0%	0%
Legal Research	0%	0%	0%	0%
Document Management	4%	10%	0%	61%
Communications	4%	10%	0%	61%
Unclassified	4%	10%	0%	61%

Appendix C
Billing Records

Lawyers, experts and out-of-pocket billing records in Excel format are available at...

http://www.VallexFund.com/Download/1-04-cv-10535_billing.xls

Appendix D

United States District Court District of Massachusetts (Boston) CIVIL DOCKET FOR CASE #: 1:04-cv-10535

Doc No.	Filed	Terminated	Description
	03/16/2004		Summons Issued
	03/16/2004		Magistrate Judge Assignment
1	03/16/2004		Complaint
2	04/06/2004	04/12/2004	Motion for Extension of Time
3	04/06/2004		Notice of Appearance
4	04/09/2004		Affidavit of Service
	04/12/2004		Order on Motion for Extension of Time
5	04/14/2004	04/30/2004	Motion for Leave to Appear Pro Hac Vice
6	04/14/2004		Certificate of Good Standing
7	04/14/2004		Certificate of Good Standing
8	04/14/2004		Certificate of Good Standing
9	04/14/2004		Corporate Disclosure Statement
10	04/29/2004		Order of Recusal
	04/30/2004		Order on Motion for Leave to Appear
11	04/30/2004		Notice of Reassignment
12	05/06/2004	06/18/2004	Motion to Dismiss
13	05/06/2004		Memorandum in Support of Motion
14	05/20/2004		Amended Complaint
15	05/20/2004		Opposition to Motion
16	05/25/2004		Notice of Hearing on Motion
17	05/25/2004		Notice of Scheduling Conference
18	06/07/2004	03/03/2005	Motion to Dismiss/Lack of Jurisdiction
19	06/07/2004		Memorandum in Support of Motion
20	06/09/2004		Joint statement re scheduling conference
21	06/15/2004		Memorandum in Opposition to Motion
22	06/15/2004		Corporate Disclosure Statement
23	06/15/2004		Certificate of Consultation
	06/17/2004		Motion Hearing
25	06/17/2004		Order Referring Case to ADR
26	06/17/2004		Scheduling Order
	06/18/2004		Order on Motion to Dismiss
24	06/21/2004		Document disclosure
	06/24/2004		Notice of assignment to ADR Provider
27	07/07/2004		Notice of ADR Conference
28	07/08/2004		Answer to Amended Complaint
29	07/27/2004	10/07/2004	Motion to Dismiss
30	07/27/2004		Memorandum in Support of Motion
31	08/10/2004		Answer to Complaint
32	08/10/2004		Opposition to Motion
33	09/01/2004		Answer to Counterclaim
34	09/13/2004		Notice of Hearing on Motion
	10/07/2004		Terminate Motions
35	10/07/2004		Notice (Other)
	10/18/2004		Proposed Document(s) submitted

37	10/25/2004		Protective Order
36	10/26/2004		Notice of ADR Conference
38	11/29/2004	03/02/2005	Motion to Compel
39	11/29/2004	03/02/2005	Motion to Seal
86	11/29/2004		Memorandum in Support of Motion
40	12/09/2004		Letter/request (non-motion)
41	12/13/2004	03/02/2005	Motion to Seal
87	12/13/2004		Opposition to Motion
	12/17/2004		Notice Resetting/Cancelling Deadline
42	12/17/2004		Order Referring Motion
43	12/17/2004		Order Referring Case to Magistrate Judge
44	12/17/2004	12/20/2004	Motion to Quash
45	12/17/2004		Memorandum in Support of Motion
46	12/17/2004		Affidavit in Support of Motion
	12/20/2004		Order on Motion to Quash
47	12/23/2004	03/02/2005	Motion to Compel
48	12/23/2004		Memorandum in Support of Motion
49	12/23/2004	03/02/2005	Motion to Compel
50	12/23/2004	03/02/2005	Motion to Seal
88	12/23/2004		Memorandum in Support of Motion
53	12/30/2004	03/02/2005	Motion to Compel
54	12/30/2004	03/02/2005	Motion to Seal
89	12/30/2004		Memorandum in Support of Motion
51	01/05/2005		Order Referring Motion
60	01/05/2005	01/11/2005	Motion for Extension of Time to Complete Discovery
52	01/06/2005		Order Referring Motion
55	01/07/2005	03/02/2005	Motion to Seal
56	01/07/2005	03/02/2005	Motion to Compel
57	01/10/2005		Order Referring Motion
58	01/10/2005	01/12/2005	Motion for Leave to Appear Pro Hac Vice
	01/11/2005		Order on Motion for Extension of Time to Complete Discovery
59	01/11/2005		Certificate of Consultation
66	01/11/2005	03/02/2005	Motion to Seal
67	01/11/2005		Reply to Response to Motion
68	01/11/2005		Affidavit
69	01/11/2005	03/02/2005	Motion to Seal
84	01/11/2005	03/02/2005	Motion for Protective Order
91	01/11/2005		Opposition to Motion
92	01/11/2005		Memorandum in Support of Motion
	01/12/2005		Order on Motion for Leave to Appear
	01/12/2005		Filing Fee Received
	01/13/2005		Order on Motion for Leave to File
61	01/13/2005	01/13/2005	Motion for Leave to File
63	01/13/2005		Opposition to Motion
64	01/13/2005	03/02/2005	Motion to Seal
65	01/13/2005		Affidavit
90	01/13/2005		Opposition to Motion
	01/14/2005		Notice of Hearing on Motion
70	01/14/2005	03/02/2005	Motion for Leave to File
71	01/14/2005	03/02/2005	Motion to Seal
93	01/14/2005		Reply to Response to Motion
62	01/18/2005		Order Referring Motion
	01/21/2005		Notice of Hearing on Motion
72	01/25/2005	03/02/2005	Motion to Seal
73	01/25/2005	03/02/2005	Motion to Seal
94	01/25/2005		Opposition to Motion
95	01/25/2005		Opposition to Motion

96	01/25/2005		Response to Motion
74	01/31/2005	03/02/2005	Motion for Leave to File
97	01/31/2005		Memorandum in Support of Motion
75	02/02/2005	03/02/2005	Motion to Seal
76	02/07/2005	02/14/2005	Motion for Leave to File
77	02/07/2005	02/15/2005	Motion for Leave to File
80	02/07/2005		Reply to Response to Motion
	02/10/2005		Motion Hearing
	02/14/2005		Order on Motion for Leave to File
82	02/14/2005		Letter/request (non-motion)
	02/15/2005		Order on Motion for Leave to File
78	02/15/2005	03/03/2005	Motion to Compel
81	02/15/2005	02/25/2005	Motion to Seal
79	02/16/2005		Order Referring Motion
83	02/22/2005		Letter/request (non-motion)
	02/25/2005		Order on Motion to Seal
108	02/25/2005	04/12/2005	Motion to Amend
109	02/25/2005		Memorandum in Support of Motion
	02/28/2005		Terminate Documents
101	02/28/2005		Letter/request (non-motion)
	03/01/2005		Notice Resetting/Cancelling Deadline
100	03/01/2005	03/08/2005	Motion to Seal
110	03/01/2005		Opposition to Motion
85	03/02/2005		Order on Motion to Compel
102	03/02/2005		Letter/request (non-motion)
	03/03/2005		Terminate Documents
98	03/03/2005		Order on Motion to Compel
99	03/03/2005	12/27/2005	Motion for Extension of Time
	03/08/2005		Electronic Endorsement (non-order)
	03/08/2005		Order on Motion to Seal
	03/08/2005		Mail Returned
103	03/16/2005	03/17/2005	Motion for Leave to File
	03/17/2005		Order on Motion for Leave to File
104	03/17/2005	03/18/2005	Motion for Extension of Time to Complete Discovery
	03/18/2005		Order on Motion for Extension of Time to Complete Discovery
105	03/18/2005		Scheduling Order
106	03/28/2005	05/03/2005	Motion for Miscellaneous Relief
111	03/28/2005		Opposition to Motion
112	03/28/2005		Memorandum in Opposition to Motion
107	04/05/2005		Notice of Appearance
	04/12/2005		Order on Motion to Amend
113	04/12/2005		Amended Complaint
114	04/19/2005		Notice (Other)
115	04/19/2005	04/25/2005	Motion to Seal
116	04/21/2005	04/25/2005	Motion for Protective Order
117	04/21/2005		Memorandum in Support of Motion
118	04/21/2005		Order Referring Motion
119	04/22/2005	04/25/2005	Motion to Seal
	04/25/2005		Order on Motion to Seal
	04/25/2005		Order on Motion to Seal
120	04/25/2005	04/26/2005	Motion to Seal
121	04/25/2005		Opposition to Motion
122	04/25/2005		Order on Motion for Protective Order
123	04/25/2005		Reply to Response to Motion
	04/26/2005		Order on Motion to Seal
124	04/29/2005		Answer to Amended Complaint
125	04/29/2005		Answer to Amended Complaint

	05/03/2005		Order on Motion for Miscellaneous Relief
126	05/13/2005	05/17/2005	Motion for Extension of Time to Complete Discovery
127	05/13/2005		Memorandum in Support of Motion
	05/17/2005		Order on Motion for Extension of Time to Complete Discovery
	05/17/2005		Set/Reset Hearings
128	05/18/2005	11/17/2005	Motion to Seal
129	05/18/2005		Answer to Counterclaim
130	05/18/2005	06/13/2005	Motion to Quash
183	05/18/2005	01/04/2006	Motion for Protective Order
184	05/18/2005		Memorandum in Support of Motion
	05/19/2005		Terminate Motions
	05/19/2005		Notice of correction to docket made by Court staff
131	06/01/2005	11/17/2005	Motion to Seal
185	06/01/2005		Memorandum in Opposition to Motion
132	06/03/2005	11/17/2005	Motion for Leave to File
133	06/07/2005		Order Referring Motion
134	06/10/2005	11/17/2005	Motion to Seal
186	06/10/2005		Memorandum in Support of Motion
	06/13/2005		Reopen Document
	06/13/2005		Terminate Motions
	06/13/2005		Notice of correction to docket made by Court staff
	06/13/2005		Terminate Documents
	06/13/2005		Notice of correction to docket made by Court staff
135	06/13/2005		Notice of Scheduling Conference
136	06/13/2005		Order Referring Motion
137	06/15/2005	11/17/2005	Motion for Leave to File
138	06/15/2005	11/17/2005	Motion for Miscellaneous Relief
187	06/15/2005		Memorandum in Opposition to Motion
139	06/20/2005	12/27/2005	Motion to Compel
140	06/20/2005	11/17/2005	Motion to Seal
192	06/20/2005		Memorandum in Support of Motion
141	06/22/2005		Order Referring Motion
142	06/24/2005		Notice of Withdrawal of Appearance
143	06/30/2005	07/07/2005	Motion for Extension of Time
144	07/06/2005	11/17/2005	Motion for Leave to File
145	07/06/2005	11/17/2005	Motion to Seal
188	07/06/2005		Sur-Reply to Motion
	07/07/2005		Order on Motion for Extension of Time
146	07/07/2005		Order Referring Motion
147	07/07/2005		Notice (Other)
148	07/08/2005	12/27/2005	Motion for Miscellaneous Relief
149	07/08/2005	11/17/2005	Motion to Seal
150	07/08/2005		Notice of Appearance
151	07/08/2005		Notice of Appearance
193	07/08/2005		Memorandum in Support of Motion
152	07/11/2005		Order Referring Motion
153	07/12/2005	11/17/2005	Motion to Seal Document
154	07/12/2005		Transcript
191	07/12/2005		Opposition to Motion
155	07/22/2005	11/17/2005	Motion to Seal
156	07/22/2005	11/17/2005	Motion to Seal
194	07/22/2005		Opposition to Motion
195	07/22/2005		Memorandum in Opposition to Motion
196	07/22/2005		Opposition to Motion
	08/16/2005		Order
157	08/18/2005		Notice of Appearance
158	08/19/2005		Letter/request (non-motion)

159	09/16/2005	11/17/2005	Motion to Seal
197	09/16/2005	12/27/2005	Motion for Extension of Time
198	09/16/2005		Memorandum in Support of Motion
	09/19/2005		Order
160	09/19/2005		Order Referring Motion
161	09/22/2005	11/17/2005	Motion for Leave to File
162	09/22/2005		Opposition to Motion
163	09/22/2005		Affidavit
189	09/22/2005		Opposition to Motion
	09/26/2005		Terminate Documents
	09/26/2005		Notice of correction to docket made by Court staff
164	09/27/2005	09/30/2005	Motion to Modify
165	09/28/2005		Order Referring Motion
166	09/29/2005		Response to Motion
167	09/29/2005		Report of Alternative Dispute Resolution Provider
	09/30/2005		Order on Motion for Modification
173	09/30/2005	11/17/2005	Motion to Seal
174	09/30/2005	11/17/2005	Motion to Seal
199	09/30/2005		Memorandum in Opposition to Motion
200	09/30/2005	12/27/2005	Motion to Compel
168	10/03/2005		Notice of Appearance
169	10/03/2005		Notice of Appearance
170	10/03/2005		Notice of Appearance
171	10/03/2005	10/11/2005	Motion to Withdraw as Attorney
172	10/04/2005	11/19/2005	Motion to Withdraw as Attorney
175	10/06/2005		Order Referring Motion
	10/11/2005		Order on Motion to Withdraw as Attorney
176	10/12/2005		Response
177	10/14/2005		Opposition to Motion
178	10/31/2005	11/14/2005	Motion to Seal Document
179	11/01/2005		Order Referring Motion
180	11/01/2005	11/17/2005	Motion for Leave to File
181	11/01/2005		Sur-Reply to Motion
190	11/01/2005		Sur-Reply to Motion
	11/02/2005		Terminate Documents
	11/02/2005		Notice of correction to docket made by Court staff
	11/02/2005		Notice of correction to docket made by Court staff
182	11/11/2005		Notice (Other)
	11/14/2005		Terminate Motions
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion for Leave to File
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion for Leave to File
	11/17/2005		Order on Motion for Miscellaneous Relief
	11/17/2005		Order on Motion for Leave to File
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal Document
	11/17/2005		Order on Motion for Leave to File
	11/17/2005		Order on Motion for Leave to File
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal
	11/17/2005		Order on Motion to Seal

	11/19/2005		Order on Motion to Withdraw as Attorney
201	12/21/2005	12/27/2005	Motion to Seal
202	12/21/2005	01/31/2006	Motion to Compel
203	12/21/2005		Affidavit
204	12/21/2005		Order Referring Motion
205	12/21/2005	01/31/2006	Motion to Compel
	12/27/2005		Order on Motion to Seal
207	12/27/2005		Order on Motion for Miscellaneous Relief
208	12/27/2005		Order on Motion to Compel
206	12/28/2005		Notice of Rescheduling
209	12/30/2005	01/04/2006	Motion for Extension of Time
	01/04/2006		Order on Motion for Extension of Time
	01/04/2006		Set/Reset Motion and R&R Deadlines/Hearings
210	01/04/2006	01/05/2006	Motion for Extension of Time to File Response/Reply
211	01/04/2006	01/05/2006	Motion for Extension of Time
212	01/04/2006		Order on Motion for Protective Order
	01/05/2006		Order on Motion for Extension of Time to File Response/Reply
	01/05/2006		Order on Motion for Extension of Time
213	01/11/2006		Response to Motion
214	01/13/2006	01/19/2006	Motion to Seal
215	01/13/2006		Opposition to Motion
222	01/13/2006		Opposition to Motion
216	01/17/2006		Order Referring Motion
	01/19/2006		Order on Motion to Seal
217	01/20/2006	01/31/2006	Motion for Clarification
218	01/20/2006	01/24/2006	Motion for Extension of Time
	01/24/2006		Order on Motion for Extension of Time
219	01/25/2006		Notice regarding mandatory use of ECF
220	01/27/2006	01/30/2006	Motion for Extension of Time to File
	01/30/2006		Order on Motion for Extension of Time to File
	01/31/2006		Terminated Case
221	01/31/2006		Stipulation of Dismissal

Sources

- ¹ U.S. District Court (Boston), Case #: 1:04-cv-10535, <http://pacer.psc.uscourts.gov>
- ² The American Lawyer, *Recession Resistant*, (May, 2006) page 70
- ³ Yale Law School Development Office, *The Truth About the Billable Hour*, http://www.law.yale.edu/documents/pdf/CDO_Public/cdo-billable_hour.pdf (accessed May 15, 2007)
- ⁴ Mari H Leigh, Miki Schroeder, Donna Wolf, *U.S. Business Litigation*, (November 1997) pages 16-17
- ⁵ The American Lawyer, *Cornering the Premium Work*, (June 2006) pages 137-140
- ⁶ Cameron Stracher, *Double Billing*, (1998) page 125
- ⁷ U.S. District Court (Boston), Case #: 1:04-cv-10535, <http://pacer.psc.uscourts.gov>
- ⁸ *American Bar Association Commission of the Renaissance of Idealism in the Legal Profession*, August, 2006 page 2
- ⁹ Court Order, U.S. District Court for the Western District of Texas, Austin Division, Case A-06-CA-594-SS, April 25, 2007
- ¹⁰ Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, American Bar Foundation, (1980) Footnote 27
- ¹¹ Plaintiff's law firm junior partner "that the full engagement..." private email message to Ron Gruner [gruner@shareholder.com], 18 Feb 2005
- ¹² Aric Press, *Adding Value*, The American Lawyer, (July 1, 2005)
- ¹³ The American Lawyer, *The Century Thus Far*, (May, 2006) page 125
- ¹⁴ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, American Bar Association Volume XXIX (1906), pages 396-397
- ¹⁵ Judge Louis A, Craco et al, *Final Report of the Committee on the Profession and the Courts* (1995) pages 17-18
- ¹⁶ Administrative Office of the U.S. Courts, *2005 Annual Report of the Director*
- ¹⁷ *The New York Times 2007 Almanac*, pages 134-135
- ¹⁸ *ABA Commission on Billable Hours Report 2001-2002*, (August, 2002) pages 65-66
- ¹⁹ Gerald F. Phillips, *Reviewing a Law Firm's Billing Practices*, The Professional Lawyer (Fall 2001) page 11