

# Best Practices in Budgeting for Patent Litigation

By Jonathan E. Retsky and Thomas V. Miller

**E**stablishing and communicating an accurate litigation budget is critical to building and maintaining a good client relationship. In patent litigation, fees and expenses can mount quickly and, if left unchecked, they can destroy an attorney-client relationship. Given today's economic climate, outside counsel need more than ever to improve their financial abilities and establish an effective tool for preparing and communicating budgets. In our experience, trial counsel—particularly patent attorneys—suffer from inexperience and lack of training in this crucial area.

This article will present a known and effective budget, forecast, and communication process that can be used by outside counsel with their clients. The process is designed to prevent or at least mitigate the impact of unforeseen surprises on quarter, annual, and complaint-to-trial litigation budgets. Sample budget spreadsheets will be described and established processes discussed to demonstrate how these lead to better communication between outside counsel and the client on this increasingly important legal function. The process steps include monthly reporting and discussions regarding monthly burn-rates, litigation developments, and the impact of these on the budget, as well as quarterly case assessments that include detailed analyses of substantive issues and tasks being pursued by the trial team.

## Spreadsheets Are a Necessary Starting Point

An effective litigation budget starts with a spreadsheet. In fact, we recommend using more than one spreadsheet, each one cross-referencing the others, to help make the budgeting process more accurate. Spreadsheets can be easily developed using common computer software such as, for example, the Microsoft Excel program. As far as the authors are aware, there are not many off-the-shelf software products available today that allow you to create specific complex litigation budgets. The good news is that you do not need anything more sophisticated than Excel to prepare a budget spreadsheet, and the nice thing about Excel is that it is readily available in most law and client offices.

There are a number of essential attributes to a functional and effective litigation spreadsheet, and two kinds of

spreadsheets can and should be used for each litigation. The first is an annual spreadsheet for estimating or predicting costs of a particular case over the course of a calendar year. The second is a filing-to-trial and/or appeal spreadsheet that can be used to predict and estimate the total legal costs of a case over its lifetime. The sample budget spreadsheets offered here (Tables 1-5) were created with the Microsoft Excel program and are the first type of spreadsheet—calendar year budgeting. However, they can be readily expanded and adapted for budgeting over the course of the entire litigation.

Tables 1–3 provide a number of different spreadsheets used to develop a comprehensive litigation budget, and each has its own specific purpose. They include a Staffing spreadsheet, a Matter Budget Forecast spreadsheet, and an Estimated Fees and Expenses spreadsheet. Each of these will be described in detail below.

The Staffing spreadsheet (Table 1) lists each lawyer and paralegal and every other law firm billing personnel who will be working on a particular matter. The spreadsheet identifies the position, the approved billing rate, and an estimate of the total hours that each person will bill over the course of the year. These estimated hours are then multiplied and totaled for a Total Estimated Fees number that appears in the bottom right-hand corner of this spreadsheet. The Total Estimated Fees number will be used in the next spreadsheet to develop the Matter Budget Forecast. A note about completing the Staffing spreadsheet: List the people on the case from the first chair, or highest biller by rate, in a decreasing hourly rate order, and then keep the litigation team to this list. Depending on the size and complexity of the case, the number of billing personnel may need to increase, but make sure to inform the client of any changes to the litigation team.

The Matter Budget Forecast spreadsheet (Table 2) has three important sections. The first section is for quarterly budget estimates that include fees, expenses, and certain large and identifiable outside costs. The second section allows the user to track actual monthly expenses on a month-by-month basis (more on this later). The final section identifies ongoing, quarterly variances between the estimated budget and the actual expenses.

The first section (Budget) is broken down in a number of different ways. Estimates are provided on a quarterly basis across the top of the table. Readers are aware that the period of time used can be weekly, monthly, quarterly, semiannually, or other time period, depending on the circumstances and needs of each case. Because patent litigation commonly spans more than one year, we have broken costs down into quarterly chunks.

As can be seen along the left-hand column, costs are divided into fees and expenses. Fees are to be entered by ABA litigation task code (Table 4, page 11). Each of these

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Table 3

## ESTIMATED FEES AND EXPENSES

Quarter	Projects	Estimated Fees	Estimated Expenses
Q1			
Q2			
Q3			
Q4			
Annual Budget (Estimated Fees & Expenses)		\$0	\$0

actual costs broken out on a monthly basis. It is important to point out that this section (and the Variance section below) is only completed after you have prepared a budget estimate and are proceeding to prosecute your case. Monthly break-outs are used because most law firms in the United States bill their clients on a monthly basis. Line items are provided for each of the entries reflected above in the budget portion of the table. However, all lawyer fees are rolled up into one line item, and expenses are broken out according to the way they are set out in the budget table.

Although the second section of the Matter Budget Forecast spreadsheet is straightforward, it represents a very important part of the overall budgeting process. This section of the table, which identifies monthly fees and expenses, is crucially important both in honing your ability to forecast and estimate accurately and in identifying whether changes to the original budget need to be made. (This will be discussed in greater detail below.) Like the budget portion, expenses are tallied on a quarterly basis, and an ongoing total is tracked in the right-hand column.

The third section (Variance) is also important because it provides instantaneous feedback on how you are performing according to your original (or revised) budget estimates. It provides a snapshot of whether you are above or below, ahead of or behind, the targeted budget forecast. This section tells at a glance whether the budget and forecast need to be revised or modified for the particular litigation.

Table 3 of the budgeting exercise is the Estimated Fees and Expenses spreadsheet. Although some of the information contained in this table is a bit redundant with respect to the tables above, it does have its own separate use and value. Indeed, it is important to make sure that the Estimated Fees column and Estimated Expenses column line up appropriately with the spreadsheets provided in the Matter Budget Forecast spreadsheet (Table 2) as well as the Staffing spreadsheet (Table 1). All three tables serve as a “sanity check” to make sure all your numbers align and make sense. The important part of the Estimated Fees and Expenses spreadsheet is the middle column that bears the heading “Projects.” This middle column identifies to the client the types of tasks and the assumptions that went into estimating the budget. This helps to focus on whether the case is accelerated or one proceeding at a normal pace, and it communicates to the client why a budget may need to be revised. For example, entries in the Projects column typically include answer complaint, written discovery, case management conference, protective order,

depositions, *Markman* hearing, summary judgment, pretrial, trial, etc. It is helpful to complete the Projects column in the early part of budgeting process and work your way backwards to the Matter Budget Forecast spreadsheet.

A point needs to be made about how to complete, or in what order you should complete, the spreadsheets shown in Tables 1–3. We have found it beneficial to start with the Staffing spreadsheet (Table 1) to identify the team. Next, fill out the Estimated Fees and Expenses spreadsheet (Table 3) to list important tasks and milestones. Finally, fill out the Matter Budget Forecast spreadsheet (Table 2) with detail behind these figures. This sequence allows outside counsel to first identify the members of the trial team that are necessary to conduct a particular case and project roughly the amount of time each individual will bill to the case based on his or her approved billing rate. This provides an overall idea of what the total fees portion of the litigation will cost.

We recommend completing the Projects column of the Estimated Fees and Expenses spreadsheet next to break up by quarter the types of activities that are anticipated to occur during the year. Depending on whether a case is starting, in the middle, or culminating in any particular year, certain tasks are identified that will take place at certain quarters of the year. For example, for a case beginning in January of a given year, the tasks generally identified in ABA task code L100 will take place in Q1, as well as some of the tasks identified in the L200 task code. Because discovery is usually a very large portion of complex commercial litigation—particularly patent litigation—these tasks may span more than one quarter of the time reflected in the table. Importantly, these tasks also may represent a very large portion of the overall estimate, depending, again, on the complexity and nuances of each particular case.

It is important to point out that developing a budget is an iterative process. After going through a first pass of the Staffing spreadsheet (Table 1), the process includes successive iterations in order to get the spreadsheets to balance out. This is where the fine-tuning takes place. Certain numbers appear in multiple different places in the spreadsheets, so it is important for these numbers to be carried through accurately in each spreadsheet. Moreover, it is important to look at the case as a whole and check your overall budget to make sure it is appropriate and realistic with respect to the case at hand. After going through several iterations and tweaking the spreadsheets, it is helpful to circulate the spreadsheet to other key members of the trial team and ask for their input and support for the numbers. It is important to have the trial team support the budget before releasing the budget estimate to the client for its review and approval.

Once you have mastered the process outlined above, you can take your estimation process to another level of detail which helps improve your accuracy. To do so, in the Matter Budget Forecast spreadsheet (Table 2), assign each lawyer line items broken out by each subtask code (Table 4) associated with the lawsuit. Under each of the ABA Task Codes and subcodes, all billing participants for a particular case can be identified, along with their hourly rate. Breaking each subtask out this way forces you to think on a person-by-person basis

about what each person's involvement will be for each identified milestone of the lawsuit. An additional column can be provided in order to identify the amount of hours each billing person will bill out to each of the milestones or tasks and subtasks of the overall case. In this manner, you are compelled to think, not only about the overall cost of each event, but just exactly how much effort each individual on your team will devote to each particular task. For example, for various reasons, the summary judgment motions for a particular case may cost more or less than in prior cases. This level of fine-tuning—though tedious at first—really allows you to hone in on the details and improve your forecasting capabilities.

It is important to understand that accuracy in budgeting and forecasting will improve over time as estimates are prepared for successive litigations. It is also important to not get frustrated at first with the detail associated with the spreadsheets, the time involved in completing them, and the potential lack of accuracy in your numbers. It may be helpful to turn to or consult with others in your law firm or in your practice area who may have budgeting experience in order to obtain realistic estimates for the spreadsheets the first several times. However, you will find over time that your own ability to “guesstimate” and complete the entries in the spreadsheets gets better and better.

Having said all of the above, it is worth pointing out a few rules of thumb for patent litigation. First, we have found that it costs between \$1.5 and \$2.5 million to defend a basic single patent lawsuit nowadays. This range of course depends on the complexity of the technology involved, the number of accused products, and the degree to which defenses are pursued and/or available—and even to some extent the court where the case is lodged. You can expect to see estimates fall within this ballpark just to know they are making sense at the

50,000-foot level. In addition, for each extra patent asserted you can add about \$500,000–\$700,000 to the baseline number. This also depends on whether the additional patents are related to the original patent (i.e., divisional, continuation, continuation-in-part), whether the technology is the same, and/or whether additional accused products are thereby brought into the case.

### Initial Case Assessment and Follow-up

An early initial case assessment is a critical client communication tool for managing budget expectations. Having now completed the original budget estimate, it is time to turn your attention to the substantive issues you are facing in the lawsuit. Some of you might be asking at this point, how can you prepare a budget estimate without looking at the issues and defenses before doing so? This is not an inappropriate question, but it goes to what you are trying to accomplish in each step of the process. Preparing an initial budget estimate typically does not require the level of detail developed and understood after a thorough review of the substantive issues of the case. Having done many budgets, you can usually get into the right ballpark from a cursory review of the patents, parties, court, opposing counsel, technology, etc. If, however, the client wants a more precise budget estimate, i.e., accurate to within \$1,000 or so, or if the client gives you the opportunity to perform more thorough due diligence before providing your estimate, it is certainly reasonable to switch the order of these two important steps. It is common, however, that outside counsel is faced with providing an initial budget estimate in order to get the work in the door, so an in-depth analysis of the substantive issues in the case is deferred until after the outside counsel has been retained by the client.

That said, however, an initial case assessment review should occur within 30 days of submitting the budget estimate.

The initial case assessment provides the client with feedback regarding the details of the new litigation. This is an important phase of the litigation because important strategic decisions need to be made by the client regarding the business impacted by the lawsuit, likely witnesses, how

aggressively to push the case, etc. The initial case assessment is also a communication tool that allows outside counsel to keep on budget and actively represent the client by way of preparing an answer to the complaint, drafting motions, and preparing for a Rule 16 conference, etc. Due diligence typically involves, at a minimum, reading the patents, the file histories, the complaint, and additional information regarding the accused infringing products. It is also important to learn as much as possible about the opponent and opposing counsel, as these factors will also impact any budget estimate.

In developing the initial case assessment presentation for the client, consider the following factors: (1) the

Table 4

ABA LITIGATION TASK CODES	
L100 - Assessment/Development/Admin	
L110	Fact Investigation/Development
L120	Analysis/Strategy
L130	Experts/Consultants
L140	Document/File Management
L150	Budgeting
L160	Settlement/Nonbinding ADR
L190	Other
L200 - Pretrial Pleadings/Motions	
L210	Pleadings
L220	Preliminary Injunctions/Provisional Remedies
L230	Court-Mandated Conferences
L240	Dispositive Motions
L250	Other Written Motions/Submissions
L260	Class Action Certification and Notice
L300 - Discovery	
L310	Written Discovery
L320	Document Production
L330	Depositions
L340	Expert Discovery
L350	Discovery Motions
L390	Other Discovery
L400 - Trial Preparation and Trial	
L410	Fact Witnesses
L420	Expert Witnesses
L430	Written Motions/Submissions
L440	Other Preparation/Support
L450	Trial and Hearing Attendance
L460	Post-Trial Motions/Submissions
L470	Enforcement
L500 - Appeal	
L510	Appellate Motions/Submissions
L520	Appellate Briefs
L530	Oral Argument

Activity Codes
A101 Plan and Prepare for
A102 Research
A103 Draft/Revise
A104 Review/Analyze
A105 Communicate/In Firm
A106 Communicate/With Client
A107 Communicate/Other Counsel
A108 Communicate/Other External
A109 Appear for/Attend
A110 Manage Data/Files
A111 Other

proposed litigation team; (2) billing rates for the proposed litigation team; (3) any unique litigation experience with the judge or court; (4) any specific or unique technical expertise on the subject matter of the patents in suit; (5) initial thoughts on litigation strategy; (6) the patent or patents in suit; (7) preliminary noninfringement defenses; (8) preliminary invalidity defenses; (9) likely schedule; (10) initial assessment of damages or exposure; and (11) modifications (if any) to the litigation budget. This list is presented in no particular order and is in no way exhaustive. In order to prepare and file an answer and/or motions in response to the complaint, you will typically delve into many of the above-listed items anyway.

The importance of the initial case assessment is multifaceted. First, it is good practice for lead counsel on the litigation to get a good sense of all of these issues as soon as possible. Second, most clients would like to receive this type of feedback as soon as possible from their lawyer so that they can size up the case internally. In addition, the initial case assessment serves as a helpful blueprint for further follow-ups with the client that are, preferably, conducted quarterly. In other words, each quarter try to update the prior answers to all of the above questions and prepare an updated report for the client.

It is good practice to prepare a memorandum or presentation slides in order to answer the above questions. Like the Microsoft Excel program, Microsoft PowerPoint and Word software are also made available in most large law firms. The initial case assessment, however, can come in many different forms depending on the lawyer's preferences and the particular client's needs. (Having prepared the initial assessment as presentation slides makes updating very easy.) A client face-to-face meeting facilitates an in-depth discussion of all critical issues. It helps the client line up potential witnesses, begin to identify documents and custodians, ensure that a litigation hold memorandum has been prepared and sent to the appropriate in-house employees, etc. These presentations can last two to three hours and are a good way to acquire essential guidance and instructions from your clients on how they would like you to handle the case.

For example, depending on many factors such as budget, accused products, personnel issues, etc., the client may instruct you to either vigorously defend the case or to take a more passive approach. Depending also on whether the client is the sole defendant or if there are codefendants, the client may ask you

to solicit joint defense agreements between other codefendants in the lawsuit. The client may also decide to take a backseat in the case to another codefendant who has more at stake in the defense of the litigation. These types of discussions naturally flow from the initial case assessment presentation when prepared to address or answer the above questions.

As mentioned, it is important to engage in regular follow-ups with your client to check in and discuss how the issues are developing in the case vis-à-vis the above questions and determine whether the client's initial strategy and instructions to you have changed in any way.

### Monthly Reporting and Budget Tracking

An essential component of any budgeting process is the act of forecasting. Forecasting is measuring your performance on some regular basis according to the original budget. Most firms in the United States invoice their clients on a monthly basis. If that is your practice, then preparing monthly forecasts is the way to go. It does not really matter if your firm bills the client more or less frequently; the important point is that forecasts take place on a periodic basis after the budget has been approved and in place.

If the outside counsel firm invoices its clients on a monthly basis, shortly after the invoices are prepared, and even before the invoices are submitted to the client, find out what last month's costs and expenses were for the particular matter. The firm should work with a business or finance person in order to obtain the most accurate information. This is an important point that should not be overlooked. Lawyers typically do not focus on budgeting and accounting in their practices. Some lawyers, in fact, loathe this part of the practice of law. Moreover, litigators are always busy and tied up with substantive and procedural issues involved in the case and do not have time to look into and track this important information. If your law firm has not done so already, devoting personnel who do not have a legal background and who can focus purely on these business issues is highly recommended. Having a nonlawyer, nonlitigation team member assisting you with the costs and expenses portion of running a litigation not only allows the lawyer to focus more on the legal issues, but it places a person specifically experienced with this type of information at your disposal—and the client's disposal as well.

Table 5

Matter #	CASE NAME	FIRM	OUTSIDE COUNSEL			
			ORIGINAL ESTIMATE	CURRENT ESTIMATE	JAN	FEB
12345	ABC v. XYZ	LAW FIRM				
		Third-Party Vendor Costs				
67890	Jones v. Smith	LAW FIRM				
		Third-Party Vendor Costs				
		LAW FIRM				
		Third-Party Vendor Costs				
		LAW FIRM				
		Third-Party Vendor Costs				
<b>Total for All Matters</b>			\$0	\$0	\$0	\$0

**Notes:**

- 1) The monthly amounts shown above reflect the total fees and disbursements for the months in which the services were rendered.
- 2) Some of the figures for XXXX may still be in the pre-bill stage. Therefore, the actual invoice amounts may vary slightly from the amounts listed in the XXXX column.
- 3) This report was produced on XXXX.

As mentioned above in connection with the budget templates, we recommend creating a spreadsheet to track monthly costs on a month-by-month basis for each lawsuit the firm is handling for a client. The Outside Counsel Budget/ Invoice Log (Table 5) shows a sample spreadsheet for tracking these types of costs. Each line represents a different lawsuit, and each column represents the sum total in monthly expenses. A column is also provided for the initial budget estimate and another column for subsequent revisions of the original estimate. Finally, a column is provided at the right-hand side showing total costs and expenses to date, which can be easily compared against the original budget estimate. We recommend using a business/financial/accounting person (i.e., a nonlawyer) to populate this chart each month with the correct figures from the accounting department; this chart is then to be reviewed by the client relationship manager before sending it off to the client. Each month, as a result, clients receive a snapshot of all of the costs they can anticipate in the invoices they are about to receive for ongoing litigation.

Another good step for improving client communication is to schedule a regular monthly call to review this spreadsheet and go over any changes or developments that have caused a shift in the assumptions used in the original budget estimate. This is the perfect opportunity to discuss with the client whether the original budget needs to be adjusted either upwards or downwards.

We cannot emphasize enough how important periodic budget calls are to maintaining effective client communication for litigation in complex commercial cases such as patent litigation. This is the one activity that most lawyers either overlook or dread. However, these discussions become easier and easier each month and end up taking less and less time as the client develops a comfort level in your budgeting capabilities and as developments proceed as expected during the course of a lawsuit. And who can argue against spending more time with your client?

Nevertheless, from time to time developments arise that were not foreseen either by the initial budget estimate or the case assessments. Having discussions with the client on a monthly basis allows you to flag these changes quickly and in a timely fashion so that costs do not begin mounting excessively without the client's understanding and awareness. As we all know, costs can escalate rapidly in many

complex commercial cases. One of the complaints most often expressed by clients is that these types of costs are not flagged early enough and presented to them in a timely fashion. Since we can only control a portion of any lawsuit and are at the mercy of other parties' activities and strategies, changes to initial strategies are part and parcel of the litigation process. Aside from the initial budgeting exercise, therefore, these monthly reports and calls are the second most important part of effective budget management for complex litigation.

### End of the Year True-Ups

As you are going along through the course of the calendar year with the monthly reports and making adjustments where necessary to the budget, you begin to approach the end of the year and things start to get more interesting. This is a result of a couple of factors. First, most law firms operate on an annual/calendar year basis. However, corporations may not necessarily follow this fiscal year/calendar year schedule. Second, another important difference between law firms and corporations is their accrual and cash accounting methods. Law firms typically operate (for various reasons) on a cash accounting basis. This may not be so for most large or sophisticated corporations, which operate on the more advanced accrual accounting methods. As a result, as you begin to approach the end of the calendar year, not only do you want to begin sending invoices out in a timely manner and receiving payment quickly for your own internal law firm needs, your client is preparing for its year-end closing of the books as well. (If your client is not on a calendar/fiscal year, changes to this approach will take place during the course of the year, rather than at year-end as described here.)

Clients who use accrual accounting methods will want you to begin estimating costs for the final month or weeks of the year. Under these circumstances, clients are typically not looking to pay you in advance for these costs, but, rather, they are preparing to set aside reserves in their finances that will be paid during the beginning of the following year but are assessed against your invoices for the last month or weeks of the past year. Therefore, your ability to forecast accurately what that last month of the year will cost is very important. If you underestimate, your client will not set aside enough reserves to cover these costs and expenses, and those funds

### BUDGET/INVOICE LOG

MAR	APRIL	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	YTD Costs	REMAINING BUDGET
										\$0	
										\$0	
										\$0	
										\$0	
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

will need to come out of the following year's budgets. Clients do not like this. If you overestimate, the reserve that is set aside does not get fully utilized unless it can be exploited in situations where other cases were under accrued.

It is important to be prepared for your client's requests for accrual-based estimates, and experience will allow you to provide more and more accurate information that the client can use to determine the amount of the reserves taken for that year. This part of the budgeting process does get a little dicey, and some help from your client and their financial professionals will go a long way to explaining how the accrual process works and to helping you to meet these important demands.

### **Phased-Budget Approach**

The above discussion has so far assumed a straight-line cost/expense structure for complex commercial litigation. What this means is that costs typically come in at about the same amount each month as the case gets moving. As we all know, this may not be an accurate reflection of reality, but the above process certainly allows for variations in costs and expenses from month to month without breaking down.

A more sophisticated approach to estimating and budgeting for complex litigation, particularly patent litigation, understands that in certain jurisdictions costs do not necessarily get incurred on a regular straight-line basis. In fact, due to the rise of local patent procedural rules in some popular jurisdictions around the country, certain costs can either be front-loaded or back-loaded in a given case. In other words, rather than utilizing a straight-line approach to regular monthly costs and bills, costs may be shifted in any particular case so that lesser expenses and fees are spent early and expenses grow as the case continues and proceeds towards trial. Phasing costs in this way allows you and your clients to explore the possibility of settlement at earlier or middle stages of the lawsuit before significant expenses have been incurred. This approach is now becoming a best practice in litigation budgeting and estimating. Clients like the approach because it defers the really expensive parts of the case until the latter stages of the case, which maximizes the time allotted for clients to try to resolve the case short of trial and its attendant costs.

It is common under the circumstances to subdivide a

lawsuit into various stages that can be budgeted separately. One way to do this, for example, is to consider the period of time between the filing of the complaint and a *Markman* hearing as the first phase of the case. The second phase is from the *Markman* hearing through summary judgment motions. The final stage of the case is the final pretrial process leading through trial and concluding with post-trial motions. Having so divided the case, you can then prepare budgets for each of these phases and communicate the costs of those phases to the client. Depending on the complexity of your case, discovery costs in the early stage of the case may be low or more significant. If they are low, then you will see overall costs escalating throughout these three phases rather than occurring as they would given a straight-line assumption.

Of course, the above subdivision of a patent case is arbitrary, and dividing your case into various phases can be done using any appropriate milestones. If you begin to look at a case in this way, you are better able to serve your client's needs and pursue the prosecution of your litigation in a manner that aligns the costs and expenses to the client's capabilities to withstand these costs. Those who have handled litigation for a sufficient time understand that the scheduling of certain phases of litigation also is not written in stone, and certain phases can be moved around, accelerated, deferred, or even broken up throughout the course of the lawsuit in order to distribute costs and expenses in a manner more palatable for your client.

### **Conclusion**

Best practices in budgeting for patent litigation include several components. The most important processes are preparing an initial budget estimate and tracking that estimate on a periodic basis. Feedback to the client is also essential and required to maintain good client relations. Preparing substantive case analyses that can be easily updated on a regular basis provides a sanity check for your budget estimate and keeps the client regularly informed about the case. Navigating year-end events is a little complicated at first, but it gets easier with time and helpful financial information from your client. Finally, phasing litigation costs gives you and your client more control and enables you to more accurately anticipate the really big costs and expenses. Good luck! ■