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OCTOBER 31, 2008 | LAW PRACTICE

Billable Hour Likely to Face More Scrutiny in a Lean Economy

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By Pat Broderick

Daily Journal Staff Writer

SAN DIEGO - As an engineer for General Electric more than 20 years ago, Pam Scholefield knew her way around construction sites, and knew what it took to get large commercial and public works projects done. But as an attorney with her own firm this past decade mired in the world of billable hours, it was a different story.

Then one day this spring, a contractor, who was not a client, asked her a question.

"The contractor had been through litigation himself, and he was disillusioned because the fees kept going up and everything took too long," Scholefield recalled.

"He said, 'I don't understand why law firms can't give a litigation budget before wePam Scholefield even go down that road. Contractors do. Why can't attorneys do that?'"

Scholefield pondered the question.

"My only response was, 'Of course we can.'"

The billable-hour debate has been growing in recent years and particularly in these lean economic times when lawyers are experiencing even more pressure to respond to their clients' bottom-line needs.

Developed more than three decades ago, the practice of hourly billing was meant to provide more transparency for clients who were complaining about receiving bills for services rendered with little accountability. But critics say the well-intentioned system has since gotten out of hand.

As a result, some firms have been responding with alternative billing models, such as using nonpartnership-track lawyers, contract attorneys, local services hubs and offering professional courtesy discounts.

Scholefield began researching and reading books on the topic.

"It bothered me to charge clients by the hour, now that I knew there are other ways," said Scholefield, who runs a small construction law firm, Scholefield Associates, in downtown San Diego.

So, with help from attorneys Bryan Weaver, who provides construction and engineering expertise, and Johnny Manriquez, who is assigned to business development, they came up with a model that would replace the billables that Scholefield had long been using.



TOM KURTZ / for the Daily Journal

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to business development, they came up with a model that would replace the enables that Scholefield had long been using.

Scholefield's Guaranteed Maximum Price, or GMP, program offers current and prospective clients the opportunity to be given a budget that covers a typical litigation schedule, including case workup, written discovery, depositions, experts, mediation and trial work, in addition to unexpected costs, known in the construction industry as "change orders."

Each segment of the budget includes a fee, based on the number of months estimated for the work. If a resolution is reached sooner than anticipated, the client pays only for the work actually done. And, Scholefield said, unlimited phone calls also are included - a perk that raised the eyebrows of some of her attorney acquaintances. There is no retainer involved and no obligation on the part of prospective clients who might not hire the firm.

Her GMP program improves communication between the attorney and client contemplating litigation, Scholefield said.

"You can tell your client that litigating this can cost more than what you are owed," she said. "Having sticker shock at the beginning is better than eight months down the road."

Scholefield had discovered a role model in Christopher B. Marston, a blogger who heads up his own Boston-based firm, Exemplar Law, which employs more than two dozen attorneys. In 2005, he set out to shape his new business as a "firm of the future," free of such traditional trappings as billable hours, and focused on what he calls "the value of services provided."

"It's very simple," Marston said. "You price based on what is the worth to the client. How complicated is that?"

Attorneys shouldn't be asking, "What am I worth?" he said, but, "What is this worth to the client?"

"We give them 100 percent visibility," he said. "They don't want to be surprised."

Jeff Bleich, immediate past president of the State Bar and a partner in the San Francisco office of Munger, Tolles & Olson, observed, "Just because you can justify it, and you are doing it, doesn't mean it's the best and highest use of your time. It doesn't make you accountable for the value of that time."

But how does one define an element as subjective as value?

"If you're a good lawyer, you really do know it when you see it," said Michael Roster, retired general counsel of Golden West Financial and Stanford University and former managing partner of Morrison & Foerster in Los Angeles.

Roster is chairing the "Value Challenge" steering committee for the nationwide Association of Corporate Counsel, a 25,000-member in-house bar group. The goal of that initiative is to "reconnect value and costs for legal services" through better communications among corporate counsel, law firms, law schools and others, he said.

"We are looking at different approaches to get off of billable hours," Roster said. "The judicial system is not a particularly efficient way to solve a dispute. If you give law firms incentives to manage a total budget and keep you out of trouble, they get good at it."

"Lawyers are dreadful managers and massively conservative and only do what they were doing yesterday. To tell them to change is beyond the pale."

The Association of Corporate Counsel and Serengeti Law recently released results from their annual survey of in-house counsel. Among the findings is that "despite a significant amount of negative publicity" about billable hours, the vast majority of corporate legal work is still done under hourly rates, either standard or discounted. The survey also showed that the percentage of in-house counsel who don't use alternatives to hourly based fees is gradually rising, indicating "that billing by the hour is becoming even more entrenched."

This doesn't surprise Kristin Stark, director of law firm strategy and structure at Hilderbrandt International, a professional services company.

"I don't see the billable hours going away altogether," she said. "But I think there is a trend that law firm leaders should have an eye on, listening to clients who give them clues and paying attention to those clues."

Many firms hold to the status quo "because they can," said Susan Hackett, senior vice president and general counsel for ACC.

"Law firms aren't different," Hackett said. "They are in business, and, for the most part, clients are coming to the point where they are holding the firm's feet to the fire."

But one size doesn't fit all firms, said Roger Haerr, a partner in the San Diego office of Luce, Forward, Hamilton & Scripps, who leads the firm's construction practice. Alternative billing options might work in a routine dispute, he said, but not in all types of complex litigation.

"You have very little control over what one's adversary is doing," Haerr said. "It's difficult to put a price tag on something like that. In a lawsuit, you are involved in civil warfare. It's not a voluntary process."

Moreover, Haerr said, he disagrees with critics that billable hours can lead to foot-dragging and inefficiency.

"This is a very competitive marketplace and you can't survive if you are inefficient in what you are doing."

Still, Bleich argued, the billable hour can cast shadows.

"In many circumstances, it creates a wedge between an attorney's interest and a client's interest," Bleich said. "Even to the extent that attorneys are behaving ethically and not succumbing to pressure to do work unnecessarily or prolong litigation, it creates a cloud over the relationship. You want an attorney-client relationship to be one of trust."

Bleich said he's had success with a budget that includes an end-of-case bonus, based on the quality of work done.

"The better the job we do, we get more of a bonus," he said. "They trust us because we trust them."

The VeraSage Institute, a Silicon Valley-based online think tank, has among its stated goals "burying the billable hour and archaic time sheets."

"I don't think there is a consumer alive who would tolerate it from any other business on the planet," said Ron Baker, blogger, writer and co-founder of VeraSage. "It's immoral and unethical, and it places the risk on the customer. We are suggesting to firms, do what every other business on the planet does. None of us would fly on airlines that charge us \$4 a minute."

But billables or nonbillables, it all comes down to "a test of reasonableness," said Ruben Garcia, a professor at California Western School of Law.

There are no absolutes, he added.

While fixed fees might guard against excesses, Garcia said, it sometimes provides "negative incentives to do your best work, knowing that you are going to do a fixed price, regardless."

Is there financial risk on the firm's end?

"Absolutely," Scholefield said. "If I mess up an estimate, we are going to eat it, just like contractors."

But, Scholefield, a veteran of the construction industry, said she is confident that she knows her turf.

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DISCUSSION

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