

# National Counsel and Alternative Fee Agreements

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Abraham Lincoln once famously said, "A lawyer's time is his stock in trade." If Honest Abe had it to do over again, I suspect he would choose his words more carefully. Attorney fee structures premised exclusively on the billable hour have been under scrutiny almost since the time they were popularized in the late 1960s. Is there a compensation system that improves the delivery of legal services, the reputation of the profession and our relationships with clients?

The billable hour has not always been the prevailing model. One of my partners, a trial lawyer for over 40 years, recounted for me the 1960s billing practice. He and two partners would gather in a conference room and review the correspondence file for a recently concluded case. From the letters to the client they would discern the amount and quality of work done, and assign a value. They might add a little if the result was especially good, or subtract if it was below average.

Consider the history of legal fee structures. In the 1800s, state law capped legal fees by task in many places. In the 1930s, state bars published minimum fee schedules for their members. Until the middle 1960s, many lawyers provided bills for "services rendered" in one lump sum. Due to anti-trust concerns, the desire of carriers and clients to have more detailed information about work performed, and the profession's need to better track our work, the billable hour has almost completely replaced these fee structures.

The American Bar Association "Commission on Billable Hours Report" noted both the strengths and weaknesses of the billable hour fee structure. The billable hour is simple to apply and understand, provides detailed information about work performed, and reduces the risk of price-fixing. On the other hand, it discourages attorney-client communication, early case planning and efficient use of resources. Also important, the billable hour is based on work performed rather than value obtained. As one looks for an improved method of valuing services, one should be mindful of both the strengths and weaknesses of the existing paradigm.

The use of national counsel can be one method to improve the delivery of legal services while controlling costs. When managed properly, national counsel can leverage expertise, and improve attorney-client communication, early case planning, and efficient use of resources. Appropriate alternative fee structures through national counsel may result in lowering total attorneys fees for the litigation or project and reflecting the value of the service rather than just the time spent. Most important, it can ensure a consistent approach and predictable results.

When the national counsel relationship is mismanaged, however, it can simply create a layer of second-guessing and bureaucracy that bloats legal bills and prevents meaningful communication between local counsel and the client. Appropriate alternative fee agreements can be used to align the interests of the client and national counsel to ensure the benefits of this arrangement and avoid potential pitfalls.

Alternative fee agreements must consider the specific needs of each assignment. There is no "one size fits all" form agreement that will magically slash bills 20 percent and make perfect the delivery of legal services. Ultimately, the creation of an alternative fee agreement that meets the needs of both client and national counsel is a collaborative process that requires significant planning and exchange of ideas. With that caveat, the following are just a few ideas to consider:

Flat fees or waived fees for scheduled attorney-client communication and reporting;

Flat fees with a reducing curve for repeated expert preparation and depositions;

Flat fees with a reducing curve for repeated dispositive and other substantive motions;

Paying bonuses to national counsel for reduction of total costs;

Penalizing national counsel for excess total costs;

Bonuses or penalties to national counsel based on results.

Alternative fee agreements can be designed to improve the quality and cost of legal services in almost any circumstance. Where appropriate, the retention of one national counsel to coordinate litigation nationally can provide a significant benefit by leveraging expertise, improving communication and aligning the interests of the lawyer and the client.

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