

Maryland Lawyer

News and analysis of legal matters in Maryland

It's not the money, it's the relationship

Trends in alternative billing

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When Adam Rubin left a megafirm in New York to work with his father in Silver Spring, his surroundings weren't the only thing he changed.

After five years as an associate at O'Melveny & Myers, Rubin said, he was convinced that the billable hour acts as a disincentive to efficiency. Now, much of Rubin & Rubin's litigation work and some transaction work is done on a flat- or capped-fee basis.

Particularly in this economy, Rubin said, clients want to know how much they are going to have to pay.

"At any point in the litigation, the best fee is going to be the one that's going to

make the client happy and the attorney adequately compensated, but the client should be paying for value, not how long it takes an attorney to do the work," Rubin said. "That's the whole point of these alternative fees."

It's a point that Eliot Wagonheim underscores. His five-lawyer Hunt Valley firm, **Wagonheim & Associates**, last week instituted an optional monthly flat-fee plan for clients who want to use the firm's services without receiving a bill for every six-minute phone call.

"Billable hours are the worst, most counterintuitive business model ever created," Wagonheim said. "They put a huge obstacle between the client and the attorney."

Different forms

Wagonheim's plan, called Empty Hourglass, might not suit all clients or law firms, but it is one of a variety of



MAXIMILIAN FRANZ

Adam Rubin says flat-fee billing can attract and keep clients, but it carries risks for small firms like his.

alternative billing arrangements popping up in Maryland's legal landscape:

Flat-fee arrangements and capped rates are widely used, offering an element of budgeting certainty. And, within flat fees, some offer phased billing, where costs are tied to certain portions of a matter, rather than the whole case.

Others offer a hybrid contingency model — the firm bills lower hourly rates than it would on a straight hourly agreement, and takes a smaller percentage of the judgment in a win than it would in a straight contingency case.

That type of deal is beneficial to both the client and the firm, said Jeffrey Wothers, managing partner at **Niles, Barton & Wilmer LLP**, a Baltimore firm with more than 30

attorneys.

Clients like the setup because if they win, they won't have to give such a big piece of the judgment to the law firm — and they also like to know that the firm is sharing the risk.

"From a law firm standpoint, with a contingency case, we carry the costs all the way through," he said. "For a mid-size firm like ours, cash flow matters, so having some payment along the way helps."

Another option is bundling fees, where a law firm agrees to give a client discounted rates for providing an agreed-upon amount of legal work.

Under Wagonheim's program, clients could pay \$350 a month for the standard plan — unlimited calls, e-mails and demand letters and one con-

tract review a month — or \$550 for extras like three contracts reviewed a month, 5 percent off all other hourly billing needs, free mechanic's lien notices and contingency fees for district court collection matters.

He said he reached out to about 20 clients and friends to gauge their interest in the program before rolling it out and got some good feedback and advice on changes he should make, like offering clients two price points.

Discounts for emerging technology firms that are recouped when the company is better established have become popular among several large firms with a local presence, including **Venable LLP** and **Saul Ewing LLP**.

Eric Orlinsky, a partner at Saul Ewing in Baltimore and chair of the firm's corporate group, said those types of arrangements are more popular in areas of the firm where business is slower, as compared to other practices, like bankruptcy or litigation, which have been busy.

"You want your people to have work to do," he said.

Discounted fees for corporate clients have also been popular over the last few years. John Wolf, chairman of the 100-attorney firm **Ober|Kaler** in Baltimore, said discounts do not contain costs in a precise manner, although they allow companies to save money.

Most of the alternative-fee arrangements Wolf said the firm has done are fixed-fee, whether it's for a portion of a legal matter or for the entire engagement. And, even though Ober|Kaler isn't paid by the hour for that work, the firm has to look to hourly rates to determine if it has made money in fixed-fee cases.

In basic terms, Wolf said he takes the cost of goods and services against what the firm has charged, and then looks at the number of hours it took to perform the service.

"You look at that number against what you quoted as a fee and the art and the science then merge and you've either made money or you've lost money because it took too many hours," he said. "Happily, we've been reasonably efficient."

Innovations

Clients are also asking law firms to bid for their business and suggest innovations.



MAXIMILIAN FRANZ

Adam Rubin (left) joined his father, Lawrence E. Rubin, after practicing at a large firm in New York.

Computer Sciences Corp. is awaiting responses to a Request for Proposals it sent to about 30 law firms, seeking ideas on alternative billing methods that the company may not have already considered.

Some early responses have generated interesting ideas, said H. Ward Classen, deputy general counsel of the company, which has an office in Hanover. One firm offered a secondment program, where an attorney would work out of CSC's office for a month — free of charge — in order to get a better understanding of the business, with the intention of improving service.

Another law firm suggested having summer associates complete smaller projects, also for free. Classen said it might be a good arrangement for both sides, since he said law firms often have trouble charging for summer associate work, and companies need to get the work done, but not at partner rates.

"We may have small, little projects that aren't that important, but we don't have the ability to do it ourselves," he said. "They're above busy work, but they're below legal scholarship so to speak."

While new payment models have gained traction with some firms, it seems that no method has unseated the billable hour as the preferred mode of payment.

That seems to be the case nationwide, too. While much of the alternative-fee movement has been motivated by corporate clients, most demands are for budgeting, which is often driven by the billable hour.

"If clients are really just looking for a budget then they are open to the billable hour," said Nathan Bowie, managing director of Hildebrandt Baker Robbins, a law firm consultancy.

"What's changing is, it has to be managed by the firms," he said. Clients are "just looking for a little bit of project management sticking to that budget."

Client-centered

Keli Whitlock, a partner in the Baltimore office of **Duane Morris LLP**, said she has been using alternative-fee arrangements in some form for about 15 years, although she said they have become more common over the last two years. She estimated that 70 percent of the transactions that go through Duane Morris are not subject to the billable hour.

The shift has been dictated by client needs and the firm's perspective of what was happening in the market, Whitlock said.

"We don't want to be the first movers, because that's not our role, but we don't want to be the lagger," she said. "You don't make a change

like this because everyone's doing it, you make a change like this because it's important to the person you're doing business with."

Nationally, the clients that have put the most emphasis on alternative billing have been large corporations like Levi Strauss & Co., DuPont and Pfizer Inc.

In Maryland, the pressure has not been as intense.

Constellation Energy Group Inc. is in the final stages of an RFP process where the bulk of its legal work would go to a core group of law firms that commit to providing budgets for work that over a certain dollar amount. The firms would also commit to a certain mix of partner and associate time as well as providing continuing education for Constellation's in-house lawyers.

"To me, one-size-fits-all with respect to legal work doesn't work in the long run," said Charles Berardesco, general counsel at Baltimore-based Constellation. "What we're trying to do with our outside counsel is to create relationships with these firms whereby we can accurately predict what our legal costs are going to be."

Other companies here are more reluctant to step into the alternative-billing arena. Like some law firms that believe alternative fees would not work in their practice areas, some general counsel believe their legal needs are too complex for flat rates or other billing models.

"In things where there is a large volume of fairly routine-type things ... defense of a certain type of discrimination case, unemployment matters, then I think alternative billing works fairly well," said Robert W. Zentz, general counsel for **Laureate Education Inc.** in Baltimore.

"In transactional-type work, which is what we do a lot of, it's difficult to formulate an alternative-billing arrangement that works for both sides," Zentz said of Laureate, an international network of higher-education institutions.

Other companies feel they lack the

heft of larger businesses to tell a law firm that it must adopt better budgeting standards or alternative-billing options to keep their business.

"We pretty much take the [law] firms as we get them. We don't have the same buying power as a larger firm," said Douglas McNitt, general counsel for **Sourcefire Inc.**, a cybersecurity solutions firm in Columbia with 350 employees.

McNitt said the company has used flat-fee agreements for predictable work like trademarks and copyrights, although he'd like to expand beyond that. He said international law firms Sourcefire works with are much more likely to embrace alternative-billing methods than their counterparts in the United States.

"I would prefer to move to more alternative-fee arrangements because it would give me greater predictability for my outside counsel spend, but I found that the U.S. firms are not yet set up in a way that it would work," he said. "You'd end up having to drag the firm along, which is not a very efficient way to work."

But even big local firms haven't pushed too hard on changing billing models. Karen Singer, general counsel for **Corporate Office Properties Trust** — a Columbia-based real estate investment trust with a \$2.26 billion market cap — has only used alternative fee arrangements on collections cases. Those cases often take more work to collect on after a judgment is won, she said.

The move came about six months ago.

"It actually happened organically because when we were using [the firm] for collections cases we would get a judgment but not be able to collect on the judgment," Singer said. "We decided to weigh whether it was worth it to go forward with these cases."

The solution was a hybrid billable-hour and contingency-fee setup, where COPT pays the firm hourly for the initial case, and then only pays a portion of the collection if it can recoup the money.

Although it is too early to tell whether the model will save the company money in the long run, Singer said her budget is on target.

Companies like COPT or Constellation could force the alternative-billing agenda, but, for the most part, they have chosen to gradually change the way they work with outside counsel.

"We could be a tad bit more aggressive, but partly because I practiced outside for so many years ... I actually want to have a positive relationship with my law firms," Berardesco said.

He said he remembers being in private practice and returning to his desk to find five messages, and having to decide which to return first.

Berardesco said he wants Constellation's to be the first call the lawyer returns — not because it pays a lot of money, but because the working relationship is good.

Wagonheim, the Hunt Valley lawyer, couldn't agree more.

He recognizes that in the short term his Empty Hourglass plan could lose money. Contracts could take longer than expected to review, gobbling up precious hours.

That's not an inconsequential risk for small firms, as Rubin pointed out.

While it's easier to be flexible on billing with a two-person firm than a 200-person firm, "I usually end up spending more time than what the client is being billed for," he said. And if he does, he takes more of a hit than a larger firm would, where inefficiencies can be averaged out among the many lawyers.

But in the long term, both lawyers hope to make up for any short-term losses through long-term client loyalty.

"This program is not in and of itself going to make money, but it's not designed to make money," Wagonheim said. "This program is designed to make it easier to build relationships with our clients."