

# THE DAILY RECORD

Monday, July 17, 2017 / Volume 109 / Number 136 / \$2.00 • Western New York's trusted source for legal and real estate news

## Civil LITIGATION

### Bringing some cost certainty to commercial litigation

The “Great Recession” that began in 2007 had tremendous impact on the U.S. economy, and the legal industry was not immune to that impact. While law firms had been changing their business and pricing practices in response to advances in technology and client demands, the pace of change has accelerated in the years following the economic crisis.

For a long time and for many law firms, pricing has been based on the billable hour: a law firm would charge its client for the legal services provided based on the number of hours worked by its lawyers, multiplied by assigned hourly rates.

The Georgetown Law Center for the Study of the Legal Profession recently issued its “2017 Report on the State of the Legal Market.” The report provided a detailed analysis of the financial performance of U.S. law firms since 2007, tracking the flat growth in demand for law firm services and summarizing the fundamental market changes that have affected law firms. In particular, the report stated that one of the most significant changes of the past decade has been “the effective death of the traditional billable hour pricing model in most law firms” in the face of the increasing use of alternative fee arrangements, or AFAs. Broadly defined, AFAs include fixed fees for specified services, hybrid arrangements combining lower hourly rates plus a contingent fee component (sometimes referred to as a success fee), and fee budgets with caps.

The report acknowledged that while most firms have not done away with hour-



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ly billing, the legal market’s imposition of “budget discipline” on firms has forced them to develop different ways to price their services. The report admitted that while AFAs probably account for only 15 to 20% of all law firm revenues—and that budget-based pricing is much more prevalent—it concluded that in many firms those two methods combined may well account for 80 or 90% of all revenues.

Of course, what are now called AFAs are not new. Many firms handling transactional, real estate and bond work have for years offered billing arrangements providing for fixed fees, often in consideration of the clients’ agreements to provide a certain volume of matters to the law firm. In addition, some law firms have retainer arrangements with certain clients, under which they are paid a set monthly fee regardless of the number of billable hours worked by the firms’ lawyers on those clients’ matters.

Although litigation is generally more unpredictable than transactional work due to its adversarial nature, which makes it more difficult to accurately project fees, insurance defense firms have worked under insurance company-imposed cost controls since the late 1980s. These cost controls have included pre-negotiated and

below-market billing rates, detailed litigation plans and budgets, and litigation management guidelines that require the carrier’s pre-authorization for legal research, filing of motions and depositions. Some insurance companies (for example, carriers who write automobile insurance) have for many years imposed flat fee arrangements on the law firms that defend their insureds, under which the firms are paid pre-determined fees for specific tasks, such as \$200 for an answer to a complaint, \$300 per deposition, etc.

Other types of litigation—and particularly the broad spectrum of lawsuits involving contested claims for money damages arising from some type of contractual or business relationship or transaction, often called commercial litigation—present further challenges to law firms who are thinking of offering AFAs or are asked by their clients to provide them. Such matters are usually highly contested, involving counterclaims, thousands of documents and numerous motions. Nevertheless, the preparation of a detailed litigation plan and budget at the outset of a commercial lawsuit has many benefits:

- The lawyer is required to think the case through from pleadings to trial;
- The client gains an understanding of the many stages of a lawsuit;
- The client gains a level of certainty on the cost of the foreseeable legal work and when those costs can be expected to be incurred; and

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- The client can gauge the cost/benefit of various litigation tactics and any potential compromise or settlement.

As a first step in the development of a detailed commercial litigation plan and budget, the lawyer must debrief the client on the specifics of the dispute: What do the key documents provide? What communications (written and oral) occurred between the parties? What will the other party (or parties) allege, and on what factual basis? How many pages of documentation (paper and electronic) will be subject to production in the pretrial discovery process? Who are the witnesses and what do they know?

From there, the lawyer must determine all foreseeable legal and factual disputes: How much research will be required to develop the client's causes of action and/or defenses? Does either party have

grounds for a motion to dismiss, or are any claims or defenses susceptible to a summary judgment motion? What information may be subject to a motion to compel or for a protective order? There are also miscellaneous tasks and concomitant legal expenses to be considered. Is there a need for expert testimony? How often, and at what level of detail, will the client want to discuss the case? What is the expected level of interaction with opposing counsel?

The resulting litigation plan and budget should provide the client with fairly accurate estimates of expected legal costs for each stage of the lawsuit: research, investigation and document review; preparation of pleadings; paper discovery (document requests, interrogatories, notices to admit); preparation for and conduct of depositions (including the number of expected depositions); motions to compel or for a protective order; dispositive motions;

mediation (if applicable); preparations for trial or arbitration; and conduct of trial or arbitration.

Some law firms may not be ready to make the leap into AFAs for commercial litigation. But regular, dedicated efforts to project expected legal fees through detailed litigation plans and budgets, followed by post-resolution analysis of the accuracy of those projections, will give those firms valuable experience—which will help make future projections increasingly accurate, and a body of data which they can use to confidently offer AFAs in the appropriate cases.

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