[InsideCounsel]

A Matter of Time

PART I: AS ALTERNATIVE FEES PROLIFERATE, THE IN-HOUSE BAR CONFRONTS THE DEATH OF THE BILLABLE HOUR.

BY MELISSA MALESKE

Article after article, panel speaker after panel speaker—in 2009, legal practitioners loudly proclaimed the death of the hourly bill, and its obituaries focused without exception on the new wave: "alternative fee arrangements."

Some law departments, confronting reduced budgets and increased litigation levels and looking to control cost by any means, are wading in for the first time. Others are enjoying unprecedented, recession-driven willingness from their outside firms to embark on alternative fee-based billing structures, sometimes on a broad scale. In any event, it's clear that the unmanageable rate of inflation for legal services is coming under scrutiny.

"It used to be lonely out here on radical fringe—not so much anymore," says Jeff Carr, general counsel of FMC Technologies and a long-time proponent of value-based billing. "But there are also a lot of people who say, 'I want to do this but I don't know how.'"

Fulbright & Jaworski's Litigation Trends survey of U.S. and UK corporate counsel, released in October 2009, found that the economic downturn had pushed 35 percent of corporate respondents to increase their use of alternative fees.

Across the legal industry, Nicky Mukerji, global director of LegalBill, a consultancy that provides help to clients structuring AFAs, estimates that only about 2 percent of total legal billings currently are being done on an alternative basis—but he contends it's an increasing trend.

"If it continues, I'd expect that almost 20 percent of all billings would be on alternative billing in eight to 10 years—that's really a lot of money," he says. "The question for in-house counsel and law firms is, are you ready for this?"

Whether the AFA trend will outlast the downturn is the wild card, but many law departments and their outside counsel are treating it as if it's here to stay—and they're finding the kind of success they want to shout about from the rooftops. Yet there is a sense among almost all of them that, in the legal arena as a whole, plenty of lawyers are talking the AFA talk without walking the walk.

Here, in-house players on the forefront of value-based or alternative fee arrangements talk about what's worked best for them and the results they've seen. Next month, law firm leaders will give their side of the story and offer valuable advice to clients on proposing and using alternative billing structures.

CASE STUDY: TYCO
Docketwide Makeover

In 2004, Tyco International set about narrowing down the law firms it used on its product liability docket. The downsizing was major, to say the least, with Tyco going from 168 firms nationwide to just one—Shook Hardy & Bacon (SHB). Although the firm had used alternative fee arrangements before, it was the first time SHB had used fixed fees on a docketwide basis, taking on 450 Tyco cases.

It was a bit of a leap of faith. "We were a new firm [for Tyco], but in-house counsel has to be willing to shake it up," says Paul Williams, products liability partner at SHB.

The partnership is based on yearly negotiations of their fixed fee arrangements, which are usually paid in 12 annual installments with incentives for quick and successful resolutions. Both in-house and outside counsel are committed to the idea that even if one party comes out on top one year, over time the benefits will even out.

Tyco senior litigation counsel Dave Nicholas says using a single firm is the preferred model for Tyco. "There are a lot of benefits," he says. "You're reducing the number of vendors, so when you partner with a firm like SHB, it becomes a partnership between client and law firm. The fixed fee makes the goals of both parties congruent."

The close partnership is even more remarkable considering Nicholas had just joined Tyco during the convergence process, and SHB was a new firm. So trust had to be the name of the game as Nicholas and SHB set out to learn about Tyco's product liability docket on the fly.

InsideCounsel.com
Learn more about hard data from Jeff Novak of AOL.

Tyco Takeaways

- **Know your docket.** "As a litigation lawyer, are you walking into a docket where it's going to be high volume, a predictable type of exposure? Is the volume predictable? What type of billing has there been? I think there's room in any docket to work with AFAs," Nicholas says.

- **The moment is now.** "Given the state of the economy, if a company came to a law firm and said they have a number of cases on an annual basis, 'Give us a proposal'—I think any law firm right now will look at those programs and see what they can do," Nicholas says.

- **The billable hour is the comfort zone—and a rut.** "There's great reluctance among in-house people to look at whether a case or a docket can be handled on an alternative fee basis because they haven't done it before and it's a change, it's new," Nicholas says.