

Special Billing and Task-Based Billing

By Steven A. Lauer

The market for legal services for corporate clients is quite large,¹ and, as the legal issues faced by companies become more numerous and complex, is growing even larger. The structure of the legal services market, on the other hand, has not changed much over the years. Law firms service corporate clients much as they have in the past.² There have been some changes, but those changes have consisted merely of relatively minor adjustments to the existing system.

Recently, however, the winds of change have begun to blow. The most significant changes have come from two distinct forces, one external to the legal profession and the other internal to it.

- The external force is the continuing explosion of technological advances—particularly those that relate to the Internet—that enable lawyers to work differently than they have previously.
- The internal force is the development and continuing maturation of the corporate law department as an institution.

As for this internal force, in-house counsel has become increasingly sophisticated. As they have grown in sophistication, in-house attorneys have become more assertive as managers of the legal affairs of the companies for which they work—the corporate clients of law firms. This assertiveness is reflected, among other ways, in in-house counsel's efforts to change how law firms charge corporate clients for legal work. For several decades, law firms have primarily used the hourly rate. Efforts to change this system have yielded only marginal success as of yet,³ but in-house counsel's high level of interest in alternative fee arrangements, reflecting their disenchantment with the hourly rate, suggests that efforts to reduce the prevalence of the hourly rate will continue.

A New Approach to the Work

Even though counsel, both inside and outside the law department, are comfortable with (or at least accustomed to) the hourly rate, that basis for the fee structure is becoming less and less acceptable. What can serve as the basis for a new paradigm of fee discussions? Is there a more acceptable method of approaching the fee issue?

Clients expect lawyers to manage the legal work, not simply perform it. They expect lawyers to be project managers. Lawyers cannot continue to function in a purely reactive fashion in litigation or in other contexts, because that approach leads to uncontrolled expense and poorly focused efforts. Lawyers are expected to choreograph the efforts of disparate groups to provide the complete legal service. Those groups might include members of one law firm or of several law firms. They may include temporary attorneys from an employment service, researchers working through a legal-research company, and document-management teams from another organization. Even while clients expect their lawyers to meld the efforts of these distinct groups, they expect those lawyers to deliver the same high-quality legal service that the clients have received, but at a lower, more-controlled cost.⁴

The general counsel of a major university in the United States has described how he re-engineered the legal function for that institution. He needed to reduce the school's legal expenses, and yet hoped to improve the quality of the legal service despite such reductions. He sought a law firm that would serve as a problem solver. When he could not find one suitable to his purposes, he determined to create the team himself.

Through an involved selection process, he identified several firms, each of which could provide a portion of the legal service he wanted. He selected the firms for their respective contributions. He then

set about turning them into an effective team. The results include reduced cost and greater client satisfaction. That general counsel effectively became a general contractor, assembling the components of a legal team from various sources. He took a project-management approach to restructuring the university's legal function.

Project Management: How Does It Fit?

This project-management role is not a familiar one for most attorneys. Many lawyers attended law school rather than business school precisely to enjoy the intellectual challenge of legal practice, not to be a manager. In law school, budding lawyers develop a solitary work style, which continues in the day-to-day world of being a practicing attorney. While lawyers may confer with other lawyers about discrete legal issues, they have been trained to tackle the work and problems alone, in the library or in an office. Teamwork is not a highly valued trait in a lawyer's training regimen.

Given this background, how can lawyers apply the project-management approach? How does it differ from their traditional method? What does it offer them?

A project-management approach requires that the attorney devote more effort than he or she typically did to planning the work and determining what steps must be completed, and in what sequence, to accomplish the goals of the engagement. Further, it requires an understanding of the cost components of the work. By combining these analyses, counsel can provide the client greater clarity as to the financial impact of the work.

Essentially, project planning requires the lawyer to start with the goals and work backwards. The lawyer must focus on the smallest components of the work in order to understand the relationships among the different tasks needed to com-

ete the assignment. Understanding where the lawyer wants to go, the lawyer must methodically plan the steps necessary to get there. Once the lawyer has identified the necessary steps, he or she can determine what expertise and capabilities are needed to accomplish each of those steps.

The sequence in which those talents will be required is an important element of a project plan. The assumptions on which the plan is based must be articulated. In terms of litigation, is minimal document discovery likely? Will two depositions suffice?

When the lawyer has broken the work down into its smallest constituent parts and determined what level of expertise is appropriate for each part, the lawyer can also assign a cost factor to each part. Those cost elements will aggregate to the total anticipated cost of the work.

Another important talent that comes into play is the ability to marshal different individuals' talents so as to complete the work efficiently and effectively. Clients are focused more and more on the need for efficiency. Those attorneys who are able to satisfy that need will prosper; those who are not will not. With the increasing emphasis by clients on pooling the expertise of independent organizations (such as temporary staffing agencies, document-management companies and legal-research firms), this talent is more important for attorneys than it has ever been. This is particularly true in terms of keeping a schedule intact and maximizing the impact that those differing specialties will have on the final, combined work product.⁵

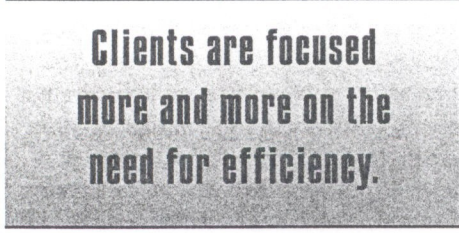
The first, and most critical, step in this process is defining the client's goals. It may also be the step with the greatest benefit for both client and counsel.

With the client's goals in mind, the lawyer can plot out the process needed to achieve those goals effectively and efficiently. The lawyer should be able to identify the assumptions that underlie the plan of attack. The elements of the plan will require the application of different talents, experience, and other qualities, which might all be in one firm, or diffused among several firms or organizations. The lawyer can then assign various responsibilities to the appropriate people,

at the appropriate levels of experience and capability.

With a well-laid-out plan of action, the lawyers and others involved in achieving the client's goals will be able to reach that end point with the least disruption and the fewest unanticipated hurdles. If unexpected developments do arise, however, they can be overcome more easily since they can be viewed in the context of what portion of the plan has been finished, what remains to be accomplished and what can be done to meet the new exigencies.

What are the possible results of applying a project-management approach to legal work? An improved understanding between client and counsel should ensue



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from the fuller discussion of the goals for the assignment. Counsel will become more cost-focused, which in turn addresses a common complaint from clients. Greater ability on the part of counsel to project costs (because counsel have a better understanding of the subordinate elements of the work and the relationships among those elements) will enable them to propose alternative fee arrangements more confidently and in ways that are more responsive to clients' goals. Anticipated completion dates should be more reliable. Through all this, counsel should enjoy improved client satisfaction. And that's the most important result.

The Role of Task-Based Billing

Task-based billing can be an important basis for this new approach for several reasons. First, it requires that the billing professional itemize his or her time in the smallest, most-discrete entries. This parallels the project-management planning exercise, where the work is broken down to its constituent steps. The lawyer will begin to conceptualize the work differently—as a series of distinct, but related, tasks and steps. The relationships among those tasks and steps will be disclosed in the litigation or transaction plan.

Second, task-based bills lend themselves readily to a budgeting protocol. A budget is essential for project management. It is organized in sequential steps that aggregate to the complete process or assignment (or as much as possible). The task-based time entries can be assembled easily in the same order so that progress against the budget can be tracked. In fact, if task-based billing is coupled with codes for the entries, the aggregation of individual time entries into a budget for tracking and other purposes is greatly simplified.⁶ A set of such codes—called the Uniform Task-Based Management System (UTBMS)—was devised ten years ago by a task force of in-house and outside counsel. The submission of invoicing information can even be accomplished electronically over the Internet through the use of codes such as those in the UTBMS.

Task-Based Budgeting as the Mechanism to Achieve a New Pricing

The practice of law for corporate clients has become more cost-focused than ever. Outside counsel experiences this increased cost-focus in the context of discussions about fees (whether at the commencement of an assignment or, less satisfactorily, at the conclusion of representation or after submission of a bill, when the client expresses dissatisfaction with the fee). The pressures on in-house counsel, however, are as intense as those on outside counsel, if not more so.

Business executives now subject legal costs budgets to the same scrutiny as they do other parts of the business concern. The legal function is no longer immune from the drive to reduce expense (while maintaining and, if possible, improving quality) to which all other parts of the company are exposed. The cost of in-house staff is reviewed carefully, as is the cost of outside legal service.

Accordingly, in-house counsel, who bear the immediate responsibility for the delivery of legal service to their corporate employers, are being told to manage the legal affairs with a greater sensitivity to cost as an element in determining whether the service was satisfactory.⁷ This intensified mandate applies on a matter-by-matter basis as well as across the spectrum of legal work.

Thus, in-house counsel are expected to manage the legal work more rigorously than ever before while simultaneously receiving less support (in terms of staff and other resources) to do so. "Do more with less" has never had a truer ring than it does today for inside attorneys at all companies.

It is no longer acceptable to assign a matter to outside counsel and not look at the progress or cost of the representation until the assignment is complete. Corporate management now focuses on legal costs and expects more-frequent, and often more-detailed, reports on the status of matters than they once welcomed.

Even if management expects legal matters to exceed their budgets periodically, executives want their in-house counsel to identify cost overruns as early as feasible. Budgetary surprises are extremely disfavored by corporate clients. Counsel must take action to minimize that problem.

These increased and somewhat conflicting demands spur in-house counsel to search for or develop new tools to enable them to manage the work more closely while they are less involved in the detailed nitty gritty of the substantive work. How can they do so?

Task-based billing helps corporate counsel to better monitor and manage the cost-related aspects of that work. Doing so requires careful planning and thorough research and design. In essence, a law department needs a systems approach to cost.

What should a law department include in that approach? A law department must capture cost-related data on both a matter-specific and an aggregate basis. Therefore, the system needs to apply across the entire range of tasks that comprise the law department's range of work. The department will require sufficient detail as to the cost to allow many different types of analysis by inside counsel.

A law department should capture and analyze cost-related data on an ongoing basis. Budgets should be created and monitored for each individual matter. Costs should also be compared among various matters, so as to determine how law firms handle those matters on a comparative basis. As those data are accumulated, costs can be analyzed for each mat-

ter and compared not only to other, contemporaneous projects, but also with historical information from prior years.

Task-based billing is a critical element of this exercise. That billing format results in output that is useful in ways appropriate to this analysis.⁸ The best use of the data also includes real-time management of the work. In-house counsel should not just review invoices after the fact in order to uncover billing irregularities (a primary purpose of invoice review historically). Rather, in-house counsel should use the data to provide important strategic direction to the conduct of the matter at a time when that direction can be effective. In order to do this, it is critical that law departments incorporate technology into their management of legal costs.

Matter-Specific Budgets for Litigation—The Microeconomic View of Costs

It is increasingly important that lawyers understand the importance of observing budgets for their assignments. While precision in establishing monetary targets for cases may be difficult, law departments are under mounting pressure to adhere to anticipated levels of expenditure in the work that they manage.

Counsel should prepare a budget for any assignment that has a substantial anticipated cost. A single number for the entire matter is generally inappropriate, particularly if the case might take years, because law department budgets are done annually. Moreover, the phases through which every piece of litigation passes are almost independent in their budgetary impacts (discovery might be far more expensive than anticipated, while the costs of briefing and investigating the claim might be less than forecast). For those and other reasons, the budget for a case should reflect its various constituent elements.

How should one prepare a budget? The first step should be to determine how the company wants to litigate the matter, or even whether it wants to litigate at all. In other words, evaluate the dispute in order to identify the ultimate goal. That goal could range from a "no holds barred, no stone unturned" strategy to "settle at all costs." The means of reaching that judgment may vary from company to company, but the purpose is the same—to

provide a foundation for a litigation plan and, of more direct relevance to this subject, the budget for the case.

If a case is a simple one and the ultimate goal is relatively modest (e.g., to settle within 60 days), a simple budget may be appropriate. Such a simple budget may have little detail. It might even consist of a single number, representing the anticipated aggregate expenditures on the case.

For most matters, however, an in-house attorney needs greater detail to manage the case. In fact, the more you specify what you expect to happen over the course of the case, the better you will be able to manage it. The UTBMS enables you to break a case down into its constituent elements—phases and, if you wish, tasks and activities—so as to use the budget as a means to measure progress against your expectations.

The budget for litigation should reflect the litigant's posture in the case. For example, a plaintiff might anticipate filing a motion for summary judgment. The litigation plan should include the factual and legal investigations necessary to prepare that motion. The plan will reflect the party's expectations as to how its case will unfold up to and subsequent to the filing and, presumably, granting of that motion. The litigation budget should reflect the anticipated costs of those factual and legal investigations. The plan and associated budget should also reflect the actions necessary, and associated expenditures of time and effort, in the event that the motion is not granted.

The tasks and activities reflected in the litigation plan for the case should be represented in the budget. Indeed, the litigation plan and the litigation budget should be prepared together. They should complement each other since they represent different perspectives on the same picture, one a financial perspective and the other intended to suggest the types and amounts of professional efforts necessary.

The budget should be prepared using the UTBMS codes. For example, in the example cited, the budget should include the fees and costs associated with that motion, such as legal research, time spent drafting and the effort to review the opponent's information secured through discovery. The various efforts would equate with the different phases and tasks partic-

ularized in the litigation code set of UTBMS.

How would this work? How can it improve the understanding on the part of in-house counsel as to the efforts of the outside lawyers?

Assume that a firm is handling a relatively uncomplicated case and the expectations of the inside and outside attorneys are that it will cost considerably less than \$100,000 in fees. One partner, one associate, and two legal assistants bill time to the file. The case is well into the pretrial stage. There has been discovery and the judge is considering the company's motion for summary judgment. An invoice arrives with the following time entries (in the "block billing" format): See Table 1.

The total amount of the fees reflected in the invoice (\$5,000) is not an exceptional amount, as fees for litigation go. The block billing entries make it difficult to reach any firm conclusions, though, about the efforts expended by the attorneys and legal assistants. Despite that, the invoice might be approved as submitted, perhaps without any questions.

Suppose, however, that the case were being billed in a task-based format. The budget for that case (as broken down among the UTBMS phases, but not including the finer details as to tasks) might be as follows as of the time that the

invoice arrives (reflecting charges for previously billed and paid time but not the just-arrived invoice): See Table 2.

The law firm should prepare its invoices for that case using the same UTBMS codes for all the time entries. As the law department processes invoices for payment, the data can be entered into the budget in order to show the amounts spent to date in addition to the amount budgeted. Moreover, the amounts will be categorized according to the UTBMS codes. In this way, it is easy to monitor the progress of the case financially. The use of the UTBMS codes enables the reviewing in-house attorney to see at a glance how the efforts expended compare against the litigation plan (which underlies the budgeted amounts). If the invoices indicate that the efforts of the outside attorneys do not conform to the expectations underlying the litigation plan and budget, it is easy and effective to speak with counsel in order to determine why that is so.

If it were prepared in a task-based format, the same invoice for \$5,500 would categorize the various efforts of the individuals among the phases of the litigation. The fees of \$5,000 (costs reflected in the invoice equal \$500) are broken down as follows: (1) \$750 for intrafirm conferences by one partner, one associate and one legal assistant, related to plotting

strategy (those time entries are coded at L100); (2) \$950 for preparation of motions to exclude evidence (motions in limine) (L200); (3) \$2,000 for efforts to review and organize documents produced by the opponent (L300); (4) \$900 for the time of two legal assistants and an associate to prepare a trial notebook (L400); and \$400 for research by a junior associate related to the pending motion (L200). Updating the budget to reflect that invoice would result in the following: See Table 3.

Clearly, the same information displayed in a task-based format allows a reviewer to reach some tentative conclusions about the efforts of the outside legal professionals. The efforts related to the already-pending motion would exceed the budget line for that phase of the case. An in-house attorney might therefore question why it was necessary to research issues related to an already-filed motion.

There is certainly reason to question the preparation of a trial notebook at this stage of the case. An obvious question would be whether it was necessary to spend that time, since success on that motion would obviate any need for that effort. It might have been possible to identify that time expenditure under the block billing format (the description of the efforts as "preparation of trial brief" is clear enough to alert the reviewer that such activity can possibly be delayed until

TABLE 1

Invoice

1/1/03	Partner	Conference with Associate and Legal Assistant; review documents produced by opponent	2.25 hrs		
1/1/03	Associate	Conference with Partner and Legal Assistant; conference with Legal Assistants; research re motion; draft motion	9.00 hrs		
1/1/03	Legal Assts	Conference with Partner and Associate; conference with Associate	1.00 hr		
1/2/03	Partner	Review draft motion; research re motion	1.20 hrs		
1/2/03	Associate	Review documents; prepare trial notebook	6.50 hrs		
1/2/03	Legal Assts	Review documents; prepare trial notebook	23.16 hrs		
	Summary	Partner	3.45 hrs @ 200	=	\$ 862.00
		Associate	15.50 hrs @ 150	=	\$ 2,325.00
		Legal Assts	24.16 hrs @ 75	=	\$ 1,813.00
		Costs			\$ 500.00

TABLE 2**Phase (UTBMS code)****Amount
Budgeted****Previously
Expended**

Case Assessment, Development and Administration (L100)

\$15,000

\$13,000

Pretrial Pleadings and Motions (L200)

25,000

24,500

Discovery (L300)

10,000

6,000

Trial Preparation and Trial (L400)

15,000

0

Appeal (L500)

0

0

TOTAL**\$65,000****\$43,500**

resolution of the pending motion). Even so, however, it would have been difficult to learn how much time was spent on that task. Had it been an inconsequential amount of time, there might have been no reason to question it. By segregating that task's time entries, however, the task-based billing format allows us to know much more readily whether the efforts are appropriate for the current stage of the case.

It is possible to eliminate some of the time and rancor that often accompany the review of invoices for legal work. If the task-based data in a particular invoice

again. The invoices received early in the case might contain data that show the outside attorneys are applying considerable resources to accumulating documents and information for production to the opponent, even while the motion to dismiss is pending. If at the same time all discovery is stayed, in-house counsel should speak with his or her outside counterpart to determine whether outside counsel are effectively managing the case. There may be a good reason for undertaking such efforts at that time, but if there is not, the in-house attorney's questions may cause the firm to redirect its efforts toward more

all the difficult and problematic depositions, while the others handle the routine ones that promise no surprises). After analyzing the data, however, the firm might determine that there is a need for additional training. The old method of preparing time sheets, with multiple tasks aggregated in "block billing" entries, made it almost impossible to analyze the information in this way.

Budgeting for litigation imposes discipline. It can support efforts to craft alternative fee arrangements. A national law firm has experimented with various types of alternative fees. The firm's Director of Financial Services has determined that in a number of fixed-fee arrangements, the firm would have enjoyed improved financial returns had its attorneys been more sensitive to and trained at establishing and meeting budgets for litigation.

Multimatter Budgeting Data— The Macroeconomic View of Costs

Analysis of case-specific data, as described above, can yield some important insights into the legal work covered by invoices. Task-based data can be useful in approaching legal work on a "portfolio" basis, as well. In this exercise, comparison of time devoted to different matters (whether litigation or not) can identify the more efficient law firms handling similar work. Aggregation of the data for multiple matters can also enable a law department to identify trends in legal work, such as whether discovery is consuming ever-greater amounts of time and cost. In this way, the department is empowered to view its work from a broader perspective.

It is important to be sure that the comparison is between cases that are not too dissimilar. For that reason, one should try to categorize the litigation into relatively homogeneous groupings. For example, employment litigation is quite different from environmental litigation, so cases from the two substantive areas should not be compared without considerable caution as to the conclusions reached. Even within substantive categories, it may be necessary to distinguish cases by severity or complexity. There are simple employment cases and there are difficult ones.

If one is confident that distinct cases

TABLE 3**Phase (UTBMS code)****Amount
Budgeted****Previously
Expended**

Case Assessment, Development and Administration (L100)

\$15,000

\$13,000

Pretrial Pleadings and Motions (L200)

25,000

25,800

Discovery (L300)

10,000

8,000

Trial Preparation and Trial (L400)

15,000

900

Appeal (L500)

0

0

TOTAL**\$65,000****\$48,500**

conform to the budgeted amounts remaining (i.e., the budget is "in balance"), the invoice might be paid routinely. When amounts in the invoices exceed the unspent budget categories, the client at least should discuss the discrepancies with counsel. Those discussions will be much more focused and productive than they could have been previously because they will address particular reasons for concern. In other words, one will be able to zoom in on the specific variations between the amounts spent and the litigation budget/plan.

Take the previously cited example

productive areas.

A firm also can benefit from having the task-based time entries. Suppose the case is big enough to require the efforts of a team of attorneys within the firm, both partners and associates. If several associates engage in similar tasks, such as preparing for and conducting depositions of employees of the firm's client, their efforts can be compared with task-based data. Those data may indicate that one associate routinely takes longer than the others to complete similar activities. There may be an acceptable explanation for this (perhaps one associate conducts

can be compared, however, task-based data can be valuable. Those data might reveal that one firm routinely spends less time in discovery-related activity, for similar cases, than other firms that represent the same company. If that reflects good management practices by that firm, the client can ask the other firms to apply those practices as well. Again, using the UTBMS codes to aggregate related time entries and permit display of the information in a more useful way allows analyses that would be almost impossible otherwise.

The company can extract similar activity from different cases. Even though different cases often have peculiarities that

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make rigid conclusions difficult, there is no reason why one cannot use the data to ask questions, probe the activities and provide the basis for designing new approaches to the tasks.

A department can periodically analyze the fees paid in multiple cases. Is there a "normal" cost for a particular type of case? Is there an "average" cost for discovery in a category of litigation? Are there demonstrable differences in the efficiency of different law firms? These questions have been almost impossible to answer prior to this. Task-based billing can allow us to begin posing such questions with some assurance that we will be able to answer them.

Another use of the aggregate data will be improved understanding of the cost structure of the legal profession. This will enable firms and clients to better design

alternative fee arrangements. At present, many proposals for alternative fee arrangements are based upon mere educated guesses. Neither the firm nor the client has a high comfort level that it will receive or pay a fee reflective of its own

position (the value to the client and the need on the part of the firm for reasonable compensation). As they both acquire experience with matters handled under task-based billing arrangements, they will be aware of what goes into each type of representation. Their discussions about fees will be more meaningful for both.

Monitoring and Tracking Your Experience

One aspect of the effort to craft alternative fees that often is overlooked is the need to monitor the arrangements. It may be necessary to adjust a fee arrangement during its course in response to unanticipated events. In order to do that, one needs to have an up-to-date understanding of the status of the matter. How is each party (the client and the firm) faring under the arrangement? Is it advantaged or disadvantaged by the arrangement compared to where it expected to be? If the client is using task-based budgeting as an important element of the fee arrangement, is the matter under or over budget? If so, where and why?

Matter-specific budgets serve important goals of corporate clients by imposing discipline in the management of legal work on a matter-by-matter basis. They assist lawyers in knowing when cases are getting out of control, since they can serve as an "early warning system" to alert the lawyer that events are not following the expected course and that the costs are not as anticipated.

It is also important to use the data from multiple matters to test the accuracy and utility of the alternative fee arrangement under which they are being handled. If a firm has agreed to handle a certain number of cases for a set fee for the entire caseload, that agreement is premised on an underlying assumption of the anticipated average cost per case. Variation in the costs of different cases is expected (and, in fact, that variation is the basis for negotiating a fixed fee for multiple cases). If that variation is too great, however, or the cost of one case is dramatically higher than the anticipated norm, the firm will be financially stressed. If, on the other hand, the anticipated norm is far greater than the actual experience of the firm and the client, the client will end up paying too much for the representation.

The Director of Financial Services of a national law firm cited above indicated that the firm periodically reviews its alternative-fee arrangements to see if they are worthwhile. In the aggregate, fixed fee arrangements have provided premium-billing opportunities for the firm.

By collecting cost data from all the cases covered by the fee arrangement, the client and the firm will be in a position to review that experience later. They will be able to determine if either of them was disadvantaged by the arrangement more than they had thought likely when they negotiated it. They will be able to adjust the arrangement if they so desire, on the basis of facts rather than supposition.

How should the client and the firm track the arrangement? What information should they collect? The data to monitor will vary from situation to situation. There are some criteria, however, by which to design the data-gathering efforts.

The first step is to decide what you want to do with the information. Do you need to assure yourself that the work is performed according to the agreements? Do you wish to keep track of the number of transactions of a certain type for internal reporting purposes? Do you want to monitor the success of the alternative arrangements, from the perspective of how much you have saved (if you are the client) or how profitable the arrangements have been (if you are the law firm)? For each of these uses, the data to be recorded might be different.

Some of the discrete data that you might want to track include the following:

1. Number of Transactions/Cases: If the fee depends on the number of cases or transactions assigned to a particular firm, this clearly is an important criterion.
2. Complexity of Transactions/Cases: This may be important, in combination with the number of cases or transactions, since the amount and types of legal work will vary among simple, routine and complex deals or litigation.
3. Substantive Area of Law: Environmental litigation, as an example, is quite different from many others on a variety of crite-

ria. It might be important to capture those distinctions in order to appreciate fully the types and volumes of work. One private placement loan may require considerably more work by more individuals than a mortgage loan of the same dollar value (or vice versa).

4. Amount of Work: Even within categories of otherwise similar work, there likely will be variations in the amount of time expended in their completion. Even if not relevant to the fee charged (as for a fixed-fee arrangement for transactions), it may be helpful (even if not necessary) to know which ones required greater time commitments. (This is probably of particular relevance to a law firm in this type of arrangement, for purposes of evaluating profitability of various arrangements.)
5. Transaction Size: A lease at a regional mall may be considerably more complex if the space in question is a major, anchor tenant's spot rather than one of the many smaller spaces leased on more routine terms.
6. Cycle Time: The length of time that it takes to complete each case or transaction can be of immense value, particularly to a client, in assessing the nature of its legal work. Many companies have determined that resolving litigation more quickly is, by itself, a powerful method of reducing litigation costs.
7. Fee Payer: In many situations, a fee may be paid by someone other than the client of the law firm. This is particularly true in the loan context, where the fees of lender's counsel may be paid by the borrower. There may very well be other examples, such as where an investment fund is the payer.
8. Law Firm: For the client, it is important to keep track of which firms handled which assignments


if it retains more than one firm for the type of work. It may be critical to being sure that the expectations underlying the fee arrangements have been complied with, or for other purposes.

The data needs to be accessible to both the firm and the client. For that reason, it is extremely helpful to collect it in a database. Doing so will not only make that information available when needed, but if done properly the data will be subject to different analysis depending on what question is posed.

For example, if each matter is entered into the database separately, with the various criteria listed above kept in distinct sortable fields, the same data will be useful for different analyses despite being entered once. The number of transactions can be the basis for determining whether the expectations of the firm and client as to the total amount of work covered by the arrangement have been satisfied. That same datum can be used to calculate the average cost of each transaction. Each of those computations may be of independent value.

A database can be shared electronically. Since many of the same data are of interest to the client and the firm for purposes of measuring the success of these fee arrangements, doing so will greatly simplify their discussions about the arrangements. Through electronic sharing of the information, they will be able to share their conclusions and opinions as to whether the relationship is working as anticipated. If the data are accessible to each equally, their respective views in that regard cannot be discounted due to disparate information.

Once the data are available and the client and firm complete their respective analyses of the benefits and costs of the arrangement, they should work together to improve the relationship. The partnering relationship requires investment by both of them, and it is logical to use the available information to improve that relationship if the facts suggest that it could be better. This is particularly so since alternative fee arrangements are relatively unknown to all and it is unlikely that the first attempts to design meaningful fee

arrangements that forsake the hourly rate will be universally fruitful. 

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Endnotes

1. According to a PricewaterhouseCoopers survey performed in 2001, the aggregate expenditure on legal matters of 203 companies surveyed, including inside and outside expenses, was over \$6.5 billion. The average per company was over \$32 million and the median expenditure was approximately \$23 million. (Telephone interview of Randy Frey of PricewaterhouseCoopers, March 1, 2002.) While that survey may have included larger companies, it still suggests that the total market for legal services for companies is quite large.

2. For the present article, the term "corporate client" means a business in whatever form, whether it is organized as a corporation under the statute of a state, a limited liability corporation, a limited liability partnership, a professional corporation or some other type of entity.

3. Surveys of in-house attorneys continue to reflect high levels of interest in alternative fee arrangements but, simultaneously, that only small fractions of the matters that they manage are subject to such arrangements. For example, a survey of members of the American Corporate Counsel Association (ACCA) conducted in 2001 revealed the following: for 78.2% of the respondents a median of 80% of the total work performed by outside counsel is covered by standard-hourly-rate-based fees, while discounts from hourly rates cover a median of 40% of the work for 55.2% of the respondents. Fixed fees per matter accounted for 10% of the work (median) for 25.5% of the respondents and retainers for certain types of work during certain periods covered 10% of the work (median figure) for 11.1% of the respondents. See *2001 ACCA Partnering With Outside Counsel Survey: Assessing Key Elements of the In-House Counsel/Outside Counsel Relationship by ACCA and Serengeti*, page 158.

4. This effort by corporate clients to have their outside firms "unbundle" legal service is a benefit for smaller law firms and sole practitioners. Small and solo practitioners will be able to compete more easily with larger firms because they will be able to make proposals to handle work using the resources of other lawyers, other companies and different services that are not a part of their own firm. Clients have expressed an interest in such "virtual" firms to service their needs and the flexibility thus represented will be viewed as an asset.

5. Think of it as serving as the coach of an all-star sports team. The individual players are all expert at their respective roles and the aggregation of talent on that team usually exceeds

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SPECIAL BILLING AND TASK-BASED BILLING

(Continued from page 17)

that of any single team in the league. The all-star team, however, does not usually play together throughout a season or through several seasons. Unlike members of one team, they do not have the opportunity to become familiar with each other's talents and idiosyncrasies, sharing strategies and a playbook. This puts a premium on the ability of the coach to meld those talents effectively on the spot, just prior to the game.

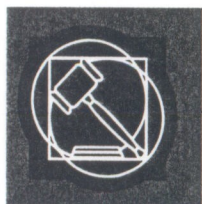
6. At first blush, task-based billing seems out of place in a discussion of alternative fee arrangements. The term "alternative fee arrangements" generally implies that the fee is based on something other than the hourly rate, whereas task-based billing suggests that the fee will be premised on the amount of time

billed (*i.e.*, some time-based charge, like the hourly rate). The disincentives (from the perspective of in-house counsel) that the hourly rate creates therefore seem as prevalent in task-based billing as they have been in the past. If the purpose of an alternative fee arrangement is to provide the client greater control of the cost of its legal service, however, then task-based billing fits in this discussion. Because task-based billing provides such a powerful basis for budgeting, it gives the client a greater ability to manage the work in order to keep costs under control, or at least more anticipatable. In that way, task-based billing serves the same goals as do alternative fee arrangements.

7. The difference in perspective of in-

house and outside counsel is reflective of this point. When outside counsel discuss the "quality" of legal service, they seem to view it in isolation as if it could be measured on a stand-alone basis, like a good brief or argument. For in-house attorneys, however, the cost of the legal service is an inherent element of its quality. A brief that might be the best ever written on an issue would be inappropriate to a standard slip-and-fall case if its cost far exceeded the value of the case.

8. This does not refer to the jurisprudential aspects and the substance of the legal work involved in the representation. Rather, lawyers should approach the legal work as a project to be managed and apply some basic business concepts to that work.



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