

Managing Litigation Costs In Difficult Times

The Editor interviews **Christopher S. Marks**, Partner in the Litigation Department of Williams Kastner PLLC.

Editor: Would you please tell our readers something about your professional experience?

Marks: I am a member of Williams Kastner in our Seattle office. My practice is primarily litigation, focusing on product liability and commercial disputes. I serve as a national trial counsel for several clients in the product liability arena and do work with them throughout the country. I am licensed in three states, Washington, Oregon and California, so my practice is heavily focused on the West Coast.

Editor: Could you please give us an overview of Williams Kastner and its litigation practice?

Marks: Williams Kastner has been a leading litigation firm in the Pacific Northwest since 1929. We handle all kinds of litigation from commercial disputes to product liability, environmental, toxic, mass tort and class action litigation. Among the top 15 largest firms here in the Pacific Northwest, Williams Kastner has historically ranked first in terms of number of successful verdicts. We also serve as national coordinating counsel in product liability litigation and serve both in the coordinating capacity as well as litigation counsel for our clients. Our lawyers assist clients in litigation throughout the United States.

Editor: What litigation trends do you see affecting businesses involved with lawsuits?

Marks: Even before the current economic crisis, we were seeing that costs related to litigation were becoming a challenge. The number of filings had been waxing and waning in various areas, but the cost of litigation was generally increasing. That is due to the advent of electronic discovery and the requirement that companies retain electronic data and produce that data as part of litigation. The duties of companies in responding to litigation have increased. And, the plaintiff's litigation bar has become more sophisticated and coordinated. The ability of plaintiffs' lawyers to seek information has grown through various court rules; they are taking advantage of them, so discovery costs associated with litigation have increased a lot. The challenge that most clients face is in balancing a strong defense against its costs.

Editor: Have changes to the federal rules had an impact?

Marks: Yes, because in essence much more work is now done at the onset of a case with the advent of initial pretrial disclosures than might have been done previously. The requirement that the parties identify and exchange evidence at the onset means that the ramp up costs can be high and very steep, so a signifi-

cant investment needs to be done at the beginning of the case.

Editor: How has Williams Kastner worked with its clients to face these challenges?

Marks: In my experience, a successful partnership is always based on good lines of communication. It has always been important to establish a budget and to determine strategies for both requesting discovery and for responding to discovery requests. This is even more important now because companies' litigation departments are under the same cost pressures as their other departments. We now try even harder at the onset of the case to identify the absolute needs and where there can be cost savings.

We also work with clients to look at creative billing arrangements. This trend has been in the making for some time but the current economic situation has brought even more attention to the need to consider alternatives to the billable hour. For instance, we recently took on a number of cases for a national company facing litigation here in the Pacific Northwest and came up with a rate blending the traditional higher rate for a senior partner with a lower rate for a junior associate. We also handle some work on a flat fee basis and even some on contingency depending, of course, on the nature of the litigation.

Editor: Would fixed fees involve segmenting the litigation into various phases and billing for those one by one rather than in total?

Marks: Absolutely. Even where we haven't scheduled a flat fee program and are continuing on the regular hourly rate, we structure our litigation plans and our budgets so that there are identifiable benchmarks within the litigation that we track against the budget.

Editor: What steps can businesses take to help control litigation costs?

Marks: The challenge is to find counsel with the experience and ability not to just achieve successful results but also to maintain reasonable costs. Companies should establish their goals and expectations from the outset. In-house counsel will likely have an expectation of where the case should end up. If that is communicated up front to outside counsel, then everyone is on the same page going forward.

Clients can also ask outside counsel for regular preset updates to measure expectations and see if the litigation is going as expected. Companies can also urge their attorneys to provide early assessments of both the risks and the benefits of taking certain courses of action.

Another way companies can minimize costs is to ensure from the outset that the fee structure makes sense for the particular litigation. Even if a particular



Christopher S. Marks

firm has traditionally handled files and matters on an hourly basis, it may make sense in the context of a particular case or group of cases to establish a different billing system.

Lastly, it is important to identify and have complete confidence in the outside litigation team. That really goes back to the importance of communication between client and outside counsel – this has always been important but is even more so when money is tight.

Editor: Has the current economic crisis affected the practice of law in ways that are peculiar to the Pacific Northwest?

Marks: We certainly haven't been immune to the shocks that other regions in the country have felt; businesses here are facing the same economic challenges and their ripples have already been felt in the law firms. Current economic conditions have affected clients in the building industry and real estate. Some national firms with local presence have disappeared, and others are reducing the number of staff lawyers here just as they are throughout the country. The problems of a couple of large banks with significant presence in the Northwest, Washington Mutual probably being the most recognized, have had a huge impact on law firms that had historically dedicated significant resources to handling their matters.

Editor: How has the current economic crisis impacted the practice of law at Williams Kastner?

Marks: As we near the end of the first quarter we are doing well, in large part due to management decisions over the past decade, both in terms of how the firm has operated and grown and the sectors in which our attorneys have chosen to focus. All of our practice areas in litigation are up.

Editor: What steps are being taken at your firm to weather this economic crisis?

Marks: We believe we've made the right choices with our particular areas of focus and expertise and expect to see growth in those. Unlike other firms in the Pacific Northwest we made strategic decisions not to grow in finance securities and other areas that are now suffering greatly with the turn of the economic climate. We are careful in terms of spending and have been fortunate not to have had to make the types of cuts that other local and national firms have been faced with.

We also take pride in our reliance upon technologies that have allowed us to achieve some cost savings. We have worked closely with a number of clients to develop litigation solutions that allow attorneys to work remotely yet with the same access to information as though they were in the office. Investments we made several years ago to help achieve cost reductions in litigation, especially in mass tort product liability, are proving to

be an even better investment now.

Editor: What trends do you foresee in litigation as the result of the current economic crisis?

Marks: We have already seen an uptick in litigation against the financial sector as well as the real estate sector, and we anticipate that there will be more claims filed against investment firms, real estate firms, mortgage lenders and banks. We have already seen the advertising and efforts from plaintiff's lawyers to identify victims of the current economic crisis and funnel those claims toward targets that may still have resources. We have seen this trend before – firms that have made money in other large scale, class action and mass tort litigation are well funded, well organized, have good marketing tools and have the capability to establish themselves as real players in litigation relating to the economic crisis. Companies that may have faced multi-plaintiff claims in environmental litigation or product liability or mass tort on a large scale will face the same types of claims related to the financial issues. The litigation likely to come from disgruntled consumers today will require the same types of case management and trial preparation processes to defend as those other types of mass claims.

Editor: What attributes should businesses look for when seeking litigation counsel?

Marks: The most important aspect is probably experience. Companies need to have confidence that their outside counsel can achieve the results needed. Outside counsel has to be creative in defining success and then achieving it at a reasonable cost; the days where every claim could be fought tooth and nail as though the company's livelihood depended upon its outcome are probably behind us. Companies should seek outside counsel who can communicate openly about expectations and work with the client to achieve the best results based upon smart case assessments. Counsel has to be capable of proceeding to trial if necessary. The trick is having that power at your disposal while trying to find reasonable resolutions without expending the resources one might have spent without question five years ago.

Editor: Is there anything that you would like to add?

Marks: It is a challenging time for everyone, including law firms. Most of us are facing economic times we have not seen before. And we don't know where it will end. So I think everyone is looking for ways to keep costs down while delivering the services or goods that customers have historically expected. Law firms are no different. Our challenge is to maintain a superior level of quality service and achievement for clients while keeping costs in line with the other economic challenges that our clients now face.

Please email the interviewee at emarks@williamskastner.com with questions about this interview.