

## McKool Smith MP on Market Doldrums, Winning on a Budget and Why Alternative Fees Aren't the Answer

By Jenna Greene

April 19, 2017

These are not the best of times for the business of litigation. Multiple reports in recent years have painted a similar, lackluster picture: the market is stagnant, with clients shying away from bringing new suits, keeping more work in-house and pushing back hard on costs.

What's a firm to do? (And don't say "alternative fee arrangements.")

I had a chance to talk about this with McKool Smith managing partner David Sochia, an accomplished litigator based in Dallas who has taken on the mantle of law firm strategist.

Sochia shared his observations on the state of litigation and how his 175-lawyer trial firm has managed to thrive by embracing "winning on a budget."

The interview has been edited for clarity and length.

**Jenna Greene:** *What's your sense of the overall demand for litigation services right now?*

**David Sochia:** It's no secret that since the recession, litigation has been flat or on a slight decline since the end of '08. I don't think we're really seeing any difference in 2017. I think there may be a slight uptick in IP, there could be a downtick in securities, there might be an uptick in class actions, but overall, when you combine everything together, it's relatively flat—very minor growth.

**JG:** *Why do you think this is?*

**DS:** I think generally post-recession, companies were loath to spend money on litigation for obvious reasons—lots of pressure from shareholders and boards, etcetera.

Given where the market has been for the last several years, you'd think that would have changed, but it actually hasn't. Companies are doing very well, the market is going



**David Sochia.**

*Courtesy photo*

crazy and yet large corporations haven't changed their willingness to file suits. I think there's a few things that are going on.

I do think the in-house departments at large companies are growing. I think they're bringing a lot more work in-house than they ever used to. Because of that, they're making a concerted effort to resolve matters before litigation ensues.

Secondly, I still think there is a large amount of pressure, especially on public companies, against filing lawsuits. Look, they have to make their numbers each quarter. If you spend five, ten, fifteen million dollars on a two or three-year endeavor, all that does is suck money out of the company and drop your share price.

Even if they win, it's a one-time hit to the bottom line. I think under their accounting rules, they don't even get to

count that, so the analysts sort of ignore the win. It really doesn't help the CEOs or CFOs drive profitability from the investor standpoint. Certainly it can bring money to the company, but a lot of times, they're just chasing the next quarter.

I think honestly, not every company has had a great deal of success [in litigation]. They figure, if we can work out a business resolution, then the courts ought to be the last resort.

**JG:** *In your experience, do alternative fee arrangements make a difference in terms of a company's willingness to file suit?*

**DS:** AFAs have sort of become the coin of the realm in the last couple years. We've been doing them, gosh, since I've been here. [He joined the firm in 2000]. I think initially, post-recession, it helped. But what we see is that everyone now offers alternative fee arrangements. The clients get into it, but if they're successful, they aren't happy with the alternative fee arrangement.

The reason is, they've given up some of the skin in the game to the outside counsel in return for a flat fee or reduced rate or some not-to-exceed type budget. And then if the law firm wins and they win big, the board is looking at the CEO saying, 'Why did we give away so much money?' So the next time around, they want the hourly rate. We see that often, we really do.

For the right company, taking a case on a contingency or some sort of hybrid model with outside funding or putting your own firm's skin in the game absolutely eases the pain to bring a lawsuit. But the fact of the matter is, everybody is doing it. And litigation still hasn't had an uptick, so I don't know if it will help much as far as driving a company's willingness to file suit.

**JG:** *How has McKool Smith responded to this flat demand for litigation? What are you guys doing?*

**DS:** Really, more of the same. We're a trial firm. We have about 175 lawyers, give or take. We are not really immune to the market pressures, but at the same time, we don't for the most part have industry-focused practice groups.

We are trial lawyers. What that means is we frequently see ourselves jumping into cases at the eleventh hour. In fact, we just got hired on a major antitrust suit in Texas that has been pending for several years and is going to

trial in six or seven months. That's actually not very uncommon.

What we do is try to distinguish ourselves based on results. Going back to 2013, I think we had 15 trials that year—which is crazy, more than a trial a month. For a small firm with only 40-something partners, that's a lot of trials. Last year, we had something like six, and maybe nine or 10 the year before. We're in court a lot.

What we found is that if you want your everyday Big Law litigation firm to run the matter, we're probably not for you. We tend to staff things pretty leanly. Part of that is we don't have the luxury of throwing a lot of bodies at cases. But secondly, it's sort of wasteful.

After you go to trial so many times, you start to see how cases get synthesized down to 12 or 15 hours a side. It's impossible to present all that evidence, all that deposition testimony—the court is not going to tolerate it, the jury won't listen to it. You start to realize how you can run your cases more efficiently, because most of it ends up falling to the cutting room floor once you get to trial.

**JG:** *Your PR person called it "winning on a budget"—which I'm sure is appealing to clients.*

**DS:** Definitely. We face the same client budgetary pressures that every law firm faces, no question...

I think like every firm, [we're] always looking at the market trying to figure out how to build a better widget. But I think there's only so much you can do to build a better widget—whether it's cutting your rates or staffing more leanly or becoming smarter in the way you litigate—that's pretty easy. Most law firms can do that.

What we really try to focus on is not just results, but our ability to try cases. What happens is, when we get hired the opposing counsel and opposing client know that we're not just unafraid to go to court, we expect to go to court.

A lot of firms say that, and I think they mean it. But at the end of the day, clients look for results and experience. That's what we try to focus on. You do what you need to do to try to help your clients with the fees and budget, but you also need to win.

We try to focus on getting them the results they want, and being trial-ready usually accomplishes that. It does drive settlements.

**JG:** *From a client's point of view, I'm sure they would rather not go to trial. They'd rather win on summary judgment. But if you're going to go that far, you really have to deliver.*

**DS:** Absolutely. And if you look to the life of a budget, more than two-thirds of your budget is going to be spent in the three months leading up to trial and the one month of trial. That is the most expensive part of the case.

Filing the lawsuit, there's not a lot of activity. Midway through discovery, it gets a little expensive. But where it really heats up is at the end.

Another way we try to help our clients—a lot of firms they take every deposition on demand, they depose every witness, they leave no stone unturned. We try to go in with a laser focus. There are a lot of times where we won't even depose the opposing experts.

**JG:** *Really? Why?*

**DS:** We don't want to give away our hand. We don't want people to know what we're going to present at trial. And that can be nerve-racking for the lawyer asking the questions on cross, but think about the witness who has no idea what's coming.

**JG:** *Good point. Has the strategy paid off in previous cases?*

**DS:** Absolutely. What happens is, lawyers can't help themselves. You get in a deposition and no matter how hard you try to train the person taking it not to give away the farm, they see blood and end up going for it. They telegraph their hand. And then the expert has weeks or months to prepare and think of good answers. By the time they get to trial, you can ask the same question again, but now the witness has a somewhat believable answer that doesn't have the same impact on a jury when they're hearing it cold.

**JG:** *Do you think the Trump administration will change demand for litigation services?*

**DS:** Looking in my crystal ball, Trump seems to be big into deregulation. I think the more he deregulates, for example, the financial markets, in a year or two you're going to start to see more litigation. Businesses are going to do things that lead to lawsuits.

A couple areas that we're focusing heavily on now are antitrust and qui tam litigation. I think you're going to see an uptick in those areas.

For example, I read an article yesterday that DOJ was going to lighten up on antitrust lawsuits related to patents. I think what that means is, you're going to see companies looking for more self-help with outside law firms.

**JS:** *When your firm is looking for lateral partners or new associates, what qualities do you seek?*

**DS:** We grow very conservatively. We are not the firm that is looking to become the 1,000-lawyer powerhouse. That's not who we are. We're pretty comfortable at our current size.

As with any firm, [new hires] have got to be bright, you've got to be exceptional at what you do. But what's really important for us is you have to have good people skills. In order to speak to a jury, you've got to be able to relate to the jury. You can be the best and the brightest, but if you can't communicate effectively, whether it be with your peers, in a boardroom with potential clients or with judges and juries, then this is probably not the place for you.

We don't have rooms full of extremely bright Rhodes Scholars doing nothing but research and document review. In fact, we have quite the opposite. Our first and second year lawyers are taking witnesses at trial. They are thinking on their feet. They are stand-up lawyers, as we like to call them, courtroom lawyers. Above all, we look for personality and people skills.

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