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Privacy Attys Capitalize on Creative Fee Arrangements

By **Allison Grande**

Law360, New York (July 22, 2013, 9:43 PM ET) -- Alston & Bird LLP recently joined a growing number of firms that offer privacy and data security counseling on an alternative fee basis, an approach that experts say works best if attorneys have a firm grasp of the relatively new practice area and make clear that unintended surprises may cost extra.

With clients increasingly turning to the firm with questions about what they should be doing to counter the growing threat of security breaches, Alston & Bird in June rolled out a new cyberrisk legal package that lets clients know what to expect in terms of pricing, according to Jim Harvey, the co-chair of the firm's security incident management and response team.

The package, offered on a flat-fee or alternative-fee basis that is customized for each client, provides data breach preparation services covering a range of practice areas, including incident response plan development, securities filing reviews and insurance product counseling.

"The idea came from a confluence of two issues that we see all the time: the need for comprehensive cyberrisk advice and the need from clients for predictable cost planning," Harvey said. "A lot of times companies have concerns and want to call and ask for advice. If they know how much it's going to cost, they are more likely to get all the information they need instead of worrying about the clock ticking."

The benefits of being able to guide clients on hot-button privacy and data security issues without hourly-rate constraints have drawn many prominent firms to offer similar fee arrangements, and their numbers are only likely to grow, according to attorneys.

"Flat-fee arrangements are likely to offer a benefit to firms that are trying to figure out how to get into the market, since they offer companies an 'all you can eat' concept, so that they aren't afraid to come in and ask questions because of the fees," said Craig Cardon, a partner at Sheppard Mullin Richter & Hampton LLP, which has been offering flat-fee arrangements for privacy issues since 1999.

But attorneys caution that not every privacy query is a good candidate for an alternative fee arrangement.

While attorneys may be able to forecast the amount of effort they'll have to put into routine maintenance tasks such as reviewing privacy policies, negotiating contracts with business partners and assessing compliance, they may find it more difficult to hang a price tag on more complex work, such as building a customized data security plan or responding to a breach.

"It is easier to provide alternative fee arrangements for the proactive services than reactive services because they can be preliminarily assessed more easily than the reactive services," said Shook Hardy & Bacon LLP data security and privacy group co-chair Al Saikali.

Instead of offering a one-size-fits-all pricing plan, Shook Hardy takes an "assess and prioritize" approach. Clients interested in proactive security and privacy services meet with the firm and select from a menu of offerings, and the firm structures fee arrangements around their choices.

A strong grasp not only of the privacy practice area, but of the client's individual needs is crucial to making the most out of alternative fee arrangements, attorneys agree.

"Understanding that one set of recommendations doesn't work for all clients is one of the marks of a mature privacy practice, and will be needed to succeed in the future," Reed Smith LLP partner Mark Melodia said. "As we do more work in this area, there are fewer and fewer things that are unpredictable, but at the same time, we know we can't predict everything, and clients are sophisticated and know that too."

By clearly defining the scope of anticipated services at the beginning of a client relationship and then maintaining an open dialogue, a firm can easily work through unexpected issues, attorneys say.

"The challenge is to very carefully define the work so that both our clients and the firm are very clear about what work will be conducted for the specified fee," Hunton & Williams LLP global privacy and data security practice head Lisa Sotto said. "Then if things change, there can be a discussion."

Pillsbury Winthrop Shaw Pittman LLP senior counsel Catherine Meyer compared assessing the risk of offering alternative fees for a certain service to bringing a car in for service.

"If you took your car to the mechanic and asked him to fix it for \$50, that's risky because the mechanic doesn't know if the problem is you forgot to put gas in the tank, or it's not working because it doesn't have an engine," she said. "Assessing a privacy policy is more like looking at a car to make sure it has doors and wheels, but on the other hand, it is hard for attorneys, especially if they're not familiar with the client, to know what they're getting into for an issue that requires them to look under the hood of the company."

While few federal privacy laws are on the books, the ones that exist can provide firms a frame around which to craft creative legal offerings, according to attorneys.

For example, Morgan Lewis & Bockius LLP has been offering clients Health Insurance Portability and Accountability Act compliance packages based on a fixed-fee pricing model for the past decade, and Reed Smith recently launched practice groups solely dedicated to compliance with the Telephone Consumer Protection Act and Fair Credit Reporting Act.

"In general, so many legal services are a little bit of a black box, and you don't always know what you're getting into before you get into it," said Morgan Lewis partner Andy Anderson. "But saying that we want to update an employer's standard HIPAA privacy notice or agreements is a fairly established task, so it lends itself to a package approach."

Some firms have also found success offering compliance and response services to small and mid-sized business that are beginning to make data security a priority but have fewer obligations than global companies, according to Susan Usatine of Cole Schotz Meisel Forman & Leonard PA, which has been offering these services for the past year.

"Of course, every business is unique, but there are consistent themes that businesses overlook and specific pockets that require attention," she said. "For smaller businesses, privacy is something that they've been meaning to get to, and with alternative fee arrangements, we can provide a 12-month schedule with a certain budget for managers to approve."

On the other hand, dealing with the complex fallout from a global data breach presents less certainty, attorneys noted.

"Oftentimes, data breaches are fairly complex and firms don't know what they're getting into until they've got a couple steps into the investigation, and due to time pressures, their first and foremost goal and focus is putting out the fire and containing a breach, as opposed to coming up with the fee estimate," said Vedder Price data privacy and security practice group chair Bruce Radke.

But as firms do more work in this area, firms will gain a better ability to estimate costs for more complex services, attorneys say.

"Certain aspects of privacy and data security have become somewhat commonplace, and attorneys are now able to price and predict in a way that none of us could five years ago," Melodia said. "That's a big factor suggesting that for a lot of these services, it makes sense to provide clients with price predictability so they know what's coming."

--Editing by Kat Laskowski and Chris Yates.