

The Lawyer's Guide to AFAs and Value Pricing

EDITED BY LAURA SLATER



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UK/EUROPE/ASIA OFFICE

Ark Conferences Ltd
6-14 Underwood Street
London N1 7JQ
United Kingdom
Tel +44 (0)207 566 5792
Fax +44 (0)20 7324 2373
publishing@ark-group.com

NORTH AMERICA OFFICE

Ark Group Inc
4408 N. Rockwood Drive
Suite 150
Peoria IL 61614
United States
Tel +1 309 495 2853
Fax +1 309 495 2858
publishingna@ark-group.com

AUSTRALIA/NZ OFFICE

Ark Group Australia Pty Ltd
Main Level
83 Walker Street
North Sydney NSW 2060
Australia
Tel +61 1300 550 662
Fax +61 1300 550 663
aga@arkgroupasia.com

Head of Content Strategy

Fiona Tucker
fiona.tucker@wilmington.co.uk

UK/Europe/Asia enquiries

Ken Fitzgerald
ken.fitzgerald@wilmington.co.uk

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Commissioning Editor

Helen Roche
helen.roche@ark-group.com

US enquiries

Daniel Smallwood
dsmallwood@ark-group.com

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Assistant Editor

Laura Slater
laura.slater@ark-group.com

Australia/NZ enquiries

Steve Oesterreich
aga@arkgroupasia.com

Online bookshop

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Chapter 13: Alternative fee arrangements – Can you ‘win-win’?

The following article has not been previously published.

CONGRATULATIONS ON winning the bid for a new client to the firm. Your new client (and the court) says you have 18 months to investigate the claims, conduct discovery, develop the experts, prepare dispositive motions, and try the cases (if they cannot otherwise be resolved). And, although you have never done it before, since you wanted to compete with firms offering alternative fee arrangements, you agreed to handle this docket for an annual flat fee, including expenses. Your firm’s management has great confidence in you. Do not worry that your continued work for the client (as well as your personal compensation next year) rises or falls, in part, based on the outcome of this engagement. Are you nervous? Where do you start? Did they have a class on this at your law school? Mine did not; but I have learned a few things over the years.

Nearly ten years ago, Tyco International selected our Kansas City-based law firm, Shook, Hardy & Bacon LLP (SHB), as their sole-source legal service provider to handle all of their product liability litigation throughout the United States. At that time, Tyco’s product liability docket included 455 cases spread across 167 law firms, and, with one gigantic leap of faith, Tyco transferred the entire docket to SHB to handle on an annual flat fee arrangement, including the cost of local counsel and routine expenses. The mission was to reduce the company’s exposure and

control costs while protecting quality service, responsiveness, and results. This was an exciting prospect with a new client and a cutting-edge pricing concept (with stomach-turning skin in the game if we go over the fee amount). No cookie-cutter cases in this docket, but rather, a sizeable collection of one-off lawsuits filed across the whole country requiring investigations, discovery, experts, motions, and trials. At times, we certainly felt like we had bitten off more than we could chew. But we dug in, innovated, and adapted. Failing was not an option. Proudly, the mission was accomplished, and, we are not yet finished. Year after year, the annual cost continues to come down while outcomes are continuing to improve. The relationship continues to get stronger each year as we work together to further reduce case counts, shrink legal spend, and innovate to improve efficiencies for even better outcomes. The Tyco-SHB partnership is a true win-win.

The ‘win-win’ I am talking about is not a ‘have your cake and eat it too’ situation, but rather a situation that presents a favorable opportunity for both parties in a relationship – in the form of cost savings for a client and a profit for the law firm. This, I believe, is quite possible. But, admittedly, a win-win takes the right approach, creative planning, active management, a measuring stick, and bonus features, as explained below.

The client comes first

This sounds obvious, but truly, the client must come first. No matter the pricing

arrangement, and no matter the impact to the law firm, the client and their needs must be the priority. Lawyers are service providers and therefore must make service a priority. If you get your head and heart right with this as the number one priority, the rest will be easier (and more enjoyable). Get to know your client. Learn and understand their business objectives, goals, and challenges. Legal problems for clients are almost always obstacles – an unwanted interference with business operations. Help your client identify practical solutions and remember that the goal is what the client wants. As hard as it can be for die-hard trial lawyers, more often than not, the client is happiest when a legal dispute is resolved and the risk is capped. Sometimes the best outcome for the client is to close the case. In brief, identify and align the client and law firm’s interests so you truly work as partners toward common objectives.

Conduct strategic early case assessments

The strategic early case assessment process forces the client and law firm to work together at the front end of a case to identify strategic objectives, to discover the facts essential to making important decisions about the course of the case, and to drive targeted activities for more efficient and effective outcomes. Cycle time (the duration between assignment of a case to the disposition of the case) is critical to success with an alternative fee arrangement. On a flat fee, the firm is not incentivized to prolong the duration of a case, and the client is most interested in capping its risk. Working together to develop the exit strategy and to execute the game plan will result in an earlier, robust evaluation of the strengths and weaknesses of the case and will provide the client with the information needed to

make timely, cost-saving decisions about the case. The strategic early case assessment process also provides a roadmap to keep the client and law firm on course to reach the end goal. Additionally, over time, the law firm and client can build on their experience and improve outcomes by documenting, road-mapping, and banking key issues and theories developed.

Actively manage processes and projects

To be efficient and cost effective, you must proactively manage the work – as well as how that work is performed. Your team must be skilled not only in legal practice, of course, but they should also be trained in how to efficiently execute the practice of law. To avoid waste (which eats away at a law firm’s profitability) the team members must both do the right things as well as do things right. Establish workflow processes to capture, move, and manage data at the appropriate level to streamline litigation support and to optimize billable time spent handling cases for the client. Leverage technology solutions to help in your practice. Through technology, you can share information and streamline the flow of work, information, and documents between team members, and between the law firm and the client. Effective knowledge management can reduce substantial waste of your resources, from basic matter management to brief banks to client reporting. Over time you can build a substantial library of institutional knowledge of the client’s business as well as of the client’s litigation experience. This knowledge will be invaluable in years to come. Think about it. Clients frequently encounter restructuring, acquisitions, in-house turn-over, and other interruptions to the continuity of the business as well as the legal practice in support of the

business. In relatively short order, you may become the sole point of continuity for the client. Automate what can be automated, and make sure you can retrieve past work product to re-purpose for the next case. Remember the strategic early case assessment? Goals were discussed and an exit strategy was established. Stay on task, and do not be distracted from your exit plan. No doubt, circumstances will change, but modify the plan, and get back to execution of the strategic plan. There is not time and there are not available resources for off-point work that does not advance the exit strategy (waste). The sooner you get the client to closure, the happier the client. And, remember, on a flat fee, the sooner you get to closure, the less you bill (and the better your profitability).

Let's pause a moment to digest the process so far. The client's interests become the law firm's interests, and that way, both parties are moving in the same direction toward common goals. The client and law firm collaborate on a front-end analysis to rapidly identify the case exit strategy to focus activities and resources toward the end game for quicker resolutions. This strategic approach results in shorter cycle times and reduced law firm fee investment, and it preserves law firm resources for use on other, more complicated matters for the client. Plus, the law firm streamlines its workflow and tailors its work effort toward a specific exit strategy to resolve the client's cases sooner rather than later. Great results in shorter time with less investment? Sounding like a win-win so far?

Measure your success

Having followed the steps discussed so far, you have collaborated with the client to identify the business and legal objectives. You have scoped the work to solve the client's

problems and support the client's objectives. You have strategically executed the work, resulting in quicker, cost-effective, better-than-expected outcomes. But how does the client define 'success' in this relationship? Is success a function of numbers (how many cases resolved, number of days reduction in cycle time, the total amount of dollars saved)? Be sure to ask the client:

- What is a 'win' for you, for your business?
- How is your (in-house counsel) performance measured – is there anything the law firm can do to help you achieve your goals?
- What is most important to the business client about this relationship? About this set of cases?

You need to be sure you have identified the key elements that are essential to the client's definition of success. You must also be sure you have established a way to measure for those elements to allow you to declare a success. For example, how are you going to measure (and document) the client's objective for its law firms to be responsive to its business client's questions? How are you going to quantify improvement year over year? How do you quantify predictability? These are all measurable, but they require forethought and planning. You do not want to get mid-way through the engagement and learn you are not tracking needed metrics to demonstrate the value you have worked so hard to provide the client. Case management and accounting software can be invaluable in capturing, filtering, and reporting on most metrics.

Add value above and beyond the cases

You won the bid, so you must be good at what you do, substantively. To keep the

work (and often to even get the work in the first place) you must distinguish yourself as exceptional at how you do what you do – meaning you provide high quality legal services and results at a reasonable value, plus added value above and beyond the substantive legal work on the cases. Find ways to add value to your in-house counsel and to business clients. Learn your client’s business. Attend a trade show/conference with the client. Learn who their customers are and get to know the people on the front lines. Educate yourself about the client’s industry. Pay attention to the news and court decisions that may be of interest and share with the client. Invite the client (their in-house counsel) to your law firm to participate in a CLE event. Share lessons learned from the litigation experience, and provide recommendations for the business clients to reduce or eliminate future liability risks. Volunteer. Take work off your client’s (in-house counsel) plate and make their job easier. Basically, be of service. Make it easy for the client to ask you for help. If you do, guess who they are more likely to call when the next big legal problem arises?

Conclusion

I would like to tell you having a successful alternative fee arrangement engagement is easy. I would like to. But I cannot. It is not easy. These types of engagements need thoughtful planning, diligent execution, and tireless management. Successful AFAs require an unswerving commitment to place the client first. They require strategic, focused action. Alternative fee arrangements also require practice and process innovations, and, sometimes, a cultural change at the law firm to be cost effective (for the client) and profitable (for the law firm). Clients also require accountability and metrics to demonstrate success. Plus, clients want

services that add value to their day, their practice, and their own business clients. But, I can tell you, if you put in the effort and do it right – if you align your interests and invest in your client – the relationship will be rewarding, long-lasting, and successful, for the client, for your law firm, and for you.

About the author

Paul Williams is a partner at Shook, Hardy & Bacon based in Kansas City. He focuses his trial practice on complex litigation and trial practice management and partners with clients to create relationships that align client and firm interests to achieve better legal outcomes at exceptional value. Paul has received national recognition for his innovative use of alternative billing arrangements and strategic litigation management techniques, and he has extensive experience in commercial and products liability litigation for many types of product manufacturers.

Since 2004, Paul has managed the firm’s role as Tyco International’s National Counsel of Product Liability Litigation, leading a team of SHB lawyers in a flat-fee partnership with the company. *The American Lawyer* noted the firm’s representation of Tyco in its feature story on the firm as Winner of the 2012 Product Liability Litigation Department of the Year Award. The *ABA Journal* also featured the program in an article titled ‘Facing the Alternative’, which highlighted the trusting relationship that exists between Tyco and SHB which is to credit for much of the success found under the flat-fee arrangement. The Association of Corporate Counsel recognized Shook, Hardy & Bacon and Tyco International as inaugural ACC Value Champions for ‘effectively driving value by cutting spending, improving predictability, and achieving better legal outcomes’.

Paul's successes in effectively managing entire dockets of litigation using alternative fee arrangements have resulted in him being tapped as a featured speaker on litigation management and alternative fee arrangements. He has participated on roundtables to discuss the growing demand for alternatives to the billable hour and the use of legal project management to enhance value in legal services. *The American Lawyer* recognized his ability to manage entire dockets of litigation on alternative fees, featuring him as one of its 'Alternative Fee Gurus' in 2010.