

More Firms Embrace Alternative Fees

Getting Paid: Part Three

Editor's note: This is part three of a five-part series on making sure you get paid as an expert witness. We have already written about the three questions to ask attorneys and how to communicate throughout your project. This installment discusses the impact of alternative fees on experts.

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Since early 2009, legal industry publications have been announcing the transition to alternative fee arrangements (AFA). The enthusiasts claim these arrangements are going to kill the hourly rate, completely change the way companies work with outside counsel and allow the high quality law firms to thrive.

While there is quite a bit of support for a shift to alternative fees, there is also the belief that the media is simply publishing reactionary articles to economic pressures.

In October of 2009, Fulbright & Jaworski's released a litigation trends survey that stated that the economic downturn had forced 35% of corporate respondents to increase their use of alternative fees. Another survey by BTI Consulting Group revealed that nearly 80% of corporate counsel already uses some form of alternative fee arrangement.

These high numbers are due, in part, to the fact that alternative fees have existed for years in the form of contingency fees, blended rates, capped fees and a number of other arrangements.

An alternative fee arrangement is classically defined as any payment method not based on the billable hour. With such a broad definition, it is easy to see why the number of companies using alternative fees is so high.

However, in *Perdue v. Kenny A.* 130 S.Ct. 50 (2009), the United States Supreme Court made their position on the shift to alternative fees clear when they disagreed with the statement "departures from the hourly billing are becoming more common."

In this case that directly addressed attorney compensation, the court went on to say that "if hourly billing becomes unusual, an alternative to the lodestar method [hours worked times billing rate] may have to be found. However, neither the respondents nor their amici contend that that day has arrived."

Despite this ruling, there is a distinct industry shift to embrace fixed rates as a norm instead of a rarity. One AmLaw 100 firm, Kirkland & Ellis, has been using alternative fee arrangements for more than 15 years. They often enter into contingency fee arrangements that determine the law firm's fee based on a percentage of the case's recoveries.

Alston & Bird is another AmLaw 100 firm that has recently implemented alternative fee programs. Bryan Ives, a partner at the firm, was quoted in a [legal blog](#) as saying, “Law firms our size have no choice but to aggressively talk to clients about alternative fees. These days, almost every new engagement begins with an active discussion of the topic.”

Other firms have gone to the extreme of utilizing flat rates. There are at least two firms that charge a flat rate under \$3M for any intellectual property case, regardless of whether it settles out of court or goes all the way through to trial.

The appeal of alternative fees, from corporate counsels’ perspectives, is the opportunity to share the risk involved in litigation. By setting alternative fee arrangements, a corporation reduces the possibility of negligent hourly billing and lessens unexpected litigation costs.

But what does this mean for experts?

If corporations are shifting the risk to the law firm, the law firm will try to shift some of the risk to the experts. As I mentioned in “Three Questions to Ask Early and Often,” outside counsel no longer have large budgets to spend on litigation. This results in less money that can be spent on experts and consultants.

To continue to operate in a system with fewer funds, experts and consultants need to ask questions about expectations early in the process. Some experts are even turning to alternative fee arrangements themselves.

In my next article, I discuss how experts can utilize alternative fees to match this industry trend. Medical experts often charge a flat rate per examination and software experts often charge per line of code.

Although alternative fees have not yet become a widespread trend in litigation, the industry may be shifting in that direction and experts need to be thinking now about future alternative fee options.