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The End of Alternative Fee Arrangements?

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In doing my nightly reading last evening in order to keep up with the latest trends in the legal profession, I came across a very recent brief video clip from Richard Susskind that made me bolt upright and reach for a very stiff drink. The clip is a bit nerve rattling; accordingly, as they say, viewer discretion is advised.

The headline on the clip is certainly designed to grab your attention: It has Sir Richard purportedly suggesting "The End of Alternative Fee Arrangements?" Quite obviously, this headline grabber is a clever play on Sir Richard's seminal work "The End of Lawyers?" My first thought was whether all of my work on AFA's over the past few years was for naught. Or was it like the chimera of the tooth fairy, the Easter bunny or Santa?

In fact, on my second and third view, Sir Richard's admonition became far more lucid and perhaps obvious: 2012 will be the last year in which the need to meet the demand for a reduction of the legal spend will be met almost exclusively by resorting to AFA's.

Prof. Richard Susskind

Much more of Sir Richard's observations are both chilling and enlightening:

- Contrary to general opinion, the legal spend in the coming year will be reduced by 30 to 40%.

- General counsel and law firms are going to need to meet these demands by creating yet new efficiencies.

- Lawyers will need to meet demands for more legal services and receive less remuneration.

- General counsel and law firms will need to learn work far more collaboratively.

- There will be a marked increase in offshoring, a phenomenon I previously addressed.

- Law firms will also be required to collaborate more regularly with non-traditional and less expensive providers of legal services, again, a matter about which I previously wrote.

Serendipitously, this morning my friends at Altman Weil, released their Annual Chief Legal Officer Survey. Altman Weil's take is consistent with much of Sir Richard's admonitions in that in spending money for legal services, "Efficiency Trumps Costs."

Dan DiLucchio

However, Altman Weil's survey numbers are a bit less glum than Sir Richard's prognostications:

- "Fifty-six percent of CLOs said they had increased their internal budgets from 2010 to 2011, compared to 51 percent the previous year. The median increase also ticked up from 6 percent to 7. Forty-six percent of respondents increased outside counsel expenditures, up from 43 percent a year earlier."

- The median budget for outside counsel increased by 10%.

- Controlling costs topped CLO's list of priorities.

- 13% of CLO's outsourced work, previously performed by traditional law firms, to non-traditional vendors of legal services.

- 60% of CLO's promoted collaboration rather than competition from their outside law firms.

- For the third year in a row, top lawyers said they don't think law firms are serious about changing their service delivery model. They gave firms a median rating of three, on a scale of zero to 10. But the companies aren't doing much better. Respondents gave themselves a five in terms of how much pressure they were putting on firms to improve the value proposition.

- 35 percent of respondents said they regularly and formally evaluated outside counsel, and only 17 percent said they communicated evaluation findings to the firm.

On this last and perhaps most significant point, Dan DiLucchio of Altman Weil had a most telling observation: "As long as the company is sending them work," says DiLucchio, "the firms assume that that is their evaluation." Law departments miss out on the opportunity to change the firms' behavior, says DiLucchio. He's seen one of two things happen for firms: "Either you die a slow death, where the faucet is slowly turned off. Or you're just called in one day and told that the company is moving the work elsewhere."

These slow deaths and sudden terminations are completely preventable. But it is the obligation of outside counsel to be extremely pro-active in doing so. The steps we encourage our law firm clients to take are very straightforward:

- Build an extranet. Make all of your work for the client, not merely timekeeping, completely transparent. Clients should be able to click on their files and have full access to the work done and in progress. Clients should be encouraged to actively engage the extranet and provide their input. Never respond to a client's compliant about work done or budget overruns by blithely saying "gee, it was all on the extranet, you should have known." The extranet does not absolve the lawyer from communicating to the client.

- Every monthly bill rendered should be accompanied by a letter that describes the objectives the firm had set out for the preceding month for the matter, the steps the firm had taken to meet those objectives, the results and the objectives for the next month. Even where the matter is undertaken on a fixed fee or an AFA, these monthly letters are essential.

- In mid-month, send the client a time run of time spent on the matter. Let the client know it is for informational purposes only.

- When an event occurs in a matter that materially affects either the fee or time budget, get on the phone and let the client know at once. Explain the issue in detail. Let the client know how you propose to deal with this hiccup and solicit the client's advice on the proposed course of action.

- Take a page out of the book of Ed Koch, New York's long term mayor, who always greeted voters and visitors with "How am I doing?" annual client surveys, annual visits by a managing or originating partner just don't do the trick anymore. You have to be on the telephone with regularity communicating with the client. You must visit the client with greater regularity. Your visit should be carefully planned out, as explained in detail here.

Yes, this is a lot of work. But it is far less painful than seeing your revenues fall by 30%, watching the faucet slow to a drip or being told where to send all of the client's files.

Five significant firms failed in 2011. More will crumble next year. As Smokey the Bear says, "only you can prevent a forest fire."

Jerry Kowalski, who provides consulting services to law firms, is also a dynamic (and often humorous) speaker on topics of interest to the profession and can be reached at jkowalski@kowalskiassociates.com .