

LAW WEEK COLORADO

FRACTIONAL AND FLEXIBLE

*Flat-fee services offer freedom for attorneys,
predictability for clients*

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Sometimes inspiration hits when you're inching through traffic during a snowstorm.

A few years ago, Bill Berger was driving through a blizzard to his job at a big Denver law firm where he practiced employment law. Stuck in his car, he thought: What would life be like if he didn't have to litigate?

"For 30 years, the bulk of my revenues as a billing attorney were from litigation," Berger said. But in the last decade or so, more of that litigation work has been done by insurance counsel as companies insure themselves against employment risks, he said. "Those panel attorneys are great," Berger said, and they were doing good work for less than he was charging at the firm.

It dawned on him that there was lots of work in his field that didn't involve litigation. While companies might not need a full-time attorney to help them comply with labor and employment law, maybe there were clients who could use him on a regular part-time basis.

In 2017, Berger started his solo practice, L2S Legal, providing fractional in-house employment and labor attorney services on a fixed-fee basis. While Berger is rare for making it his entire business model, he's one of several Colorado solo attorneys to adopt the "fractional" label for in-house attorney services while making the billable hour optional.

Mark Spitz, who offers fractional general counsel services through his practice at Spitz Legal Counsel, said the legal industry has borrowed the term from the larger business world, where

finance or marketing specialists have made themselves available as "fractional" CFOs or CMOs to companies that might not need full-time managers in those areas.

He said it's not always clear what differentiates a fractional general counsel versus an outside general counsel — a label that has been in use longer. "There's not much of a difference in that other than terminology and trying to use something that's a little more current," Spitz said, but added a fractional GC might be more likely to spend some portion of time working out of a client's office.

Attorneys branded as "fractional" are also likely to eschew the billable hour, he said, often offering the services for a fixed monthly fee.

FIGURING OUT FEES

Berger said he has a steady

stable of about eight clients, and most have been with him since he started. They tend to be national or regional companies that need to comply with laws in different cities and states. Some have a full-time general counsel, and some even have internal employment counsel but turn to Berger for labor law compliance or union issues.

He said almost all his work is done on a recurring fixed monthly fee invoiced at the end of the month. Fees range from \$1,500 to \$7,500 per month and are determined based on discussions with the client about their legal needs.

"I thought that was going to be the big challenge, trying to ballpark those numbers," he said. But thanks to three decades of experience and familiarity with the market, the estimates have been pretty accurate, he added.

Berger keeps track of his time

so clients know how much they're using his services, and they look at the numbers once or twice a year to see whether an adjustment is needed. He hasn't had a client use him less than expected, and the few times he's spent more time than planned on a client, it hasn't cost them extra. "If it does go over, that's on me. That's my risk," he said.

"This whole business model is really predicated on me trusting my clients," Berger said. "Because I do the work, and then I bill them at the end of the month. I am holding myself available for them and not trying to fill up and take on more work than I can do."

Spitz echoed the importance of trust and said it's probably easier to propose flat-fee, fractional services to an existing client than a new one.

"I think it's easier to get a business to enter into this kind of arrangement when they know you, trust you, [and] you've proved yourself to them in terms of what you can do to help them," he said.

In the past couple years, Spitz has experimented with subscription packages that cover a set number of phone calls, e-mails, contracts and other services each month. He said it's important to evaluate flat-fee arrangements regularly.

"I think it would be wrong to insist on a long-term commitment from a client, because you want to be able to revisit it every few months or every so often and make sure it's working for both parties," Spitz said.

Adam Aldrich of Aldrich Legal is another Denver attorney offering fractional general counsel services, which make up about half of his practice. He represents a lot of small to mid-size com-

panies, and his services include everything from contract review to employment issues and dispute resolution. He said some of his clients pay a monthly flat fee, while others prefer to be billed by the hour.

Figuring out his flat-fee price tag was "kind of trial-and-error to start with," Aldrich said, and he ended up underbilling a few clients at first. He said being direct in asking what kind of work a client needs and taking time to understand their business has helped make sure he's charging a fair fee.

PROS, CONS, PERKS AND CHALLENGES

One of the biggest advantages of the fixed fee approach for clients is predictability. Businesses like knowing what their bill will be every month.

The amount of that bill is often a welcome change for clients used to working with bigger firms that bill by the hour. Aldrich said part of his decision to strike out on his own came from hearing clients complain about paying too much to big law firms.

"I just don't have the overhead that a lot of firms have. My overhead is really low," said Aldrich, whose clients span a range of industries, from regional airline Denver Air Connection to an epoxy manufacturer that distributes worldwide. "So, I can still make good money and pass that savings on to the client."

Berger said that his business model allows him to devote more time to custom research and legal advice than a national law firm would be able to provide. Employment laws vary from state



ADAM ALDRICH

to state, he said, and big firms are often focused primarily on compliance. But with more time and better understanding of a client's business, Berger said, he can give advice aimed at increasing productivity — not just avoiding lawsuits.

One of Berger's clients is Denver-based Tuff Shed. The company's general counsel, Mark Butterman, said that while his job requires him to be a generalist, "I can't be an expert in everything." Butterman said having Berger available at a flat rate allows the two of them to not only address immediate issues but have longer conversations about how to fix any underlying problems.

"It's really nice to be able to spend a little more time, relax and discuss an issue in depth, see where all the tangents go and not pay attention to the clock," Butterman said. "I just really enjoy that. It feels like having a virtual reality lawyer in the next office."

There are a few challenges to being a fractional in-house attorney. Software and technology are an expensive part of doing business, according to Berger. State-of-the-art encryption and security are a must since he handles medical records, Social Security numbers and other sensitive employee information. But the software licenses cost him the same as it would cost a larger firm.

"I spend well into five figures... pretty much every single year," Berger said. "And that's just for me, a sole practitioner."

The upside of spending that money, however, is he can work securely from anywhere. That's crucial, since business requires

him to travel more than 80 days a year.

According to Aldrich, managing client expectations can sometimes be a challenge. "Some clients think that if you're going to be a de facto general counsel for them that you can do anything," he said. "And if you try to outsource something or say this is not within my scope, some of them tend to be like, 'Well, can't you just figure it out?'"

Aldrich added that's not always the best thing, especially in a really specialized area.

Downsides aside, the attorneys said fractional in-house attorney arrangements let them take on the work they enjoy most and allow for more freedom and flexibility.

"It's actually given me a little bit of freedom in terms of my working schedule and the way that I run my business," Aldrich said.

By avoiding litigation, Berger said he's largely able to avoid same-day deadlines, giving him a more flexible schedule than he would have in a larger firm.

"I didn't do it for the lifestyle, but it's turned out to be a great lifestyle," said Berger, who manages to make time for work-outs and volunteering despite client demands and a heavy travel schedule.

"I will still get the work done right, but there's no sense anymore of nine-to-five in this kind of structure." •

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MARK SPITZ