

Alternative Fee Arrangements: Their Popularity Soars

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There was a time when many lawyers, settled in their ways, thought that they could ignore alternative fee arrangements. That day is clearly gone. The 2010 Fulbright Litigation Trends Survey (http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=9222&site_id=286) announced that 51% of the corporate counsel responding to the survey were using some form of alternative fee arrangements.

Why? They cite lower costs first, then predictability, and then risk sharing. So what kind of AFAs do they favor? It's a very mixed bag with fixed fees, conditional or contingent fees, blended rates, capped fees and performance/reward-based fees. Clearly, there is a lot of exploration going on and a lot of innovative thinking about the kinds of AFAs that may work in particular situations.

Mind you, there is still a way to go for AFAs - while they are now mainstream, the billable hour still rules, with only one quarter of respondents estimating that AFAs exceed 30% of their total litigation budget.

What strikes us is how new AFAs are, relatively, and yet how quickly they have gained a foothold even in major law firms when they were once the province of solos and small seeking to counter a bad economy.

Why the fast track? We think there are several reasons:

- There has been intense pressure from in-house counsel to lower litigation budgets, especially in a fairly uncertain economy
- The smart folks in law firms began to see that they would be more competitive if they adopted AFAs and promoted that adoption
- They make sense, often when the billable hour does not. Why be more efficient when inefficiency pays so handsomely? Why invest in technology which will only contract the amount of time billed? With hourly billing, the client bears the risk of higher fees, complications and delay. Under an AFA, the law firm bears those risks. No wonder companies are starting, in earnest, to move away from hourly billing.

The Orick law firm now handles all of Levi Strauss' legal work worldwide for an annual fee. United Technologies requires fixed-fee arrangements with its law firms. And Cisco Systems now buys all of its legal work via AFAs. The list could go on and on.

Lawyers often ask us if they should go "all AFA." This is usually not a good idea. Our experience is that most lawyers really don't know how long most tasks take, so they may inadvertently enter into an agreement and then find themselves working for \$20 an hour. Take the tasks that you know the best, where you are almost certain to earn the equivalent of your hourly rate (or more). See how it works out and measure the results.

One way of implementing AFAs is to bundle services. Perhaps you agree to form a corporation, act as a registered agent for a year and provide four hours of phone or in-person consultation for a fixed price. This can be attractive (and very predictable) to a client.

To be successful, you need to keep refining the process. And it is very important to institute a way to do a "change order" if the scope of work is modified. Make sure you have the client's agreement in writing – even a modest change should be approved via e-mail by the client – and large changes should require that both parties sign a modification agreement. It should go without saying that you'll have to be very careful to define the scope of work lest there be a misunderstanding.

There are many of what author/visionary Richard Susskind would call "disruptive technologies" in the legal world. We can work today from anywhere at any time. We are always connected, unless we choose not to be. We have hardware and software that can get our legal work done in a fraction of the time it used to take. There are online legal resources – think LegalZoom – that pull in clients who would otherwise seek an attorney.

The days when clients would pay 500% of value vanish when they have the option, in small matters and large, to pay far less by finding a lawyer or firm which has done everything it can to promote efficiency in tendering legal services. This means that software for billing/accounting, practice management software, document automation software and document management software become the fundamentals of your AFA toolkit.

Those who have adopted AFAs very consistently report success in attracting clients, especially when they aggressively market their alternative fee arrangements. Is it easy moving to these new models? Of course not, and you'll trip yourself up now and again and really may work for \$20 an hour on a case. But you'll learn, perfect the system, and hopefully enhance your bottom line.

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