

Alternative Fee Arrangements on The Rise at Law Firms

Brown Rudnick's 'unusual' deal a local blueprint

By Lisa van der Pool – March 29, 2012



photo by W. Marc Bernsaj

Andrew Kaplan, a partner at Brown Rudnick, says that handling the Beacon Power matter on a contingency fee basis helped the business survive bankruptcy.

Lawyers have buzzed about using alternative fee arrangements - designed to make legal bills more predictable and client- friendly - for the past several years.

But it's rare to get the details on realworld examples these types of arrangements - for instance, like the one Brown Rudnick LLP arranged for client Beacon Power Corp. The energy firm was sold earlier this month to a unit of Rockland Capital.

Beacon Power, which had filed for bankruptcy protection last fall, was sold for \$5.5 million in cash and a promissory note worth \$25 million payable to the U.S. Department of Energy.

The Tyngsborough firm had received \$39.1 million in loan guarantees from the DOE.

Boston-based Brown Rudnick agreed to advise Beacon Power under a contingency fee arrangement, meaning Brown Rudnick attorneys would not have collected any payment had Beacon Power not been sold.

“We understood that for Beacon Power to survive the bankruptcy, we really had no choice,” said Andrew Kaplan, a partner in the energy, utilities and environmental practice at Brown Rudnick. “Without that arrangement, there would have been no resources for Beacon Power to pay its employees, operate its plant, earn revenues and repay its loans from the government.”

At one point, about 35 Brown Rudnick attorneys worked on the Beacon Power deal, which took a total of 3,800 hours, said Kaplan.

Kaplan would not say how much Brown Rudnick sought for its work, but court documents indicate the firm billed about \$1.8 million for its first three months of work on the case.

The documents, on file with the U.S. Bankruptcy Court in Delaware, contain smaller billings from comparatively minor players in the matter.

While this type of arrangement on a bankruptcy case was a first for Brown Rudnick, Kaplan said that because it was a win for the client, firm and the DOE, he foresees similar arrangements will be negotiated in the future.

AFAs continue to be on the rise at law firms. Last year, 84 percent of in-house legal departments reported using some sort of alternative or non-hourly billing arrangement with their law firm, up from 81 percent in 2010, according to legal tracker Altman Weil Inc.

Patrick Dinardo, a litigation and bankruptcy partner at Boston-based Sullivan & Worcester LLP, called the fee arrangement for the Brown Rudnick/ Beacon Power deal “unusual.” He said that in his 30 years at Sullivan & Worcester, he’s seen only a few contingency fee arrangements, although he does think in general they are becoming more common.

“You’re seeing a lot more flexibility and willingness on the part of lawyers to be accommodating to clients,” said Dinardo.

At Boston-based WilmerHale, there are currently more than 400 alternative fee arrangements at the 1,000-lawyer firm, and they have increased every year for the past several years. The firm offers a variety of AFA options including fixed fee arrangements; contingent fees and the “phased fee” among others, WilmerHale co-managing partner Susan Murley said.

The firm has a program called Quickstart, whereby it charges less money to startup companies. AFAs are also used in litigation cases, where the fee is discounted 20 percent, but then paid in full if the case is settled or even more than that if the case goes to trial and the client wins.

“Part of the reason (why they’re increasing) is that it really does foster greater communication between a firm and its clients, in addition to predictability and an increase in client satisfaction,” Murley said.