

## Get on the Winning Side of the Alternative Fee Transition

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When we started out 20 years ago in the law, accounting and consulting professions, all the work was bid and proposed based on billable hours. But clients started to demand higher value and lower risk when purchasing these services. As a result, shared risk, performance based compensation, fixed fee contracts, service level agreements and eventually outsourcing became the industry norm.

About half of clients are using alternate fees, according to the new Fulbright & Jaworski 6<sup>th</sup> annual Litigation Trends Survey Report (see chart at right).

**In our business development and training work with law firms, we see this same tsunami of change starting to form in its early stages.**

We see an increasingly high percentage of new matters for large corporations being subjected to some form of alternative fee structures, including several outsourcing deals. We have seen law firms that are willing to embrace alternative fee structures win a greater share of the business with top clients. My sense is that these creative fee structures will become more of the norm! Why?

***The answer is your client's business "pain."*** The economic pressures facing clients are requiring them to adapt and either revamp or reinvent the way they buy legal services – and consequently change the nature of their relationships with law firms.

For example, **this week at the Association of Corporate Council annual meeting, there was a full day of programs on the Value Challenge and Alternative Fees.** This movement is being formally embraced by many top corporations and informally pursued among general counsels almost across the board. Clients want more value, predictable expenditures and clear return on their investment.

Here are just a few of the alternative fees structures that are becoming more popular among clients:

- *Bounty hunting* : Offering a highly discounted fee for a poor outcome and different rate for a good outcome
- *Concierge plans*: Put specialists on a flat fee retainer to answer questions.
- *Exclusivity in exchange for a discount*: Promise that a firm will have first dibs on certain work in exchange for aggressive pricing commitments up front



Larry Bodine

- *Litigation by the bucket*: Tell your litigator what a dispute is worth to you, give the firm that amount of money and let the firm resolve the matter however they'd like.
- *Risk sharing*: Create incentives and link fees to quality of outcome, speed of outcome, quality of work. Pay premiums for success and discounts for lesser outcomes.

While these are emerging fee structures, clients are also insisting on more traditional alternatives such as fixed fee arrangements and blended rates. More importantly, they are shopping work to boutique firms and even non lawyer service providers.

### **Are You and Your Firm Ready To Change?**

Now, change in a profession always creates winners and losers. The winners anticipate change, adapt and emerge stronger. The losers hang on to their old ways, lose a share of business with the most important clients and shrink.

So, are you on the winning or losing side?

- Has your share of work with top clients been increasing or decreasing?
- Have you reviewed the fee to value reactions with all the decision-makers at your clients
- Have you won business based on new or innovative fee structures?
- Are you and your client relationship partners trained and skilled at negotiating alternative fee structures?
- Have you discussed the client's perspective on your value and your relationship with the general counsel and/or CFO? What changes are you making to best address the needs identified?
- How many critical matters have you lost out to new or unexpected competitors who have offered different fee structures or lower fees?



Michael G. Cummings

Early adopters are reaping the benefits of alternative fees, including firms large and small: Bodman LLP, Valorem Law Group; Summit Law Group; Shepherd Law Group; Bartlit & Beck; Exemplar Law Partners; Chinn and Associates; Waite, Schneider, Bayless & Chesley; and Raymond & Bennett.

Some mega firms have also begun to publicize their work in this area, including Drinker Biddle & Reath LLP, Womble Carlyle, Seyfarth Shaw; Cravath; Howrey; Morgan Lewis; and Fenwick & West.

### **An Approach to Fixed Fees**

Fixed fees are the favorite approach, other than contingency. So how do you begin to wrap your hands around them? Historical data should provide the starting point for setting the fixed fee.



Barry Schneider

Following is an approach recommended by William F. Lee, co-managing partner of Wilmer Cutler Pickering Hale and Dorr, and Ben W. Heineman Jr., former General Electric Co. senior vice president-general counsel.

Both firms and corporations have detailed information on the past cost of different kinds of matters. They can use data-mining techniques to determine reasonable ranges of cost for a wide variety of legal services. These services range, obviously, from the simple to the complex:

- *A single project involving expertise and judgment, but not much risk*, such as writing a handbook, creating form contracts, developing a compliance training program, and monitoring developments in evolving areas of law.
- *A repeating, routine book of business, which involves expertise and judgment, but not much risk*, such as filing a certain type of patent or trademark application, monitoring compliance with environmental permits, and handling routine labor matters in arbitration (as opposed to court).
- *A repeating, but more complex book of business that involves judgment, expertise, and risk*, such as annual securities reporting, a line of product liability cases, a series of venture capital financings, or more complex multiparty contracts for capital equipment sales.
- *A one-off, highly complex, high-risk matter*. Some may have historical antecedents: the bet-the-company litigation for the pharmaceutical company; the company-wide bribery scandal being pursued by enforcers in multiple jurisdictions; the transaction to double the company's size with a target in similar lines of business. Other high-risk matters may arise on new frontiers: a patent-defense action in China; a novel product litigation; the huge acquisition of a company in a different line of business, etc.
- *In complex, risky matters*, the fixed fee can be split into segments. For example, one flat fee for a litigation evaluation period, and then a second fixed fee for completion - depending on joint expectations of the likely process (early settlement; reasonable discovery/settlement; full, contested discovery and trial).

But whatever the type of matter, arriving at the fixed fee will depend on the motivation of both in-house and outside counsel to work toward a future result that is fair to both parties.

### **So What Should You And Your Firm Do? The 6 Imperatives**

Our basic message is to see the Value Challenge and move to Alternative Fee Structures as a business development opportunity. With this mindset, your firm can embrace change, cultivate stronger relationships with clients, gain share from more rigid competitors and even drive profits for your firm.

#### **Here is what we recommend:**

1. Assign A High Power Team Of Partners To Define The Firm Strategy And Response To The Value Challenge And Alternative Fee Structures (Do It NOW)
2. Collect All Examples Of Winning Alternative Fee Structures (Both Yours and Other Firms) And Define Best Practices

3. Get Trained And Up To Speed On The ACC Value Challenge And Alternative Fee Structures. Consider The Two Upcoming Web Seminars As A Start: *a) Alternate Fees -- Current Best Practices and Likely Trends, October 29, 2009; b) Womble Carlyle Prospers by Adopting Association of Corporate Counsel in Value Challenge, November 12, 2009: <http://www.pbdi.org>*
4. Train And Coach Your Partners To Have Value Based Dialogues With Your Clients; Conduct A Client Review And Value Audit With Your Top Clients
5. Target Rigid, High Cost Competitors
6. If You Are A Regional Or Boutique, Target The Fortune 1000 And Value Challenge Adoptors

From your client's point of view, business as usual is not meeting their needs. Legal expenditures are being subjected to the same procurement scrutiny as all aspects of your client's business. They are facing the same business pressures to do more with the same or less investment. This creates an opportunity for you and your firm to be pro-active and innovative in solving this point of business pain.

Our belief and prediction is that the attorneys and firms who address this need will be rewarded with a greater share of their business and long term relationships – which are the real keys to sustainable competitive advantage and profitability.