
CORPORATE COUNSEL INSTITUTE

CHANGING MODEL OF OUTSIDE LAW FIRMS AND THE
VALUE PROPOSITION

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PANEL DISCUSSION:
CHANGING MODEL OF OUTSIDE LAW FIRMS AND THE VALUE
PROPOSITION

Alternative Methods of Selling Value to the Client

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ALTERNATIVE METHODS OF SELLING VALUE TO THE CLIENT

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“Time” is not necessarily what the client wants to buy from their outside counsel. They probably believe they are buying legal solutions, winning results, or some other benefit arising from retaining counsel. If outside counsel sticks to valuing his or her services only in time increments, they may actually be short-changing their value. With significant advancement in law firm technology and automation, it simply takes less time now to research and formulate legal opinions and strategies. Instead of “cost based” billing, how can we move toward “value-added” billing? Beyond alternative billing arrangements, how can we partner with clients to arrive at creative solutions for saving not just fees but total legal spend?

FIXED FEES IN LITIGATION: The fairness dilemma

The simplest and most familiar method of alternative billing arrangements, short of contingent fee arrangements, is fixed fee billing. Particularly in the arena of litigation, the problem with fixed fee arrangements is reaching a proposal that is fair for both sides. The client wants to be protected from paying the full amount of the fixed fee

in the event of early case resolution. And of course, early resolution is often one of the client's goals.

The firm, on the other hand, wants to be protected from taking a bath on realization of profits on the negotiated fee in the event the case is unpredictably protracted or becomes significantly more complex than anticipated. The desire to submit a competitive bid may be in conflict with the necessity of factoring in substantial costs associated with relatively low risks of complicating events in the course of litigation. Even without complicating events, a competitive bid may place the firm at risk of substantial losses if the matter does not settle but goes to trial.

One solution to this "fairness dilemma" is to base the negotiated fee on a matrix that takes into account both the amount in controversy and various stages of litigation. This staged-based/amount-at-risk fee analysis works very well for a bid to handle all the client's legal matters for a class of routine claims that involve a common set of legal issues. An example would be check and deposit account fraud claims against a bank that has a large number of such claims brought by customers each year. This solution should be helpful, however, to any set of routine claims asserted against the client by customers or suppliers. Even in one-off legal matters, formulating a legal fees bid calculated both on stages and amount in controversy should be a helpful tool to assure fairness and satisfaction to both client and firm.

Attached is a sample grid for a bid to handle all adverse matters of a particular type based on a sliding scale of amount in controversy and various stages of litigation work. This grid recognizes that cases involving smaller amounts in controversy, even though they may involve all the same legal issues and defenses, do not justify the same

total legal fees, or even the same fees for a given stage of litigation, as those cases that place a larger amount in controversy. If the firm is awarded all the client's work on a particular class of cases, the initial legal research, preparation, and expertise the firm develops for these matters will be spread among the cases. It will establish efficiencies in handling these matters that will result in reasonable profits from even complicated matters that present a smaller amount in controversy.

By breaking down legal services by stages, the firm is adequately compensated for actual services rendered in any given case. The firm is not penalized by a low-ball whole-case fee arrangement in the event the case results in protracted litigation. Conversely, the client pays only for services actually rendered and is not penalized for the desired efficiency of early case resolution by having to pay the same fees it would pay if the case went to trial.

The stages may be further refined, for example, to specify a maximum number of depositions to be taken before additional per diem costs are added. The "Pretrial Pleadings and Motions Phase" may be defined to include only one dispositive motion. For example, if a motion to dismiss is filed and denied so that a motion for summary judgment is necessary after discovery is completed, additional costs may be added.

However it is formulated, the aim of the fee arrangement should be to provide predictability to the client for budget purposes and to provide stability to the firm's realization rate.

SAVING TOTAL LEGAL SPEND WITH EARLY DISPUTE RESOLUTION:

Incentives for both client and outside counsel

From the corporate client's perspective, the win or lose outcome of any given litigation matter may not be as important as the total cost outcome. This is particularly true for routine litigation that does not involve precedent setting issues. In these types of disputes, settlement of the case at any reasonable value may be preferable to winning after incurring substantial legal fees.

With the exception of precedent setting or "bet the company" litigation, the in-house legal department is just as accountable for "total legal spend" (legal costs plus cost of resolution) as for favorable outcomes. Outside counsel who have partnered with a client over time on repetitive legal disputes should have developed a keen sense of projected defense (or prosecution) costs for these legal matters, as well as the likelihood of adversarial success based on given facts. Outside counsel should capitalize on this legal experience as well as their business acumen to help the client resolve legal disputes for the minimum amount of total legal spend.

Think outside the box. Innovative initiatives to streamline lower total legal spend can be proposed by outside counsel as well as the client. Creative solutions are appreciated.

One to consider is an early case resolution plan for settling cases at the earliest possible stage for some arbitrary percentage of the total budgeted costs of defense or the risk-weighted exposure. Most cases start with a mutually agreed-upon budget for

handling the matter through completion. You may also arrive at a risk-weighted exposure value from the inception of the case. The appropriate formula for early resolution settlement should depend upon whether the client has substantive defenses to the claim. A reasonable settlement formula for those cases where a substantive defense exists might be for up to 75% of the budgeted cost of defense (because these amounts will be spent even for a win) or up to 25% of risk-weighted exposure, whichever is greater. A reasonable settlement formula for those cases where no substantive defense exists might be for up to only 25% of the budgeted cost of defense (because, presumably, mediation settlement before the case was tried would be considered in any event) or up to 75% of risk-weighted exposure, whichever is greater.

The incentive to outside counsel for early resolution might be a bonus “kicker” of some percentage of the saved legal fees for resolution at the earliest stages of the dispute over what would have been spent for fees to completion. Even if such a program results in decreased billable time spent on each case and thus decreased revenues to the outside firm for handling these cases, the lawyer who creates good financial results for a client is sure to be rewarded with additional legal work for more complicated matters that generate greater firm revenues.

The incentive to the client is demonstrated savings in total legal spend. The results of any settlement formula plan over a specified period of time should be compared to total legal spend historically incurred on similar cases. At least one large corporation that adopted such a program discovered significant total legal spend savings as a result of application of such an arbitrary formula for early resolution over traditional fee plans.

Any proposal that results in total legal spend savings to your client makes the legal department look good and makes you a hero. The lawyer becomes a business partner with the client in a manner that cements the lawyer-client relationship. This is truly a win-win solution.

SAMPLE STAGE-BASED/AMOUNT AT RISK FEE GRID

CASES UNDER \$15,000.00

- Case Evaluation and Developing Defensive Strategy Phase \$ _____
- Filing Pretrial Pleadings & Motions Phase \$ _____
- Discovery Phase \$ _____
- Mediation Phase \$ _____
- Trial Preparation Phase:
 - Non-Jury \$ _____
 - Jury (*per diem*) \$ _____
- Trial Phase:
 - Non-Jury (*1 day*) \$ _____
 - Jury (*1 day*) \$ _____

CASES \$15,000.00 - \$100,000.00

- Case Evaluation and Developing Defensive Strategy Phase \$ _____
- Filing Pretrial Pleadings & Motions Phase \$ _____
- Discovery Phase \$ _____
- Mediation Phase \$ _____
- Trial Preparation Phase:
 - Non-Jury \$ _____
 - Jury (*per diem*) \$ _____
- Trial Phase:
 - Non-Jury (*1 day*) \$ _____
 - Jury (*1 day*) \$ _____

CASES \$100,000.00 - \$250,000.00

- Case Evaluation and Developing Defensive Strategy Phase \$ _____
- Filing Pretrial Pleadings & Motions Phase \$ _____
- Discovery Phase \$ _____
- Mediation Phase \$ _____
- Trial Preparation Phase:
 - Non-Jury \$ _____
 - Jury (*per diem*) \$ _____
- Trial Phase:
 - Non-Jury (*1 day*) \$ _____
 - Jury (*1 day*) \$ _____

CASES \$250,000.00 - \$500,000.00

- Case Evaluation and Developing Defensive Strategy Phase \$ _____
- Filing Pretrial Pleadings & Motions Phase \$ _____
- Discovery Phase \$ _____
- Mediation Phase \$ _____
- Trial Preparation Phase:
 - Non-Jury \$ _____
 - Jury (*per diem*) \$ _____
- Trial Phase:
 - Non-Jury (*1 day*) \$ _____
 - Jury (*1 day*) \$ _____