

LEGAL COSTS

Managing and Reducing Outside Legal Expenses

Economic conditions have virtually all businesses looking for ways to cut costs. In this time of retrenchment, one place to look for savings is in the line item for outside legal services. Many businesses pay more than they have to for lawyers. Hourly rates at some firms have reached extreme heights, and not just for their stars. While the opportunity to reduce legal costs exists regardless of economic downturns, the current recession presents a greater need to do so and increased opportunities as law firms face intense competition.

Most legal fee disputes are private, which complicates an effort to analyze them. A recent public fee dispute arose in a securities receivership action that provides guideposts for many issues that in-house counsel face when attempting to manage and reduce legal fees. In *SEC v. Byers, et al.*, Case No. 08-7104, slip op. at 22 (SDNY Dec. 30, 2008)—in which the authors were involved—U.S. District Judge Denny Chin, in what is known as the WexTrust matter (arising from one of the largest pre-Madoff Ponzi schemes), explained:

In this economy, with law firms going out of existence or laying off lawyers for lack of work, and clients—including large corporate clients—insisting upon and obtaining alternative fee arrangements...surely there would have been qualified law firms willing to perform these services at rates substantially lower than \$850 or \$950 per hour for partners and \$605 per hour for associates six years out of law school.

After the WexTrust receiver and his firm performed more than three months of services, the court reduced their first interim fee application, which sought fees for the first 20 days of their



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work, by nearly one-half million dollars. The original fee application sought more than \$2.2 million from the receivership estate for the first 20 days of work. (The authors filed an objection to the fee application on behalf of a victim.)

Prompt, regular and individualized communication between clients and their lawyers regarding fees, staffing and alternatives is likely the most important factor in the management and reduction of legal expenses on a matter-by-matter basis.

The perception of excessive fees grew largely from the same sort of fundamental flaws that can affect the more traditional attorney-client relationship: (1) poor communication about fees and staffing; (2) the lack of meaningful consideration of alternatives to pure hourly rate arrangements; (3) the selection of a law firm without a focus on most of the particular lawyers who would be involved; (4) insufficient descriptions on bills of work performed; and (5) a lack of proper incentives.

Fundamentals

Focusing on the fundamentals can help counsel improve relationships with clients and generate savings.

• **Increase communication regarding fees and staffing arrangements, early and often.** Most lawyers will respond to clients' expressions of fee sensitivity. Just making clear a sensitivity to legal fees can cause lawyers to be more thoughtful about how they staff matters, and possibly more creative about efficiencies. Clients sometimes desire the maximum time available from their lawyers to facilitate scorched-earth efforts. Expressing fee sensitivity early and often can free lawyers from possible misperceptions.

Communication flaws about billing and staffing permeated the WexTrust fee dispute. How would most in-house counsel react if a firm, without notice, in the first 20 days of work, assigned 47 lawyers, including 16 partners at up to \$950 per hour and associates in excess of \$600 per hour? The firm also placed a team of law students on the matter at \$285 per hour each. A guideline that emerges is that lawyers and clients should communicate early regarding their hourly rates and staffing expectations before work begins.

Communication with lawyers about fees and staffing can include questions as to who will work on the matter, how many partners, how many associates, how steps can be taken to avoid redundancies, and how else fees will be kept in check. Clients may want to ask for the identification of each lawyer and non-lawyer, as well as his or her background, before he or she performs any significant work on matters. By understanding how firms staff a matter, clients can effectively discuss fee terms and potential alternatives.

The potential for savings still exists when bills are about to leave a firm and after the bill has reached the client. By expressing to lawyers a desire for close scrutiny of bills before they go out, at times a client may generate discounts, thoughtful reactions or careful planning of future staffing. Promptly and regularly taking the time to have what can be difficult or uncomfortable conversations can be productive, not only in obtaining possible discounts, but also in reaching a mutual understanding regarding the client's primary objectives and concerns so that future staffing and bills are

acceptable or at least less objectionable.

- **Consider and discuss alternative fee arrangements.** Much has been written about alternatives to the standard billable hour, a much-maligned concept that nevertheless shows no sign of disappearing. Common suggestions include blended rates and fixed fees for discrete matters. While these alternatives might have their place in certain circumstances, they can just as easily cost clients money as produce savings.

These arrangements can provide an incentive for law firms to shift seniority of a legal team on matters to more junior attorneys, so that their actual, full rates come in below the blended rate or the cap. Without other limits on staffing, this not only could lead at times to higher fees, but also to less experienced representation. An efficient partner at \$600 may be far less expensive for certain tasks than would be an inexperienced associate at \$300.

The WexTrust fee dispute is again illustrative. As the court explained when reducing fees, the firm purported to offer a “public service discount” in part by capping fees for legal services at a blended hourly rate of \$550. By including paralegals and summer associates in the calculation, and by staffing the matter heavily with lawyers who bill at lower rates, however, the actual blended rate fell below the blended cap. This allowed the firm to avoid the so-called “blended rate” discount. As the court said, the “discount” from the blended rate cap was entirely “illusory.”

What alternatives exist? One approach is to seek discounts based on the length of engagements. Rates can simply decrease as engagements proceed. Doing so provides an incentive for firms to finish matters promptly, while rates remain at higher levels. Alternatively, a bulk discount may be possible.

Discussions between a client and its firm about whether fees can be reduced if work is consolidated with that firm can be worthwhile. Such discounts could take the form of across-the-board reductions in hourly rates or breakpoint arrangements, in which fees beyond an agreed-upon threshold are reduced. These arrangements can result in additional efficiency savings. The more work a set of lawyers completes for a given client, the less time they may need to spend on subsequent matters learning the client’s business and issues that recur. Furthermore, if there is the prospect of significant work, many lawyers are willing to spend non-billable time with clients to gain a better understanding of their businesses.

Arguments for spreading work among several firms include that doing so suggests more active competition and that regionalization reduces costs. There is some merit to the first of these arguments, particularly prior to the development of a strong relationship with particular firms. But once a firm earns a client’s confidence in both quality of work and customer service, this barrier to consolidation largely disappears. Most lawyers know that they have plenty of competitors who pose a threat to future work if their service is not

what it should be, even when those competitors are not actively engaged.

The efficiency-from-regionalization argument can often be eliminated through discussions about increasing volume. A client can ask, for example, whether a firm that does not have an office in a region where litigation is pending can refrain from billing for non-working travel time to attend proceedings in that region. In certain matters, some firms may agree to modify billing for certain travel time, particularly if it means increases in the amount of work that they receive from the client by expanding the geographic areas in which they provide services.

- **Know lawyers beyond their brand.** Particularly in the last decade, law firms have focused intensely on branding efforts. Shortening firm names has become a hallmark of strategic planning. Law firm consultants have opined that less may be more when it comes to names, in order to promote “brand” recognition. With notable exceptions, the biggest brands tend to belong to the biggest firms, which tend to demand the biggest fees. Shopping by brand can be tempting, perhaps because it can make a choice (at least superficially) easy to defend.

What if a firm is hired because of its brand, but the best lawyers in the firm are not assigned to the matter or spend insignificant time contributing to the matter? It is true that the biggest names have, among their ranks, some terrific lawyers. Among big firm lawyers are exceptionally talented professionals worth every penny of a high hourly rate, but the same can be said about many lawyers at less-branded firms. It is simply not true that less well-known firms—which are often less well-known because they are smaller or do not spend as much effort on branding—lack terrific lawyers. Also, rampant mergers and lateral recruitment among law firms have tagged brands on lawyers who may have little to do with the historical reputation of the acquiring firm.

The quality of legal services can depend on the particular lawyers more than on the reputation of the firm. A client may be better off—both in terms of quality and cost—seeking out particular lawyers who have had success on comparable matters, impressed others, and demonstrated a commitment to clients’ businesses than picking a law firm exclusively based on how well-known it is. As in the WexTrust matter, growing a team quickly to more than several dozen lawyers, without advance identification of them, potentially compromises client satisfaction. A client may want to determine who specifically would work on matters and the breakdown of time they would devote to the representation. Just as a client does not want overstaffing, it may not want it surprisingly staffed by unknown attorneys.

- **Consider using task codes, including non-billable events.** Time entries can function as sales presentations. Detailed descriptions of legal services can provide valuable information to clients that make them more comfortable paying bills. Some lawyers view detailed time entries as an inefficiency or as posing a risk that sensitive

information could possibly be discovered by others. A compromise can result in the use of task codes. Rather than author lengthy descriptions, a lawyer can characterize time into different fundamental tasks by a prearranged code. Within a typical client matter, one task code can be reserved for research, another for writing, yet others for courtroom events, depositions, witness preparation, client meetings, etc. Forcing a lawyer to consider the amount of time at each task can prompt an attorney to reduce time for a particular task that seems, at the end of the day, potentially unreasonable.

Particularly with dozens of lawyers on a matter, such as in the WexTrust case, time entries can reveal or prevent potential redundancies. Using task codes can also facilitate conversations between clients and their lawyers concerning specific areas where resources may deviate from expectations. An additional safeguard can be imposed by using certain non-billable task codes for matters that involve administrative skills, such as copying, faxing, filing, etc. Regular use of those codes can focus a lawyer and client on specific efficiencies or inefficiencies, as well as the extent of tasks more ministerial in nature, thereby assisting decisions on staffing and other cooperative planning.

- **Manage expenses with the proper incentives.** Generally firms charge clients for out-of-pocket expenses. What some clients may not realize is that the policies of firms in this regard can vary dramatically when it comes to particular items, such as meals for lawyers working late, transportation home, electronic research and photocopies. Clients can ask their attorneys for details about these policies and request desired accommodations. Rather than simply imposing a rule that meals will not be charged to the client, consider a rule that requires and reminds a lawyer to charge meal time to a non-billable task code.

Conclusion

In sum, what is right for some clients and in some matters may not maximize economic objectives for all clients and matters. As a result, prompt, regular and individualized communication between clients and their lawyers regarding fees, staffing and alternatives is likely the most important factor in the management and reduction of legal expenses on a matter-by-matter basis.

Most clients do not have simple, inexpensive access to a court to reduce legal bills. Instead, clients and their lawyers should work cooperatively to maximize the quality of their communication, to understand each other’s expectations, and to explore creatively what can work for all constituents in the particular representation.