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CORPORATE COUNSEL

Wouldn't You Rather Be Partners?

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In 2004, when Tyco International selected Shook Hardy & Bacon as its sole provider for product liability litigation services, nearly 455 cases were transferred from 167 law firms to SHB using an alternative fee arrangement.

The consolidation of firms to a single provider on a flat fee was a significant undertaking and required a leap of faith by all parties involved. As Judy Reinsdorf, general counsel for Tyco will attest, the relationship has since grown in strength and reputation as an example of how an alternative fee arrangement can work for both in-house counsel and a law firm as the industry strives to turn the call for change into reality.

Tyco's product liability docket was a convergence of specific types of litigation for all of its businesses across the country but was by no means limited to repetitive issue litigation. Part of the Tyco docket was traditional product liability litigation with many repetitive issues.

The majority of the cases, however, were general negligence or breach of service contract actions dependent on individual case facts. Still, Tyco and SHB, who had a relatively new working relationship, were able to design a flat fee that continues to accommodate all types of cases on this docket.

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Since the flat-fee model was adopted SHB and Tyco have reduced the inventory of Tyco's product liability cases by more than half, and the risk level of new matters filed has decreased by nearly 60 percent. Proof of our arrangement's success can be found in an expansion of the relationship with SHB, which has grown to also include Tyco's automotive and general liability litigation.

An effective flat fee contemplates essentially a fixed-fee arrangement for the defense of an entire docket. Whether the size of the docket significantly increases or decreases and whether the time required to work the docket is the same, more, or less than the previous term, the cases will be handled on a fixed fee.

If the time spent goes dramatically up or down, the company and firm agree to share to some extent in overages and shortfalls. By the nature of the agreement, however, both parties have a shared interest in finely tuning the process so that budgets mirror actual expenditures and create stability in the financial arrangement. Business analysts for both entities support this effort and help optimize the financial aspects of the relationship.

For the in-house law department, the arrangement provides cost certainty and predictability, plus the added bonus of direct savings from year to year as the docket continues to decline. For the outside counsel, the arrangement provides a steady flow of cases as well as regular monthly revenue.

Much of the burden is on the law firm, however, to provide strong leadership with attentive management to find success with a flat-fee model. To that end, attorneys and paralegals must be trained (or re-trained) to be efficient and effective in this practice. Exit strategies should drive litigation activities, without the billable hour giving the law firm an incentive to draw out the process.

One key component of a successful flat-fee model is effective and efficient processes and staffing arrangements. Detailed work flow processes capture, move, and manage data at the appropriate level which streamlines litigation support and optimizes billable time spent defending claims against a company.

This organizational effort eliminates wasteful consumption of law firm resources by reusing, not reinventing the wheel. Staffing is also focused on the appropriate person for the case, activity and task considering the risks and rewards involved and the program objectives.

For a flat-fee program, the lead partner must build a core team that understands the client and its products and issues, and that masters the program processes. Assignments are then made based on which team member will be most effective for any given task.

Equally key to the success of a flat fee is a collaborative partnership between in-house and outside counsel. Daily communication allows for continued evaluation of the team's strategic direction. Conversations focus on how the in-house law department's business units might revise practices to reduce the risk of litigation and how litigation processes (such as technical support and discovery) can be accomplished more efficiently.

The two teams also work closely to balance litigation activities (legal spend) with the risk presented in each case and to identify opportunities to favorably and cost effectively resolve litigation. Given this shared interest, the law firm has incentives to go a step further by establishing effective strategies that are tailored to its clients' legal and financial goals.

In evaluating whether a flat-fee arrangement might provide value, law departments and firms should study very closely the benefits of reducing the number of outside firms to a handful or even a single firm handling all its litigation. In some cases, this examination may reveal that different firms handling similar cases may be achieving different results.

A flat fee with a single firm, however, can bring consistency not only to the budget but to legal outcomes with better management and awareness of a company's litigation from state to state and across the country. This also provides the opportunity to examine staffing issues on both sides of the arrangement to make certain each is able to appropriately match resources to litigation demands.

The team also is better positioned to track overall cycle times of cases and run comparisons to legal spends in previous years to better anticipate expected costs.

Multiple law firms and multiple attorneys mean inherent inefficiencies. Law firms at lower hourly rates without the incentive or tools to strategically extricate the company from the case will lead to longer cycle times and unnecessary litigation costs — and possibly higher indemnity costs as well.

A flat-fee model focuses everyone on the mutual objectives of the program. It virtually eliminates the temptation of focusing on a single case and encourages consideration of an entire docket strategy. For example, if a case included is earmarked for resolution; given the nature of the flat fee, it behooves the outside law firm to get it resolved as quickly as possible. By the same token, if a case needs to be tried, the inside and outside counsel will agree to try it perhaps to discourage a repeat opponent from filing future cases.

In either example, it is a win-win situation, and the inside law department pays no more than the agreed-upon flat fee. The key is the alignment of the company and law firm interests. When the law firm and client see eye to eye and together pursue a common objective, success will follow. The financial aspects of the relationship will take care of themselves once the client/vendor model gives way to a true partnership.

Paul Williams, a partner with Shook, Hardy & Bacon, focuses his practice on products liability, torts, and negligence cases. Williams has received national recognition for his innovative use of alternative billing arrangements. He can be reached at pwilliams@shb.com.