

# As Time Goes By

Legal departments explore  
alternative billing methods

*By Amy I. Stickel*

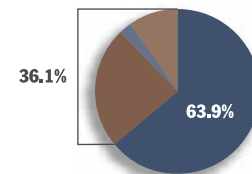


## Legal Department Size

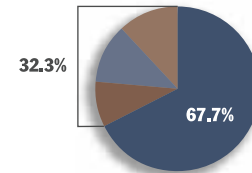
For the last four years, most respondents have come from legal departments with five or fewer lawyers.

Number of Lawyers

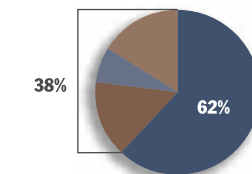
1-5 6-10 11-20 More than 20



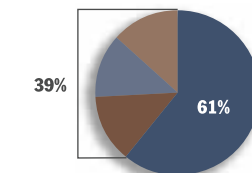
2005



2004



2003



2002

Source: LexisNexis Examen Inc.

In-house counsel spend much of their time racing against the clock, trying to check items off their to-do lists before adding more tasks.

For many, there are just never enough hours in the day.

But besides monitoring their own clocks, in-house counsel also spend a great deal of time watching the hours that their law firm lawyers bill: According to “The Fourth Annual Outside Counsel Fee Survey,” conducted by LexisNexis Examen Inc., nearly 95 percent of legal department respondents still pay their outside counsel on an hourly basis, despite all the grumbling of in-house counsel about the hourly bill.

Some legal departments are working with other compensation methods, of course—38.4 percent of respondents have paid their law firms on a flat or fixed fee rate, and 36.3 percent have developed a blended hourly rate (see chart, “Counting the Hours”). But for many of the respondents, other billing methods such as flat fees, contingency rates and blended hourly rates are just not part of the picture.

### An Inefficient System

Lack of time, difficulty in implementing an alternative-fee structure and law firm resistance are the main reasons legal department respondents cite for not using alternative billings. “They are helpful in limited circumstances but hourly is still the predominant billing method,” said one survey respondent.

But while it may seem easier to continue with the hourly billing because of all those reasons, it’s actually more work—and more expense—to stay with the status quo, says one general counsel.

“I hate hourly billing,” says Rick Lavers, executive vice president, secretary and general counsel of Coachmen Industries, Inc., Elkhart, Ind. “It has all the wrong incentives. I use any opportunity to move away from hourly billing.”

In-house counsel must focus on being efficient and getting things done, and Lavers considers the hourly billing rate the antithesis of that. When he first considered moving away from hourly billing several years ago, Lavers experienced many of the same concerns other legal departments expressed in the survey: How would Coachmen’s law firms react? How would the legal department gather the data to determine pricing for alternative fees?

“The problem with fixed-fee billing is that the law firms are afraid of getting burned,” says Lavers. “Another problem was a lack of data.”

At the time, Coachmen did not have a matter management or e-billing program, so Lavers’ three-member legal department began looking closely at the number and types of cases they dealt with most frequently. Some matters were fairly repetitive, so Coachmen’s legal department began examining what it paid law firms to handle those matters, along with what it seemed they should be paying their law firms. And the department realized that what it was paying didn’t seem reasonable in many cases, even after factoring in variables such as the geographic location of the firm. “We sat around with coffee and doughnuts and kicked around how many hours this [type of matter] should take,” he says.

Lavers then approached his law firms and asked what they thought of moving to the flat or fixed fee. “There was a lot of caution, but there was also a fair degree of acceptance,” he says. Coachmen started with law firms the company often employed, and he made it clear that the intention of alternative fees was not to launch a bidding process to drive down costs.

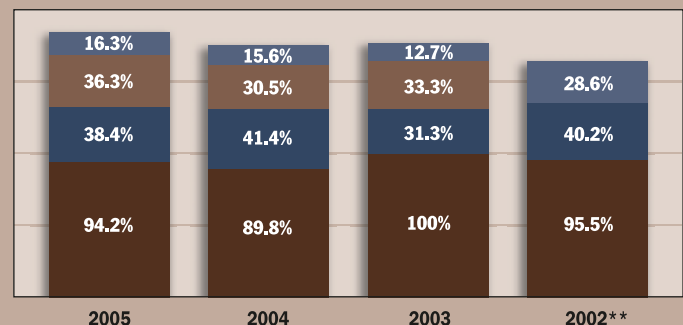
“You get what you pay for, but you have to be fair,” he says. Lavers estimates that about 75 percent of the law firms had no problem with the alternative billing, 10 to 15 percent

## Counting the Hours

For most legal departments, the hourly billing rate is still far and away the most common method of compensating law firms.

Method\*

Contingent Fee  
Blended Hourly  
Flat or Fixed Fee  
Hourly Rate



\* Respondents could select all that apply.

\*\* Category labels vary slightly from subsequent surveys. The “Blended Hourly” category was not an option in 2002.

Source: LexisNexis Examen Inc.

were hesitant and another 10 percent just weren't comfortable with the process.

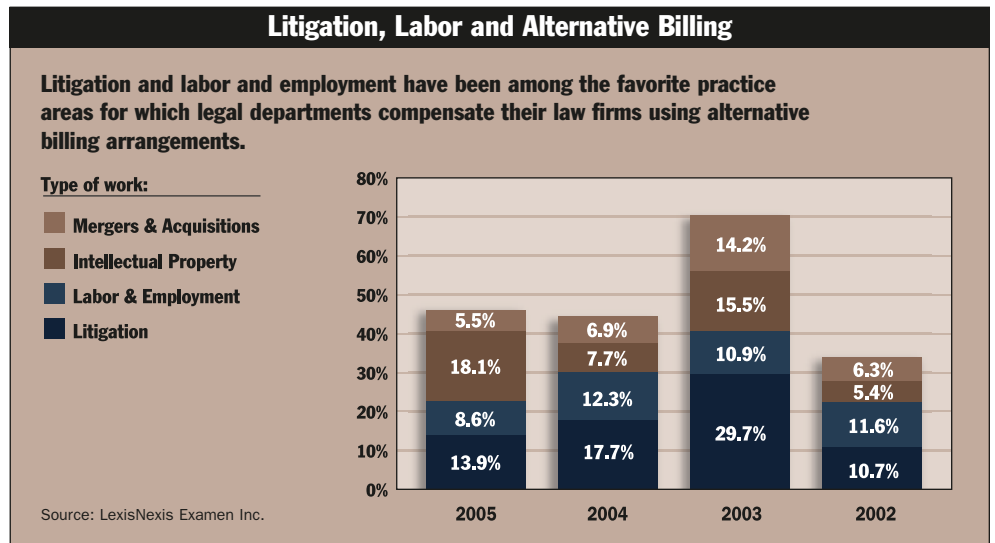
He worked with those reluctant firms and managed to bring most of them on board. "There was a learning curve," he admits. "Law firms have to get comfortable with this. Some law firms have figured it out, and some are still scratching their heads."

### Start Small

It is still hard to shake the hourly rate, and some matters do lend themselves to that billing method, says Lavers. But while Lavers is a believer, he is still the exception, according to the survey, which was conducted at the Association of Corporate Counsel's annual meeting in October 2005.

"It is a good idea, but practically it can be difficult to implement [because] it's hard to estimate time," said one survey respondent. "I would consider alternative fees if I had a larger budget/need for outside counsel but currently do not," said another.

But legal departments, even small ones who don't think they have the resources or time to develop a program, are shortchanging themselves with those preconceptions, according to Mary B. Clark, vice president and associate general counsel of LexisNexis Examen. "Initially, it does take time to evaluate the areas of law for alternative



billing," says Clark. "But most general counsel have an instinctive knowledge of what a particular type of matter should cost."

According to Clark, legal departments would benefit by using e-billing data in developing alternative fees, and Lavers is a strong proponent of such systems as ways to gather more and better data. But even without this data, law departments can master the task.

Rather than turning over their entire portfolio of legal matters to alternative fee structures, legal departments can start small, Clark advises. "Select one or two areas of law or

types of matters," she says. Among those survey respondents who do use alternative billing, litigation, labor and employment, intellectual property, and mergers and acquisitions have been popular areas that legal departments use for alternative billing (see chart, "Litigation, Labor and Alternative Billing").

Clark also says legal departments must be prepared for push back by law firms; but many law firms understand that this is what their clients expect and they are willing to work with legal departments. "Many law firms have a familiarity with alternative billing, even if they don't always advertise it," she says. "They should realize that other firms have figured out how to do it."

And legal departments have one very strong advantage over their law firms when it comes to determining alternative billing rates; legal departments know what other law firms charge for work, while most law firms are only familiar with their own pricing structure, she says.

Legal departments tired of being slaves to the hourly bill must accept the challenges of developing and instituting a new system, Clark says. "General counsel should not be reluctant to try," she adds. "There is no one answer, and every business is different. The idea is to have fee structures that reflect value, not just time on task.

"If we keep doing things the same way, things will remain the same," Clark says. 📍

