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Corporate attorneys push for flexible billing

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Janet Adams | Business First

Joe Morford, a partner at Tucker Ellis & West LLP, is able to take associates Eric Weldele and Jen Woloschyn to depositions and trials more often these days because the firm doesn't have to bill its corporate clients by the hour for each attorney's individual workload. The firm has a variety of payment arrangements, including flat fees and success fees, often allowing for more manpower on each case.

In the legal industry, there's been a lot of talk lately about law firms moving away from billing their corporate clients by the hour.

And it might not be just a passing fad spurred by the recession, Central Ohio attorneys say.

"The biggest advantage for our lawyers is that it resets the focus for why most of us became lawyers in the first place. We can accomplish things," said Joe Morford, a partner with **Tucker Ellis & West LLP** in Columbus. "It is a much more rewarding way of practicing law."

Benefits include the freedom to train new hires without having to itemize that on the hourly bill.

"I take young lawyers to depositions, to trial and I don't have to worry about billing that client," Morford said.

The firms also don't have to spend time tracking their hours.

Traditional hourly billing took a hit because of the recession. With companies looking at every aspect of the business for cost cutting, many decided they didn't like paying their attorneys by the hour – they instead wanted a more accurate estimate of costs.

According to the California Bar Journal, a survey by the **Corporate Executive Board** found that large-company spending on law firms jumped by 49 percent between 2002 and 2005. And while non-law firm costs increased by 20 percent over the past 10 years, large law firms' prices jumped almost 75 percent in the same period, according to the survey.

Alternative fee structures are among the topics the **Association for Corporate Counsel** has been addressing in a series of "value challenge" forums across the country this year, including one held in Columbus last month.

"The idea behind the (forums) is an initiative to get law firms and their clients to work out new arrangements," said Robert Gage, in-house corporate counsel for BMW Financial Services in Hilliard and Central Ohio chapter president of the association. "The idea is not so much to hit the firm's fees and get them down; the idea is to restructure the arrangement to maximize the value."

Nationwide Insurance spokesman Eric Hardgrove said Nationwide is using alternative billing arrangements such as flat fees for certain types of legal work because they are efficient and offer more predictable costs.

"We currently have a number of efforts under way, and are looking to increase our use of these types of arrangements," he said.

Seeking value

Law firms seem willing to at least discuss the idea, and some are embracing it. Most companies want their law firms to do well, and most law firms want their clients to do well, so both can continue the relationship, Gage said.

"Typically, neither side wants to get an arrangement unless they think it is going to work for both sides," he said.

The big advantage for the client is easy – a more predictable legal bill, and maybe even a smaller one with an arrangement such as a monthly retainer or a flat-fee per project. Corporate counsel can call an attorney for an update without worrying it will add to the cost of the case, for instance.

According to the 2009 Chief Legal Officer Survey conducted by consulting company Altman Weil Inc. of Newtown Square, Pa., of 183 attorneys at corporations that pay law firms to handle their affairs, just 4.9 percent said the majority of fees they pay will be for "non-hourly" work. But, that's up from 2.7% in 2008.

The survey also showed that, on a scale from one to 10 – with 10 representing "doing everything they can" – just 0.6 percent of those surveyed felt law firms were going all out to change their legal service delivery model to provide greater value to clients as opposed to simply cutting costs.

"If you move to an alternative fee arrangement with a client, there has to be a heck of a lot of work done up front to make sure the lawyer fully understands the matter for which he is being engaged," said Michael Grodhaus, an attorney for **Waite Schneider Bayless & Chesley** in Columbus, who also blogs as The Alternative Fee Lawyer.

His firm offers a variety of fee alternatives including contingency fees and success fees.

The right fit?

While the benefits of a choice of billing seem obvious for the corporate side of the equation, some law firms like the structure, too.

When Tucker Ellis & West set up shop in Columbus in 2003, about 90 percent of its revenue was billed by the hour. This year, about 40 percent of billings are coming through alternative fees. In those six years, the firm's revenue has doubled to about \$70 million.

Morford, co-chairman of the firm's mass tort and product liability practice group, said Tucker Ellis has a bunch of different payment arrangements for clients.

"We have flat fees. We have success fees. We have hold-backs if we achieve certain objectives with the client," he said. "The variety of alternative fees that we use and that we are seeing are almost endless."

But not all law firms embrace alternative fee structures. The billable hour remains the dominant method, attorneys said. In many large firms, the number of hours an attorney bills in a year can be a requirement for promotion. And when taking on a new case, it's easier to simply start the stopwatch than to map out a complete schedule.

Some law firms create matrix-like fee schedules for defense litigation, Gage said. The earlier a case is dismissed, the more financial incentive the law firm gets. But there's no single approach that works for all clients in all cases, he said.

The Association of Corporate Counsel has urged its members to consider monthly fixed fees for basic law firm counseling, fixed fees for specific tasks and having a law firm take on a whole portfolio of work at a fixed fee for a set amount of time.

Clients, too, need to think through the projected workload, such as when one company is acquiring another.

"I think everyone, when they go into a transaction, thinks this is going to be a smooth arrangement to buy company X," Morford said. If all goes well, the client may come away worrying that it paid too much.

Some work lends itself more easily to alternative fees. Columbus patent law firm **Gallagher & Dawsey Co. LPA** offers a flat fee to about 95 percent of its clients for basic work, said partner Michael Gallagher. That would include a search of patent records to see if someone's invention already is covered and for preparing a patent application.

After that stage, the work shifts more to an hourly fee, because it's hard to know in advance if the Patent Office will accept an application right away or if it will require many more hours of work.

And, patent infringement cases are too unpredictable to handle with a flat fee.

"If there is a car accident, fault is almost immediately clear and the only issue to be hashed out is the damages. But with patents and infringement, one of the issues is whether the patent is valid," Gallagher said.

That issue can come up at any time, and there's no way to know ahead of time how long it will take to settle it, he said.

But in a tough economy, clients and law firms are using alternative fees as an incentive to get creative.

Grodhaus said some large companies have taken to bundling certain types of similar work together and then shopping the work to firms at a fixed rate.

Some law firms, meanwhile, have taken their fixed-price services on the road.

"We have gone into situations where we take over nationwide litigation responsibility (for a client), and we're responsible for overseeing and paying local counsel, court reporters, record providers," Morford said.

One of the selling points is that clients can spend less time and money reviewing bills from multiple law firms and let Morford's firm handle it all.

As more firms offer alternatives to hourly billing, there will need to be hard evidence to show how well it works, the attorneys said.

If the trend continues, Morford said the more reluctant law firms will be forced into offering alternative fee arrangements because it will become standard practice.

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