

MANAGING LITIGATION COSTS: THE CLIENT CANNOT START TOO SOON

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I. INTRODUCTION

Increased attention is being focused on the changing relationships between businesses and lawyers. The business press writes more frequently on how companies select lawyers and seek to control them. Most notably, businesses are readdressing the use of lawyers, legal fees, satisfaction with legal relationships, and results. Law firms retain consultants for advice on client retention and client service.

Today's business clients are sophisticated purchasers of legal services. As a result, law firms are increasingly asked to display their talent, expertise, and cost effectiveness to corporate management. Companies compare law firms with each other and with their own corporate legal staff. At the same time, management and its general counsel are under significant pressure to reduce the growth of legal fees. This challenge is particularly difficult to meet in the context of litigation, where the costs can be influenced significantly by the opposing parties. As with all consumers,

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These authors express their appreciation to James W. Adams, a second year student at Duke Law School, for his assistance in the preparation of this article.

however, businesses nonetheless must secure the highest quality legal support given available funds.

When analyzing cost controls in litigation, potential corporate clients often identify possible advantages from partial reliance on in-house counsel, and search for outside counsel who are ready, willing, and able to work in partnership with staff counsel. This Article focuses on the client's perspective on managing legal expenses for litigation, beginning as early as the selection process.

II. CORPORATE COUNSEL

As legal costs increased over the last twenty years, many businesses, large and small, turned to corporate counsel to save money. This approach has been effective in many instances. *Fortune* magazine cites estimates claiming the cost of using a staff corporate lawyer can be as much as forty percent below that of using a lawyer from an outside firm.¹ A separate study conducted in the early Eighties indicated the cost of a corporate lawyer could be thirty to fifty percent less per hour than that of outside counsel.²

Corporate counsel may appear to be more efficient than an outside lawyer, partially because the former is more closely scrutinized. The company can control extra costs that could add up in a law firm's bill, such as staff overtime, whether and where the staff eats at company expense, and when and what type of air travel is used by lawyers and other support personnel.³

Use of corporate counsel also affords greater control over staffing, an issue of increasing concern. As Harry Pearce, General Counsel of General Motors Corporation, stated: "I'm very, very interested in how a law firm staffs a case. A lot of money gets spent with over staffing."⁴ Some believe corporate counsel will be more inclined to use nonlawyer personnel when possible, and less likely to overstaff a case with lawyers.⁵

Standardizing legal work may also be a cost effective measure for companies with corporate counsel.⁶ If a corporation often faces similar types of legal issues, the legal department can develop an approach that fits

1. Anne B. Fisher, *How to Cut Your Legal Costs*, FORTUNE, Apr. 23, 1990, at 185.

2. A Philadelphia consulting firm's 1981 study showed in-house lawyers tend to cost thirty to fifty percent less per hour than outside counsel. *Managing the Corporate Legal Function: The Law Department, Outside Counsel and Legal Costs*, 13 BUS. LAW MONOGRAPHS (MB) 1-4 (1991) [hereinafter *Managing the Corporate Legal Function*].

3. ERWIN G. KRASNOW & ROBIN S. CONRAD, 100 WAYS TO CUT LEGAL FEES AND MANAGE YOUR LAWYER 78-80 (1988).

4. Michele Galen et al., *For Law Firms, It's Dog v. Dog Out There*, BUS. WK., Aug. 6, 1990, at 56.

5. Fisher, *supra* note 1, at 185. Similarly, John Worthington, General Counsel of MCI Telecommunications says, "If a firm insists on its own paralegals it usually means goodbye as far as I'm concerned." William Gifford, *Hourly Rates Likely to Stay at 1990 Levels*, LEGAL TIMES, Dec. 10, 1990, at 13.

6. Fisher, *supra* note 1, at 185.

the company's philosophy and uses a staff lawyer's experience. Such standardization would avoid "re-inventing the wheel" with outside counsel each time a similar problem arises. Procedures of this kind may also allow a company to develop a more accurate estimate of the costs of handling particular types of litigation and, therefore, better evaluate when it is in the company's interest to pursue litigation.⁷

Using corporate counsel may also have benefits that are not easily quantifiable. A simple way to reduce legal fees is to have a lawyer look at projects in the planning stages before litigation results.⁸ Companies with corporate counsel may develop a culture in which employees are encouraged to obtain input from lawyers at the outset of a project because it is perceived not to cost anything. Moreover, if corporate counsel is given a part in the planning of the company's actions, the lawyer may gain greater familiarity with the company's goals and policies than would an outside lawyer.⁹

Furthermore, using corporate counsel may reassure the corporation that its litigation goals are shared by its lawyers. No independent profit motive should exist on the part of corporate lawyers. Rather, the goal of corporate lawyers should be to ensure reasonable legal costs and to minimize the exposure of their employers to costly risks. This may be in contrast to some nonlawyers' perception that law firms billing by the hour are better served the longer a case takes to be resolved.¹⁰

Some also argue corporate counsel may not become as emotionally involved in a case as outside counsel.¹¹ A lawyer who is emotionally involved in a case may be reluctant to seriously explore settlement until every other option has been exhausted. A disdain for early settlement may cost a company because it pays for the time the lawyer spends waiting to negotiate, even though the settlement itself may be, and often is, the same.¹²

Using corporate counsel may also allow a company to keep lawyers' salaries down and, therefore, keep legal expenses under control. However, this perceived advantage may not last. As companies demand more from their legal departments, they will need more talented people to make it worth their while. Corporate counsel positions have unfairly been viewed as second rate by some; often they are perceived as positions for associates who were not partner material in the big firm representing the company.¹³

7. *Managing the Corporate Legal Function*, *supra* note 2, at 4-10.

8. Erwin Krasnow & Robin S. Conrad, *Managing Your Lawyer*, NATION'S BUS., Apr. 1989, at 70.

9. See *Managing the Corporate Legal Function*, *supra* note 2, at 6-12.

10. An anonymous associate at an anonymous large law firm tells of the law firm tracking legislation for two main clients and doing research on many issues that did not concern the paying clients. Part of this work product was then distributed to 300 people in an attempt to win new clients. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 707 (1989-1990).

11. Roger Fisher, *He Who Pays the Piper*, in BEYOND THE BILLABLE HOUR 57, 59 (Richard C. Reed ed., ABA 1989).

12. *Id.* at 57.

13. *Managing the Corporate Legal Function*, *supra* note 2, at 1-3.

This perception is changing, but talented and ambitious lawyers do not anxiously await lower paying, lower status jobs. Companies have to pay for talent, and as part of the compensation package they will have to provide enhanced status, higher visibility, and exciting work.¹⁴ Often young lawyers are offered salaries from private firms that will be out of line with regular corporate pay structures.¹⁵ Certainly, few companies can afford to match the salaries of highly successful and experienced partners in private practice. If companies enhance corporate counsels' status and increase their salaries, the cost savings experienced by a company may disappear.

III. LAW FIRMS

Legal costs have risen sharply over the last two decades and the perception has been that law firms are to blame for much of the increase. As competition between firms increases, however, certain law firms are becoming as cost effective as corporate counsel. For example, several Washington, D.C. firms did not raise their hourly rates in 1989 and 1990,¹⁶ and some firms have brought in managing partners with M.B.A.'s rather than law degrees to manage themselves more efficiently.¹⁷ Law firms are also becoming much more willing to adapt their operations to clients' demands. To take advantage of this change, clients must know what to demand when selecting and initially establishing a relationship with outside counsel.

If a client uses a law firm for litigation work, the client must be aware that legal situations are rarely exactly alike. Different situations will call for different billing techniques, staffing, and amount of work by a law firm. No matter what type of work a client needs, however, some basic considerations should always be evaluated.

A. Itemized Billing

More clients are demanding detailed, itemized billing statements from law firms. Itemized billing requires outside counsel to list and explain the time spent on a matter by each lawyer involved in the project. The benefits of itemized billing are clear: If the client is willing to spend the time reviewing bills, the company can monitor what the law firm is doing. One suggestion is that clients should look for expensive maneuvers that are a habitual part of litigation. For example, "[b]e suspicious of any lawyer whose budget calls for deposing a whole crowd of witnesses, which is very time consuming."¹⁸

14. *Id.*

15. *Id.* at 5-14.

16. Gifford, *supra* note 5, at 11.

17. Galen et al., *supra* note 4, at 57.

18. Fisher, *supra* note 1, at 185, 187.

Many lawyers engage in litigation practices that can be very expensive and only marginally increase the chance of winning.¹⁹ Some believe lawyers follow this practice because they are typically paid on an hourly basis.²⁰ To allow a lawyer to spend time on tasks that only marginally increase the chance of victory may not be worth the expense. After informed consultation, the client and lawyer should decide the value of the case to the company, and simply not exceed that value absent unanticipated developments. Thus, itemized, detailed billing statements arguably can provide the client a means to monitor and control outside legal expenses.

Itemized billing, however, may not be appropriate in every instance. If corporate counsel has been involved in the case and familiar with the services, a detailed bill may be unnecessary.²¹ Some argue itemized billing is time consuming and accomplishes nothing.²² Also, a time sheet fails to show the client what work was necessary. In this regard, one general counsel writes that:

The current monthly billing system provides, in our view, no meaningful control of litigation costs whatever. About the only thing we can determine from looking at a monthly bill is whether or not lawyers in the firm have taken trips to Hawaii on a case being tried in Joplin, Missouri. Under this arrangement, it is possible (and in fact has happened) that when you add up all the monthly bills at the end of the case that has lasted three years, you may have paid legal fees of \$150,000 in a \$50,000 piece of litigation.²³

Instead, this general counsel prefers to give outside firms a budget that they are not to overstep without further authorization.²⁴ It saves corporate counsel time by avoiding review of time sheets, and it may allow for more inventiveness on the part of the outside firm's lawyers. If a lawyer can win a case with expenses under budget while eating out at expensive restaurants five times a week, the general counsel will not object.²⁵ Importantly, however, the client, not the law firm, should decide what type of billing will be used.²⁶ As another general counsel noted, "[t]en years ago, if you asked for

19. Rex J. Beaber, *How to Shrink Attorney Fees*, NAT'L L. J., Dec. 31, 1990, at 15.

20. *Id.*

21. KRASNOW & CONRAD, *supra* note 3, at 66-67.

22. Charles Hansen, *Cost Containment—Or a Route to Greater Client Satisfaction Through Increased Efficiency*, in BEYOND THE BILLABLE HOUR 139, 139 (Richard C. Reed ed., ABA 1989).

23. *Id.*

24. *Id.* at 140.

25. Larry Smith, *Avoiding Line Item Review: Emerson Electric's Approach to Litigation Budgeting*, in BEYOND THE BILLABLE HOUR 143, 144 (Richard C. Reed ed., ABA 1989).

26. KRASNOW & CONRAD, *supra* note 3, at 66-67.

a bill breakdown, the major firms would tell you to stuff it. . . . Now, you get whatever you want."²⁷

B. Budgets

As noted above, it may be extremely important for a client to initially establish a budget for outside counsel's representation. According to one survey, over one-half of the companies surveyed required budgets occasionally.²⁸ The budgeting process forces lawyers who are directly involved in the case to evaluate what may be required in that particular matter. To be effective, the budget must be sufficiently detailed. Otherwise, lawyers may provide nothing more than an unstructured guess of the total litigation costs.

The budget can require outside counsel to identify the lawyers who will be used and their hourly rates, as well as how and when they may be used in the case. Emphasis on staffing at the earliest stage possible will allow the client immediately to evaluate the law firm's staffing philosophy. The "life" of the litigation should then be broken down into its key components and a cost estimate should be provided for each component. These components may include pre-answer or pre-petition filing, investigation or research, discovery (interrogatories, depositions, and informal interviews), possible dispositive motions, trial preparation, trial, and even anticipated post-trial matters.

The budget can provide several valuable benefits to the client—litigation planning, baseline criteria for evaluating the cost of actual services, and more effective communication and coordination between the client and lawyer.²⁹ The budget should be viewed as an estimate and should not be applied mechanically. Clients should also recognize unanticipated developments can arise in litigation, and should maintain flexibility in any budget.

C. Staffing with Experienced Lawyers

Clients typically do not expect to pay a lawyer to educate himself.³⁰ If a lawyer does not generally do the type of work required, she may charge the client for time spent to "get up to speed" on the issues.³¹ Consequently, it may be better for the client to hire a specialist to get the job done quickly and efficiently, even if the hourly rates are higher than those of the general practitioners.

27. Galen et al., *supra* note 4, at 58.

28. ARTHUR YOUNG CO., CITY OF NEW YORK BAR ASS'N, NATIONAL SURVEY OF CORPORATE LAW 11-40 (1984).

29. *Managing the Corporate Legal Function*, *supra* note 2, § 7.06, 7-12.

30. Krasnow & Conrad, *supra* note 8, at 70.

31. *Id.*

Similarly, a client should not pay a lawyer to provide on-the-job training to associates and young lawyers.³² Although younger lawyers can and should be used to perform some services, the client ordinarily does not expect them to handle functions more appropriately managed by senior lawyers. Senior lawyers may be more cost-effective, even if their hourly rates are far higher than those of the associates.³³ Nondiscriminating use of inexperienced associates may cost the client more because these associates are learning as they go, leading to many more billable hours.³⁴

Clear communication between the lawyer and client may eliminate many of these issues. To the extent possible, corporate lawyers or key corporate management should be active members of the litigation team.

D. Alternative Billing Arrangements

Hourly billing came into vogue about thirty years ago.³⁵ Before then, most lawyers set their fees without many guidelines.³⁶ A lawyer took into account the worth of the client, the time the lawyer had spent working on the case, the importance of the case, how good a friend the client was, and possibly a number of other factors such as the weather and the lawyer's mother-in-law's health.³⁷ In that climate of fee uncertainty, hourly billing was welcomed as a way to make fees relate to something tangible.³⁸ While clients were often unable to gauge the importance or difficulty of a legal task and the relationship of a fee to it, clients could easily understand the relationship between time, hourly billing rates, and the fees.³⁹

1. Potential Pitfalls of Hourly Rate Billing

Motivated by the recession and increased competition between law firms, some lawyers and clients have begun to question the hourly billing system.⁴⁰ They recognize that many of the money-saving tips offered when using a law firm stem from an attempt to avoid perceived abuses of the hourly billing system.⁴¹ These lawyers and clients have gone beyond attempting to correct potential problems caused by hourly billing and,

32. Fisher, *supra* note 1, at 188.

33. *Id.*

34. *Id.* "[O]ne corporate general counsel [stated], 'Always go with the firm that is going to put the most senior people on your case. They may cost more but they get right to the heart of things.'" *Id.*

35. Mary Ann Altman, *A Perspective-From Value Billing to Time Billing and Back to Value Billing*, in *BEYOND THE BILLABLE HOUR* 11, 11 (Richard C. Reed ed., ABA 1989).

36. *Id.*

37. Jay G. Foonberg, *The Short Happy Life of Hourly Fee Billing*, in *BEYOND THE BILLABLE HOUR* 25, 25 (Richard C. Reed ed., ABA 1989).

38. Altman, *supra* note 35, at 11.

39. *Id.*

40. Paul Marcotte, *Designer Billing*, A.B.A. J., Nov. 1989, at 38.

41. *Id.*

instead, have focused on alternative billing methods.⁴² Many of these new billing systems exist. Some systems are highly adapted to one specific type of practice and some are generally applicable; however, all purport to avoid the problems of the hourly billing system while maintaining a fair level of compensation for the attorney.⁴³

The perceived problems of the hourly billing system are based on economics. Hourly billing rates, it is argued, are inefficient, reward inexperience over expertise, and are not related to the importance of the task as perceived by the client.⁴⁴ In addition, hourly rates create the impression it is to an attorney's benefit to drag out work, which leads to suspicions about lawyers' integrity. This causes the cynic to suspect a few lawyers may be adding extra hours onto the bill or engaging in unnecessary, time-consuming tasks.⁴⁵

At some firms, associates are under pressure to bill a certain number of hours annually. A young associate may believe not only that a larger fee is to be gained if he drags out a case, but also that his entire future is at stake if he does not.⁴⁶ Unconscious pressure may exist to cover every detail and make certain no stone is left unturned, even if the value to the client of this double-checking service is negligible.⁴⁷

The accuracy of hourly fees has also been questioned.⁴⁸ Some believe it is difficult to keep an accurate record of the time one truly spent on a case.⁴⁹ This may be exacerbated if the time is recorded by estimating the hours long after the work has been completed. If the time is overestimated, the client is hurt. In reality, however, lawyers are just as likely to underestimate the hours, thereby hurting the firm.⁵⁰ Nonetheless, lawyers do not receive the full value for their money or work.

It can be time consuming to keep accurate billing records.⁵¹ Costs quickly accrue when a lawyer takes time to write down exactly what one has done immediately after completing it.⁵² The entire administrative process needed to prepare an hourly-rate bill is time consuming and expen-

42. *Id.*

43. *Id.*

44. *Id.*

45. Jerome Braun, an attorney at Farella, Braun & Martel in San Francisco, has indicated a suspicion the lodestar method of setting fees leads to "the heavy penciling or overworking of a case." Nancy Rutter, *Bidding for Cases*, 22 CAL. L. REV. 22 (1990).

46. An associate at a medium sized firm tells of a senior associate working an average of two hours a day, but billing twelve to sixteen hours a day to clients. Lerman, *supra* note 10, at 710-11. The senior associate was under pressure from the firm to increase billable hours or be fired. *Id.*

47. Geoffrey Furlonger, *Time For Business-Lawyers to Stop Billing Time*, in BEYOND THE BILLABLE HOUR 93, 95 (Richard C. Reed ed., ABA 1989).

48. Altman, *supra* note 35, at 11.

49. *Id.*

50. *Id.*

51. Furlonger, *supra* note 47, at 95.

52. *Id.*

sive.⁵³ The record of time spent is completed by the lawyer.⁵⁴ This information is then re-recorded in some type of central recording system that adds to expenses charged to the client.⁵⁵ Finally, the lawyer reviews the bill again to ensure the bill reflects the time spent on the case.⁵⁶ This entire procedure costs time, money, and effort.⁵⁷

If an hourly billing system places a premium on hours worked, it does not place a premium on expertise and efficiency.⁵⁸ Using hourly rates, a second- or third-year lawyer with no experience in a particular field might be able to bill twice as much for working on a particular matter as might an expert in the field.⁵⁹ Due to his background, the expert could finish in several hours a problem that might take an associate several days.⁶⁰ The firm therefore makes money from the associate's inefficiency and lack of expertise.⁶¹ It has been suggested this not only hurts the client but also the associate because in the short term it makes sense for the firm to give their associates only this type of "on-the-job training."⁶² This results in lawyers with a "random and haphazard education gaining detailed knowledge of certain areas of his or her chosen field . . . while remaining ignorant of other very important areas."⁶³

The analysis is simplistic: Efficiency may attract clients, as may lower bills. An associate may make twice as much on a single problem, but lose the client to a more efficient firm.⁶⁴ In the past, some clients have viewed their lawyers differently from other sellers of services, and market pressures have not come to bear on inefficient firms.⁶⁵ As consumers of legal services become more sophisticated and more willing to shift work to different firms, concomitant market pressures will result.⁶⁶

Finally, hourly billing is sometimes criticized because the rates do not reflect the true value of the services performed for the client. A brilliant and innovative legal maneuver may only take three days to perfect and may save a client millions of dollars, while deposing three marginal wit-

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 93.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Recall the discussion earlier in this Article in which in-house counsel recommended hiring more expensive senior staff because in the long run it was cheaper than paying the lower rates of young associates. See *supra* note 34 and accompanying text.

62. *Id.*

63. Furlonger, *supra* note 47, at 93, 94. Of course, lawyers are required to spend three years in law school and pass a bar exam. It is unclear how much more education would be acceptable to Mr. Furlonger.

64. Jesse D. Miller, *Pros and Cons of Alternative Fee Structures-Beyond Hourly Fees*, in *BEYOND THE BILLABLE HOUR* 85, 89 (Richard C. Reed ed., ABA 1989).

65. KRASNOW & CONRAD, *supra* note 3, at 2.

66. Marcotte, *supra* note 40, at 38.

nesses may take the same three days, require a trip to Little Rock, Arkansas, and accomplish nothing at all. An ideal billing system would take into account what the lawyer did with his time, not just how much time he spent. Once a bill attempts to take into account the ability of the lawyer and the value of the service performed, however, it may drift back into the subjectivity that hourly billing was created to defeat.

Clients and lawyers are consequently beginning to use alternative billing methods as a means of improving the hourly billing system. Many of the alternatives are combinations of methods that work well for individualized practices. The main building blocks for these combinations are contingency fees, fixed fees, and value billing.

2. *Contingency Fees*

A contingency fee is a familiar modification of hourly billing. It is paid only if a certain result is attained. Plaintiffs' lawyers in personal injury cases often use this method of billing. In such cases, the plaintiff often does not have enough money to pay the lawyer at an hourly rate if he should lose. The lawyer, therefore, agrees to risk not being paid in return for a percentage of the winnings if the case should be resolved in the plaintiff's favor.

A contingency fee clearly makes sense from one perspective: People are paid for winning in sports and in business, so why not in the law? A contingency fee gives lawyers incentive to do their best. Reasoning thus, some corporate executives have begun using contingency fees when hiring outside firms. Firms will not accept the risk of a straight contingency fee in most actions, but companies are now paying firms at a reduced hourly rate for work and then increasing the rate if they win, or paying the firm on a fixed-fee basis that increases if the case is won or settled to the client's satisfaction.⁶⁷

3. *Fixed Fees*

Fixed fees are a second alternative method of billing. They are flat fees for doing certain tasks. However, fixed fees are not necessarily money savers. In a survey of over four hundred members of the American Bar Association's ("ABA") Committee on Corporate Counsel, a majority of both staff and outside counsel agreed fixed rates did not save companies money.⁶⁸ Fixed fees do, however, have at least one large advantage: The rates are decided and agreed on before the lawyer does the job. This gives a lawyer incentive to complete the job as quickly as possible because he is

67. Galen et al., *supra* note 4, at 58.

68. Edward P. Liebensperger, *A Proposal for Improving Litigation Team Management: Task Based Billing*, in BEYOND THE BILLABLE HOUR 153, 154 (Richard C. Reed ed., ABA 1989).

being paid only to complete the task.⁶⁹ Fixed fees cure the main complaint associated with hourly billing. No more heavy penciling of cases exists because the more tasks the lawyer can complete in his day the more money the lawyer makes. This may, of course, encourage the lawyer to trim his efforts to stay within that amount allowed by the fixed fee.

Fixed fees also help in other ways. A previously agreed on fee preserves a client's goodwill toward a law firm and makes him more willing to pay the bill. This billing system spares the lawyer the experience of justifying an especially high bill to an unsuspecting and hitherto friendly client.⁷⁰ The fixed rate may also save time by allowing a firm to avoid the sometimes cumbersome time-billing process.⁷¹ Finally, a set fee allows a client to budget with more certainty. Such budgeting results in more informed decisions by the company in planning for its expenses.

In addition, a small majority of corporate counsel in the ABA survey thought a flat fee encouraged preventive maintenance on the part of the company client.⁷² A majority of outside counsel believed this to be untrue.⁷³

One disadvantage to fixed fees is that they are not flexible enough for many situations. In the ABA survey, two-thirds of the outside counsel responding thought flat fees were unacceptable because of the lawyer's risk of not being compensated for the time spent on the task.⁷⁴ More lawyers were willing to accept flat fees while representing the client as a plaintiff, thus presumably having more control of costs, rather than as a defendant where the opposing party could control the direction and extent of litigation.⁷⁵ Outside counsel contends it is simply not possible to estimate what twists and turns a litigant's road will take at the outset.

Because law firms may be reluctant to take the risk of fixed fees, such fees are used in only a limited number of situations in which the probable costs can be estimated with some accuracy.⁷⁶ The preparation of documents is one such area.⁷⁷ Other areas in which flat fees may become more popular are routine legal tasks such as "research, discovery, legislative services and routine litigation matters."⁷⁸ However, the risk factor must be lessened before lawyers will accept flat-rate billing. This means lawyers must begin to learn exactly what different services cost. They can then

69. *Id.*

70. Furlonger, *supra* note 47, at 93, 95.

71. *Id.*; see also *supra* notes 35-66 and accompanying text.

72. Liebensperger, *supra* note 68, at 153.

73. *Id.*

74. *Id.*

75. *Id.* In contrast to this position, inside counsel was unsympathetic with outside counsel's complaints and thought that flat fees were workable. *Id.*

76. Demetrias Dimitria, *Value Billing—Second Approach*, in BEYOND THE BILLABLE HOUR 161, 161 (Richard C. Reed ed., ABA 1989).

77. Edna P. S. Alvarez, *Value Billing—Five Approaches from Small-Firm Practitioners: First Approach*, in BEYOND THE BILLABLE HOUR 159, 159 (Richard C. Reed ed., ABA 1989).

78. Ezra Tom Clark, Jr., *Getting Out of the Hourly Rate Quagmire—Other Billing Alternatives*, in BEYOND THE BILLABLE HOUR 183, 195 (Richard C. Reed ed., ABA 1989).

accurately calculate a fixed fee that affords them a reasonable return, while providing clients with a good value. As a general rule, most lawyers do not know this information because hourly billing provides no incentive to learn. Lawyers should make an effort to itemize the costs involved in different aspects of their services so even if flat-rate billing is not currently practicable, it may be in the near future.

4. *Value Billing*

Value billing is an attempt to bill the client for the true value of the services rendered.⁷⁹ This broad definition allows for different interpretations. One lawyer calls her hybrid method of hourly billing combined with fixed fees "value billing."⁸⁰ Another characterizes value billing as a fee based on the lawyer's responsibility and experience required and the value added to the client's experience with the law "because of the attorney's talent and productivity."⁸¹ A flat billing rate could accommodate these goals as well as any other type of rate. Nevertheless, value billing is often thought of as a rate that is set after the lawyer's work is done. This type of billing would account for hours worked, but also for brilliant legal strategy and successes.

Value billing also avoids the disincentives of time billing. It lessens the incentive for a lawyer to spend marginally useful time running up a bill on a project. Because a matter will presumably have the same value whether or not the lawyer performs the task efficiently, there is an economic incentive to move to another activity that will add more value to the client's case and hence to the lawyer's bill. Therefore value billing rewards productivity and efficiency, rather than a mastery of the unnecessary deposition.⁸²

Skill and experience also are rewarded by value billing.⁸³ A better-skilled lawyer can accomplish more and can charge more per case.⁸⁴ Value billing makes young associates less valuable to firms, and firms might be forced to install training programs and cap associates' salaries.⁸⁵ This in turn might result in better trained lawyers.

Value billing does not address the problem of "sticker shock." Theoretically, however, the bill should represent the honest worth of the work so the client has no reason to be upset. Value billing is subjective, and

79. Alvarez, *supra* note 77, at 159.

80. *Id.*

81. Ronald W. DelSesto, *Value Billing-Third Approach*, in BEYOND THE BILLABLE HOUR 163, 165 (Richard C. Reed ed., ABA 1989).

82. Richard C. Reed, *Responsibility, Expertise, Productivity: The True Measure of Value of a Lawyer's Service*, in BEYOND THE BILLABLE HOUR 79, 80 (Richard C. Reed ed., ABA 1989).

83. *Id.* at 80.

84. *Id.*

85. *Id.* at 81.

if a lawyer is going to throw an extra hour of research down on a time sheet, value billing simply will make the lawyer's job easier by not requiring a record of his work. Just as in hourly billing, however, sophisticated legal consumers who shop around may create market pressures resulting in accurate value rates.⁸⁶

Some view value billing as just another gimmick allowing a lawyer to obtain an otherwise unjustifiable fee. One consultant, for example, claims value billing is an inventive way for law firms to keep income rising in an environment in which it is impossible to bill more hours and where clients are becoming leery of paying higher hourly rates.⁸⁷ At the same time, young associates' salaries keep rising. Value billing is a way to pay for the associates and to keep the partners' profit margins increasing. The consultant claims a large New York law firm uses value billing to reach an "effective rate . . . [of] about \$4,000 to \$5,000 an hour."⁸⁸ An anonymous associate for a large firm states, "Because . . . [premium billing] has no apparent limits on money, it gets them tremendously excited . . . this is how the firm is going to average, instead of half a million dollars a year, a million dollars per partner"⁸⁹

To be successful for clients and their lawyers, value billing will necessarily require a trusting and respectful relationship. If the billing lawyer attempts to judge the value of his services, and does so incorrectly in the eyes of the client, the two must then attempt to reach a common ground.

IV. CONCLUSION

Businesses must place themselves in the best position possible to make the correct choice of a lawyer or a law firm. To do so, clients must know their needs by analyzing their historical areas of required services and their past legal costs, as well as the effectiveness of the legal services used to meet those needs.

Once those needs are identified, projects that tend to repeat themselves should be assigned to corporate counsel whose substantive expertise and familiarity with company philosophy can most cost efficiently provide the services. If the expertise does not exist within the company, a business may want to consider consolidating all such projects with one outside lawyer or law firm who has the required expertise, and negotiate a billing arrangement that recognizes the value to be received by the client as well as the volume of the work for the lawyer.

As to specialized projects, if corporate counsel staff has the time available and level of necessary expertise, the work can be performed without

86. DelSesto, *supra* note 81, at 164.

87. Gifford, *supra* note 5, at 11.

88. Barbara Cotlman Becnel & Robert Hanley, *Firms Moving Back to 'value' Method*, PA. L.J.R., Dec. 1987, at 57.

89. Lerman, *supra* note 10, at 714.

retaining outside counsel. The staff counsel must nevertheless be monitored both in terms of efficiency and quality of performance by the corporate manager to assure competent representation.

When a need for greater experience and expertise exists, however, outside counsel should be retained. Lawyers with whom the company can comfortably work and who are willing to discuss flexible billing arrangements under which the lawyer may assume a portion of the risk should be given strong consideration. To the extent feasible, budgets should be discussed and agreed on with outside counsel. Frequent billing statements should be required that are sufficiently detailed so that management in reviewing such statements can understand the value being received.

As is the case in any business relationship, the lawyer must become a member of the corporate team, whether as staff counsel or outside counsel. Frequent communication should always be required. All lawyers and clients must remember the client is just that—the purchaser of the lawyer's services. The lawyer must be willing to serve the client as the client believes is appropriate, within ethical limitations. The company must always retain responsibility for its legal problems, even if handled by outside counsel, to assure that *its* goals—and not those of the lawyer are advanced.