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GC New England

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ROCKIN' THE FEE WORLD

Is the billable hour dead? Not yet. But some law firms are wooing frugal business clients with alternative payment arrangements.

By DOUGLAS S. MALAN

Attorney Bruce Raymond knew there was a better way of doing business.

For two decades, he practiced at a downtown Hartford law firm of about 100 lawyers where every year the M.O. was similar to thousands of other firms—increase billing rates and billable hours.

Partners leveraged a number of associates to each case, which guaranteed a certain revenue stream for the firm as hours piled up. The system worked fine, but Raymond noticed a lot of inefficiencies that led to increased costs for the client.

He believed that a law firm with high-tech capabilities could decrease its rates along with its overhead and provide billing options that work for both sides. So Raymond and a colleague, N. Kane Bennett, moved to the suburbs and launched Raymond & Bennett in Glastonbury, Conn., in 2007, a five-lawyer business firm concentrating on litigation, product liability and employment law.

Moving away from the billable hour "is one of the founding principles of the firm," Raymond said. "We did this before the current recession started. Large companies, and a wide range of companies, are looking for an option to paying the $600-an-hour partner who'll put three associates on the case."

He's not alone in his thinking. Several law firms around the country have been using alternative billing arrangements for a decade or more, including Butler Snow of Jackson, Miss., and Bartlit Beck in Chicago. Depending on how one defines it, alternative arrangements can include flat-fee rates, or hybrid rates based on a standard fee with an added bump in pay tied to performance, which is the version Raymond prefers. But it's more than just discounted rates.

As Raymond said, the discussion of non-hourly billing options "has grown from a whisper to a roar" in recent months as budget-conscious corporate legal departments trim costs and reduce the number of outside counsel they retain. Some law firms see alternative arrangements as a way to grab more business and position themselves as one of the few go-to firms for important clients.

NO BLANK CHECKS

Alternative billing supporters say the billable-hour model is flawed and headed toward extinction because it's too risky for companies to write a blank check to a law firm for services based on the amount of time spent on a case. Plus, there are too many opportunities for attorneys to pad the file by taking additional, unnecessary depositions, for example.

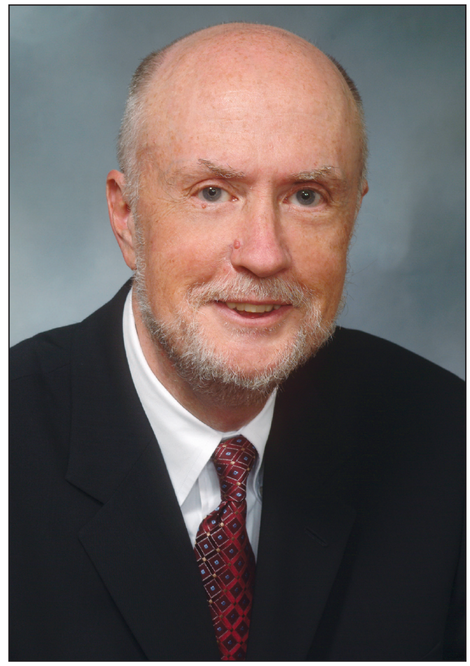
A better system is for both the law firm and client to agree at the beginning what the legal services are worth in order to avoid surprises, said Michael B. Rynowecer of The BTI Consulting Group, a Boston-based legal consultancy.

BTI recently conducted a mid-year survey of 370 corporate counsel whose companies are on the *Fortune* 1000 list.

"Most corporate counsel are focused on getting in a position where risk is nonexistent," Rynowecer said. "If a litigator tells the client he can't predict the cost of litigation, it's unnerving to the [company's chief financial officer]."

For the most part, clients are leading the way when it comes to talking about different ways of paying for legal services. Big law firms, Rynowecer said, typically respond by saying they will drop their rates in return for volume guarantees.

That response is not what GCs want to hear, Rynowecer noted. "What they like to hear is, 'Let's talk about how to do that.'" Otherwise, the message that the corporate law department gets is that the firm cares about protecting its revenue stream, not helping the client.



Contributed Photo

Boston-based business consultant Jim Hassett said some corporate counsel think that everyone will jump back on the billable hour gravy train once the economy turns around. But he believes alt-fee arrangements are 'here to stay.'

FEAR OF UNKNOWN

Opponents of alternative billing structures include law firms that believe it's too risky to negotiate a flat fee and face the prospect of losing money when they spend more time on a legal matter than originally predicted.

Others, including many corporate clients, are simply afraid of the unknown.

"Many of our clients elect to pay billable hours because that's what they're used to," said Raymond. "People are interested in learning about [alternative billing]…but everybody likes to do what they're used to."

And when it comes to flat-fee arrangements, some corporate clients worry that the law firm will stick their most junior attorney on the case to maximize profits, Raymond said.

He offered a couple of typical examples of alternate billing. Currently, many of his clients are calling about employment matters, such as job elimination. Raymond and his client agree on a flat-fee to review the matter and provide an assessment of the situation. Sometimes the engagement ends there. More frequently, the client comes back to draft a severance agreement for the employee or get involved further if an employee retains a lawyer. Each step involves a discussion about defining success within the case, how it will be measured and how much money that's worth.

With volume work from an insurance company, for instance, Raymond works out an annual contract with a set fee. But the client makes a monthly payment to guarantee the firm an income stream. Plus, there are incentive bonuses of 10 to 20 percent tied to successful outcomes, however that is defined in the negotiations.

To make alternate billing work, law firms have to take more of a business mindset, Raymond said, and both sides have to be willing to take some risks.

Gary Lewis

Attorney Bruce Raymond, a partner in a five-lawyer firm in Glastonbury, Conn., said 'a wide range of companies are looking for an option to paying the $600-an-hour partner who'll put three associates on the case.'

SMALLER FIRMS ADAPT

The time seems ripe for more discussions, though there's more talk than action at the moment.

Corporate counsel "are holding their attorneys to budgets and they want alternative billing," said Rynowecer, the Boston-based consultant. "A small group of firms has embraced alternative billing, but not many."

BTI's research revealed that 95 percent of corporate counsel surveyed engaged in rate negotiations with outside counsel in the past three months to reduce legal costs, with 40 percent discussing non-hourly billing options.

This spring, Altman Weil surveyed 208 law firms, 93 percent of which said they use some type of non-hourly billing structure with some clients. Yet, those firms said such arrangements accounted for 10 percent or less of total revenue.

The percentage of revenue stemming from alternative arrangements tends to be larger in smaller firms, according to the survey, because smaller firms have the flexibility to be more innovative and aggressive with their billing plans.

Those numbers likely will change this year as legal departments cut back more severely than in 2008, based on firms' projections for alternative billing revenues.

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"I have not seen a huge uptick in the use of alternative fees across the entire industry," said Pamela Woldow, a consultant with Altman Weil. "I have seen specific firms adopt and adapt it to their clients."

From the in-house counsel perspective, Boston-based business development consultant Jim Hassett said, "Clients are extremely interested in this topic, but there's a lot of tire-kicking."

Based on a survey he is conducting, Hassett said he has heard some corporate counsel question whether alternative billing actually is a movement that has staying power. Some have privately told Hassett that everyone will jump back on the billable hour gravy train once the economy turns around.

Others, including Hassett, aren't so sure. "I believe it's here to stay," he said. And those in the best position to capitalize "are cutting edge and willing to take risks from the law firm point of view."

Connecticut's Raymond agrees that small and mid-size firms are best able to adapt in this manner. His firm has created a document retention system that's paperless and all-digital. It has outsourced word processing projects to an Atlanta-based business designed to assist law firms, done away with secretaries and made use of software that allows attorneys to work within the firm's network from their homes.

All of which provides the type of flexibility to offer lower rates that are profitable for the firm and attractive to the client, he said.

But major law firms around the country also have started to join the movement, including Kirkland & Ellis, Morgan, Lewis & Bockius, Alston & Bird and Holland & Knight. In mid-June, the Mid-Atlantic firm of Saul Ewing launched two different alternative programs, one focused on fixed fees and the other on a per-attorney/per-day billing system.

It seems clear that many business clients hope their outside counsel figures out a way to make alternative billing profitable. They're focused on reducing their legal costs without compromising quality of service, and all options are worth exploring.

"Clients have never been more open to new approaches and new firms," said Rynowecer, the Boston-based consultant at BTI. "Clients are the most receptive in the 11 years I've been tracking this market to hear about the new approaches [law firms] can bring." ■

This story contains reporting from GC New England's sister publications, including The American Lawyer and Corporate Counsel.