

CHANGING TIMES, NEW OPPORTUNITIES: WHAT BUYERS OF LEGAL SERVICES NEED TO KNOW ABOUT CHANGES IN THE CLIENT-ATTORNEY DYNAMIC

*By Keith A. Clinard, Michael J. Sullivan, and John Parker Sweeney
Womble Carlyle Sandridge & Rice, PLLC.*

Change is constant in the medical technology and life science industries. New products, changed and new demands for products, new resources and vendors, and new business approaches are all marks of progress, and some are flexible responses to an uncertain economy.

The same is true in the legal world. If you think you know how corporate legal services are purchased, you might want to take a second look, because the relationship between companies and their lawyers is rapidly changing—and that’s good news for buyers of legal services, who today find themselves in a “buyers market” for legal services.

Clients are entitled to expect exceptional service from their lawyers. Clients are also entitled to feel that they have received value for the costs they pay for such services.

Providing Value

In today’s economy, both clients and law firms are working to realign legal services with the client’s perceived value of those services, both in terms of price and service delivery. While this conversation is being initiated at companies large enough to have their own in-house attorneys, the changes are trickling down to mid-sized companies that do not.

The Association of Corporate Counsel is at the forefront of these efforts in its [“Value Challenge”](#) initiative. Our law firm, Womble Carlyle, is proud to be working hand-in-hand with the ACC. This campaign has several goals, but primary among them is to improve working relationships between companies and their outside lawyers, and to help ensure that both parties clearly understand the value of working together. Exploring alternative pricing arrangements and new ways of delivering legal services is a major part of these efforts.

As a result of these efforts, more options than ever are available to mid-sized companies, both in service delivery and pricing for those services. All clients now can expect more value for their legal dollar.

Traditionally, law firms have billed clients on the basis of an hourly rate applied to the total time spent performing the services. Despite its prevalence, many clients have raised legitimate concerns as to whether the “billable hour” approach truly meets client objectives. Projecting ultimate costs and budgeting with reasonable certainty is difficult under this approach. Additionally, clients can be left wondering whether the services were performed efficiently, because of the perceived inherent “conflict” between the law firm's incentives and interests

(maximizing time and fees) and the client's (attaining reasonable objectives for predicted and fair costs). All the "risks" associated with pricing by the hour can seem to fall upon the client and not the firm, which is different from the normal business world where the seller often bears risk too.

Corporate clients also traditionally tended to use one firm or a select few firms for all their legal needs. This approach fostered a sense of the law firm as a "trusted business partner," but denied the client some advantages of the competitive marketplace including competitive pricing and access to expertise and experience of other firms.

Change comes slowly in the legal profession, but it is happening. The current economic recession has quickened the pace of change and forced law firms to become more responsive and client-focused. Gone are the days when a firm could simply hang a shingle and dictate the terms of services and fees. Many law firms are rethinking their approach to match the expectations of a competitive marketplace.

Two of the biggest changes in the relationship between corporate clients and their outside law firms are the rising popularity of alternative pricing structures and the unbundling of legal services. Many clients have found that differing approaches to pricing and service delivery can give them greater cost-certainty and increased value for their legal dollar. Alternative approaches can also shift some of the risk associated with legal fees from the client to the law firm.

Customizing an alternative approach requires communication, early and often, between client and counsel. Law firms need to listen to clients and understand their goals and objectives, and then offer service options and pricing that promote the client's goals and not the law firm's goals. Additionally, law firms need to be prepared to accept some of the "risks" and "burdens" associated with budgeting and outcomes.

Alternative Pricing Options

Alternative fee options generally refer broadly to any arrangement other than the traditional fee based on hourly rates. Examples include:

Discounting

One category of options is to simply discount off of the standard hourly rates. Some examples commonly used include a percentage or dollar reduction off of the standard rates, "blended" or fixed rates for categories of timekeepers (partners, associates, paraprofessionals) or for all timekeepers, and "volume" discounts with graduated discounts based upon reaching specific volume levels.

However, no variation of the "discount" approach addresses perceived problems with hourly rate fee arrangements. Total costs remain difficult to project, and perceptions regarding inherent conflict remain. In the final analysis, total cost is generally more important to the client than hourly rates. The lowest rate does not always produce the lowest total cost, since time spent also determines total cost.

Fixed Fees

Fixed-fee arrangements involve the firm charging an agreed-upon price for specified legal work. Fixed-fee pricing provides the client more predictability and better control of costs. This option takes the focus off of “time” and puts it on “service.” It can foster better communication between law firm and client, since every conversation is not “on the clock.”

For a fixed fee pricing option to be fair to both the client and the law firm, the fee should be based upon a specific scope of work and assumptions agreed upon between the client and the firm at the outset. Under this option, some of the burden of the “unexpected” is shifted from the buyer (the client) to the seller (the law firm).

A fixed fee option can be applied to an entire matter, or to parts of a matter, or a portfolio of matters. When combined with alternative service delivery options, fixed fees can be used effectively to enhance cost control and predictability. For example, routine counseling, research, or repetitive portions of a litigation matter (such as preliminary pleadings, document review, and written discovery) could be handled on a fixed fee arrangement, while other portions could be under a different fee arrangement with the same or even a different legal service provider. Fixed fees are not necessarily limited to routine or repeating tasks. One client implemented fixed fees in the form of a fixed per diem for its trial counsel during trial regardless of the number of people that law firm brought to trial.

Performance Based Pricing

Even law firms that continue to employ the hourly rate model are exploring new wrinkles. Several innovative billing approaches currently being used involve a “holdback” or bonus model tied to incentives based upon objective and subjective criteria. Under these approaches, an agreed upon percentage or amount of the law firm’s fees are dependent upon reaching agreed goals or outcomes. If benchmarks are met, the firm receives the held-back money as an incentive bonus.

The attractiveness of this “holdback” approach is that both clients and firms share risks and rewards. They have incentive to work as “partners” to achieve the client’s objectives. The final cost for legal services is adjusted to reflect whether or not the client’s objectives were accomplished.

One mechanism for measuring success is the extent to which the law firm achieved a desired resolution within a predicted budget. Incentives are provided for successful outcomes within budget, while fee reductions are implemented for work performed over budget. Other approaches distribute holdbacks based upon law firm compliance with subjective goals established by the client with the client making a discretionary determination of law firm success in achieving the goals.

The “holdback” approach could be implemented with hourly rate billing, fixed fee, or even other incentive approaches.

Discretionary Components

Several emerging alternative fee models employ discretionary components to the fee. In these approaches, a benchmark or fixed fee or discounted hourly fee is established and then an additional fee is set based upon defined, or even undefined, criteria to be assessed by the client entirely in the client's discretion. These components provide incentives to law firms to keep the client's goals and desires front and center, to communicate consistently, clearly and often about results, to avoid surprising the client, to obtain the best and quickest result possible and to otherwise provide a very high level of service in order to motivate the client to pay a large discretionary fee.

Discretionary components to legal fees align law firm interests with their clients' interests and do so from the subjective perspective of the client. This alignment is a central aim of the emphasis on value. Trust is clearly an element of this approach to legal fees but as one lawyer who has used this approach observed, "we don't worry about clients not paying the discretionary part of the fee when we do a good job for them. When we exceed their expectations, they will want us to make time to work for them again on other matters and the discretionary payment is a tangible way for clients to accomplish that goal."

Escape Clauses

Several of these alternative fee arrangements have risks for both clients and law firms associated with them and are dependent upon the accuracy of various assumptions at the beginning of a representation. To make sure that goals stay aligned and that neither client nor law firm become trapped in a bad arrangement which threatens the relationship or worse yet the outcome of the representation, some thought should be given to the circumstances in which renegotiation of the fee would be appropriate. These circumstances can be defined based upon a number of different criteria.

One approach is to bracket the fee so that a different fee would apply if the matter is resolved in substantially less or substantially more time than the benchmark projection for the case. In this approach the brackets can be defined based upon hours expended or hours times some hourly rate or based upon the passage of time without a resolution.

Another approach is to carefully define the assumptions and provide for variations of the arrangement if the assumptions turn out to be wrong. For example, a fee might be based upon the assumption that the other side would take five depositions. If the other side ended up taking 15 depositions despite counsel's best efforts to limit the number, the fee would probably be inadequate given that the original assumption turned out to be untrue. With an escape clause these extra depositions would be handled on a different fee basis than the original fee. That additional fee could be set in advance or negotiated once the assumption was found to be untrue. Obviously, escape clauses are representation specific and are closely aligned with development of a detailed scope of work to define the representation adequately in the context of the alternative fee.

Alternative Service Options

The unbundling of services combined with alternative pricing presents a tremendous opportunity for companies to save money on their legal expenses. “Unbundling” simply refers to separating specific tasks or aspects of a matter from the whole for purposes of fee arrangements and / or assignments to attorneys for performance of the work.

Unbundling can be utilized for one or more matters assigned to a single law firm, by pricing portions of the matter differently from others. Even if a law firm isn’t yet comfortable with using alternative pricing strategies on an entire matter, it may well agree to a different approach on some portion of the work.

Corporate clients no longer feel bound to just one outside legal provider. Instead, many companies are opting for an approach that assigns specific tasks or different aspects of a representation to different firms, based upon considerations such as expertise, experience, costs and others. The advantage of such an approach is that the client can tap into specific experience and expertise that tends to vary from firm to firm, and can find the right fits for its needs.

An example of how this approach might work is as follows: For a client facing recurring litigation, certain case management, routine research, or other regularly recurring tasks might be provided based upon a fixed fee or retainer arrangement. Other tasks, such as depositions and court appearances, might be based upon hourly billing because the volume of work may vary widely from case to case. Still other tasks, such as a motion for summary judgment, might be based upon a blended fee or discounted rate with an incentive payment for success. The various respective tasks could be assigned to one or more law firms.

An “unbundled” approach can be more time consuming, in that a buyer must do the legwork on what services are available and build relationships with multiple law firms. But in this increasingly cost-conscious environment, many companies are finding that the time is well spent.

Innovative Approaches

The following are several real-world examples, taken from our own experience, of innovative approaches that aligned legal services with the needs of corporate clients. In each example, specific services were “unbundled” and handled separately from the law firm or firms that were retained as trial counsel.

- **Centralized document and e-discovery review teams were set up for several companies facing litigation involving voluminous documents.** These teams have been customized to meet several different clients’ needs, ranging from single lawsuits to recurring cases in multiple jurisdictions. Alternative fee arrangements have ranged from a per-page or per-document fixed rate, to a deep volume discount of hourly billing. Documents and electronic data were reviewed once and key information was captured and coded for retrieval, including production, privilege and confidentiality logs. These services were performed by counsel separate from the

primary law firm or firms to whom the cases were assigned, but all firms as well as clients were provided access to the work product generated. Because this work is done within a law firm (instead of by an outside vendor), attorney-client and work product privileges were preserved. For more information, click on the following links for a [Document Review Services description](#) as well as an illustrative [statement of work](#).

- **An early resolution / mediation approach was set up for a client facing recurring litigation in North Carolina.** A fixed fee per case was charged for this service, with most discovery and major motions deferred until 90 days prior to trial to afford reasonable opportunity to conclude the matters within the fixed fee. Although this program related to multiple cases handled by one law firm, another early resolution model provides a firm separate from trial counsel a reasonable number of days to achieve resolution before the case is assigned to trial counsel, either on a fixed fee or incentive-based fee arrangement.
- **A “consolidated case file” approach was set up for a company facing recurring litigation in multiple jurisdictions.** Under this approach, one firm created and managed a streamlined process to organize, track, search and synthesize the “case file” (including paper and electronic data), preserved high value work product, and made it all available electronically through a web-based unified platform to in-house counsel as well as trial counsel handling cases across the country. This service was provided on a fixed fee arrangement. [Click here](#) for more information.
- **A “medical team” was created to assist several clients and other law firms locate, retrieve and analyze medical records, develop medical defenses, and locate and develop expert witness testimony.** These services were provided under various alternative billing arrangements ranging from fixed fees to discounted hourly billing within budgets.

Change can be unsettling—but it also can be exciting. More and more law firms are recognizing that they must be business partners with their corporate clients. The ongoing changes in the client-provider dynamic present tremendous opportunities that can benefit both client and firm.

Better communication leads to better results, which leads to a more satisfied client, which in turn leads to more engagements for the law firm. Everyone wins in this scenario. So if you haven't spoken with your outside counsel in a while, pick up the phone and do so. You might be surprised by what they have to say.

Keith A. Clinard, Michael J. Sullivan, and John Parker Sweeney are Members of Womble Carlyle and concentrate their practices in product liability risk management and litigation, and coordination of complex, mass tort litigation. All have extensive trial experience, as well as experience in developing and managing cost effective solutions to risk and litigation exposures. For more information, contact information is below.

Keith A. Clinard
One West Fourth Street
Winston Salem, NC 27101
(336) 721-3631
KClinard@wcsr.com

Michael J. Sullivan
Atlantic Station
271 17th Street NW, Suite 2400
Atlanta, GA 30363-1017
(404) 879-2438
MSullivan@wcsr.com

John Parker Sweeney
250 West Pratt Street
Suite 1300
Baltimore, MD 21201
(410) 545-5821
JSweeney@wcsr.com