**The in-house counsel**

Most law firms are traditionally set up to bill by the hour, with rates based on the level of experience of the lawyer involved. I think it’s important to appreciate that psychologically that’s how they manage and measure their value as they’re providing an intellectual service. In a way, it’s a bit like when you go to the hairdresser and you pay more to have the top stylist compared to the trainee. So there is a lot of reluctance to change.

But the world is moving on, and many clients have had to cut their budgets, adopt efficiencies and set up new systems due to the economic climate. It’s naive to think that those changes are going to be reversed, even when the economy recovers. So we all have to adapt. Many outside firms now recognise that clients want something different, though they have not been as proactive in suggesting alternative models as we would like. I think the key starting points are transparency (for example regarding timesheets) and a better understanding of who can do what and when.

Some firms have suggested paying a retainer up front for a fixed period or set of cases. But there is reluctance among in-house counsel to do that unless you can manage the volume very carefully. Clients can also feel resentful if they are later presented with additional costs for things outside the agreement. Despite that, I think this is something that could be worked on by clients and law firms and could offer benefits.

For trade mark prosecution and opposition work we now insist on fixed fee billing, rather than hourly rates. That includes searching, filing and renewals. It works well for us because we have volume and we don’t charge everything back to particular brands. Of course some of our cases are straightforward and some are more complex, but because of the number we have, we think it balances out over a year or 18 months. That may not work for every client, particularly smaller companies that don’t have as much work to give out.

There was quite a lot of pushback from some firms when we suggested moving to fixed fees, and we had to show them the benefits and in particular the figures that showed they would not lose out over time. I suppose we also dangled the carrot of future work. We also had to realise that it presented internal difficulties for many firms, for example in the way individual staff were recognised, and they had to take time to address that. I think it was particularly

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**The boutique firm**

Pressure to rein in outside legal spending has resulted in increased workloads for in-house legal departments as companies look for alternatives to outsourcing work to large firms. This has led to more unbundling of outsourced legal tasks (for example, using niche legal service providers such as legal process outsourcing companies and former large firm attorneys), as an ever-wider spectrum of legal providers vie for corporate work. The billable hour model still retains the largest piece of the pie, but law firms are increasingly asked to participate in requests for proposals and alternative fee arrangements.

Even as pressure intensifies for alternatives to the blank cheque of the billable hour, most so-called alternative billing arrangements are nothing more than negotiated discounts that lack price assurance and transparency. They fail to address who is doing the work and what work is, in fact, being performed in consideration for the fee. And while law firms frequently provide estimates, such estimates are not binding, much less transparent.

An alternative to the traditional hourly model or alternative fee arrangements is to provide clients with a transparent, fixed-price fee model. This can be achieved by creating a detailed statement of work for each client matter, much like a general contractor does with a building project. One approach, such as that adopted by Clearspire, involves simultaneous contracts: an internal contract between attorneys (who are firm employees practising only for Clearspire) and the firm, and an external contract between the firm and its client. All three stakeholders in this model are incentivised to ensure that the matter is handled effectively, efficiently and with price predictability.

After determining client goals and objectives for the matter, the firm then selects the attorneys best-suited to the work based upon domain expertise, appropriate level of experience and availability. The statement of work is customised from proprietary templates created for each practice area, enabling the lead attorney to assign and budget for the phases, tasks and activities involved in the scope of work. As part of the internal contract, each attorney in the selected team commits to specific tasks and activities to be undertaken within a set number of hours, based on certain assumptions and deliverables, and by a set date.

The client is then presented with the statement of work for review and comment. Once accepted, the scope of work becomes the basis of the external contract, whereby the client knows who is doing the work, what is being done, how long it will take, billing assumptions and total project cost.

This process achieves complete transparency, alignment of objectives and...
fixed fees?
predictability. Should we ask law firms to move away from the billable hour?

The global firm

The costs of IP litigation vary tremendously depending on factors such as the rights at issue, availability of evidence, extent of disclosure, and the competence and attitude of the opposing lawyers. The vast majority of work carried out by the UK dispute resolution department of Rouse, a specialist IP firm, is charged to our clients on an hourly basis. The scope of the work is agreed beforehand and at the end of each month our clients receive an invoice with detailed narratives showing the number of hours worked, by whom and on what. Our clients are not charged for work not actually done, and the firm does not lose income for value given, both of which are possible outcomes of fixed fees. Billable hours are also used by the court and our opponents to assess the recovery of costs incurred in litigation.

We understand that clients need certainty when it comes to their legal spend and do not want to be surprised by receiving a bill higher than expected. That is why the hourly rate works most effectively when there is a deep level of trust and understanding between the client and the firm. Both parties must be transparent and able to communicate freely on any concerns. It is also incumbent on us to manage our client’s expectations and we have invested heavily in IT and accounts staff to provide us with fee data and analysis, both of which enable us to provide timely information to clients of fees incurred on a matter and to give useful and realistic costs estimates for certain types of work or for certain stages of litigation.

Rouse has adapted to offer fixed fees for certain types of litigation work that would normally be charged on an hourly rate basis. For example, for one client we have agreed a fixed fee for sending cease and desist letters to infringers of its IP rights. The letters are in a standard format, the infringements are of a very similar nature and there is a regular flow of such work, allowing us to know with more confidence what is going to be entailed. Work done after the cease and desist letter has been sent is charged on an hourly basis. This means the client knows its initial fee spend on a new matter in advance but is then able to prioritise which matters are pernicious enough to merit greater spending and which matters should be settled as quickly as possible in order to manage costs. We have learned from the experience of doing this and that has helped us to become more efficient in a very specific area, and more able to the factors that will drive the costs of a matter up, or down.

Pricing is fundamentally about value – delivering something clients want, in the way they want, at a price which is fair and acceptable to both client and law firm. What clients want varies. Some will be looking for a defined outcome at as knowable a cost as possible. Others will want a very bespoke service with less measurable success criteria. Different notions of value will dictate different approaches to pricing.

Any commercially minded firm offering fixed fees for complex litigation will put a great deal of effort into defining and limiting scope at the start to ensure that it does not find itself committed to a crippling amount of time on an activity which was not foreseen. As a result, fixed price agreements for complex activity may not bring the benefit of certainty they promise. Clients attracted by fixed fee deals may find that a lot of work has ended up being “out of scope” and therefore charged for additionally, ultimately damaging the client relationship.

Katrina Burchell
Head of trade marks
Unilever

and price predictability for each matter. Technology accelerates the process, allowing the scope of work process to be completed quickly and seamlessly, regardless of geography. In addition, the use of technology dramatically reduces heavy real estate costs, reducing imputed billing rates. The result is a value-driven fixed pricing option with unprecedented transparency and predictability.

One area in which this structure might not make sense is when a client wants to call the firm with relatively quick, discrete issues. In those cases we open a house account with set parameters of how we will work with the client to handle such issues which do not rise to the level of a full-blown matter.

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