
Getting Away from the Hourly Rate:

An Efficient, Effective Team Maximizes Value

Editor's Note: The following is the third of a four-part series. The final article in the series will appear in an upcoming Of Counsel issue.

Time-based billing does not serve corporate clients well in respect of their interest in efficient, effective legal service. Clients want the lowest cost possible consistent with achieving their desired outcomes, and they want the highest-value legal service achievable within those parameters.

Although there is a misalignment between what clients want and what time-based billing provides, the latter fee arrangement persists for the great bulk of corporate billings. We have canvassed in prior articles in this series why, in the great majority of situations, fee arrangements still use the amount of time spent by the lawyers as the primary or exclusive basis for calculating those lawyers' fees.

Despite the hurdles to moving away from time-based billing that we identified in those articles, counsel still need to take a broader view of the work managed by corporate law departments in order to craft alternative fee arrangements (sometimes called "appropriate fee arrangements" and, using either phrase, AFAs) that can assist the clients in reaching those goals. They need to understand the dynamics of that work and how those dynamics might affect the cost and value of the respective contributions of the various team members. Finally, they must explore how in-house attorneys can take that into account in the design and application of AFAs.

Different types of matters overseen or handled by law departments will require different management techniques to control

costs. How effectively AFAs are designed will be impacted as a result. Let's examine some distinct situations.

The Challenge of Managing a Large Portfolio of Similar, Non-Complex Disputes

One company in our experience faced a very large number of similar, non-complex disputes that had arisen throughout the country. The law department's traditional approach had been to assign such matters regionally, in some instances to regional firms and in other areas to "national" law firms.

Costs for those matters varied widely; the processes that the law firms followed were inconsistent (leading to data that was difficult if not impossible to aggregate because it was collected in disparate fashions), and the results were unpredictable. Within the law department, three attorneys, each working individually with no coordination among them, managed those matters idiosyncratically with no disciplined process, assisted by diverse administrative staff performing similar work in similarly disparate ways.

The department's technology was not embraced: the data for some matters were entered into the matter management system internally by individuals (still with insufficient discipline), while data entry from other matters was aggregated by the law firm assigned to handle those matters, with no consistency. The lack of clarity regarding use of the technology led to "rogue" use of those tools and the resulting inconsistency in data capture and use.

The company embarked on a cost-reduction initiative, with the law department tasked with managing more effectively the matters entrusted to it. As a first step, the performance of regional firms was evaluated. One firm stood out from the rest when a few key metrics were developed and analyzed: it demonstrated reasonable, consistent turnaround times for the matters that it handled; its invoices included crisp descriptions of the work billed by its timekeepers; and it provided a set of management reports that articulated open matters, closed matters, an inventory of active matters being worked on, key lessons learned, and a “no surprises” unusual-developments analysis. While that firm’s costs were not the lowest among the firms used, it demonstrated a sincere effort to manage the work assigned to it.

The law department brought key members of that firm to the company’s headquarters to generate ideas for better managing the national book of business. The group explored how they might standardize processes, collect reliable data, and reduce costs. The plan they collaboratively developed included the following key components:

- The firm would develop a simple but effective software tool; key elements of data-capture were designed and agreed upon; access to the software was engineered to enable the in-house legal team to access all data housed there; monthly/quarterly/annual management reports were designed; and automated processes were developed to enable the in-house staff to manage the matters by exception rather than having to touch every individual case. Higher-level matter data were bridged into the corporate matter-management system.
- Analysis of the firm’s staffing led to the development of a national team of lawyers within the firm assigned to the portfolio. Those lawyers were allowed to work schedules that suited their personal circumstances because they were held to standards and to achieving results, rather than being measured by the number of hours billed.

- The law department was able to reduce its internal management team for that portfolio to one in-house attorney and three legal assistants.
- The law department and the law firm agreed to a budget that paid actual costs and a reasonable profit margin for the firm.

Creating a Team—A Deliberate Assignment of Responsibilities

Cost control and reduction are most effectively accomplished by a cohesive, well managed team, the creation of which requires an appreciation for and application of various tools and techniques routinely used in project management. In essence, in order to achieve the client’s goals in the most cost-effective and efficient manner, in-house counsel must for each matter proceed to build a team that harnesses the talents and expertise of its members with minimum overlap of effort as well as coverage equal to the range of tasks necessary to reach that goal.

(We don’t suggest that every matter will justify all of the analysis and techniques that we describe here. Low-risk routine engagements—*e.g.*, routine because of their repetitive, well-understood parameters—may be handled without all of the process described here, and perhaps even without an AFA, because the client’s goals of cost efficiency and speed might be achieved in other ways. On the other hand, such routine engagements might be addressed by treating them as individual components of a portfolio of similar matters covered by a single AFA for all matters in the defined portfolio, as in the above example.)

The members of a team for complex litigation (as an example) should possess (in the aggregate) all the talents required for the representation. If much electronic discovery will be required, and we can’t imagine that in today’s digital world this wouldn’t be the case, the team should include one or more individuals with demonstrated expertise in managing that intricate but critical exercise.

A case with scientific or technical issues will require one or more individuals who understand those issues and their intimate applicability to the legal arguments involved.

In other words, selection of members of a team should be careful, considered, and deliberate. The choices should take into account the needs of the matter (whether a transaction or litigation) as well as the “strategic strengths” of the individuals or firms under consideration. The in-house lawyers may need to ignore traditional organizational boundaries in order to bring together those team members best positioned to effectively advance the client’s interests. In-house counsel might select a senior partner and an associate from one firm to work with an e-discovery team from another firm and a contract-attorney firm in order to constitute a team that incorporates the best capabilities of those respective entities, for example.

Selection of team members must proceed simultaneously with the creation of a plan for managing the work. Each team member’s responsibilities and strengths must be mapped out carefully. The plan, when complete, will provide a roadmap for the team members’ efforts, enabling each to know not only his/her role but also those of the other team members as well as the sequence of efforts necessary to complete the work in an efficient and effective manner.

The plan will enable the manager of the effort (typically, an in-house lawyer) to monitor those efforts, make course corrections, and measure their effectiveness against the expectations set out in that plan.

The following example involving multiple law firms should illustrate this best management practice and its dynamics as well as the cost benefits thereby achieved.

As in-house counsel at a large insurance company, this author was responsible for managing the appeal of a significant adverse jury verdict in a Texas court. Due to the nature of the matter, three law firms, all of significant

size and renown, were involved in varying ways. Subsequent to a meeting with attorneys from all three firms to discuss the appellate process, we sent a memorandum to the firms delineating each one’s distinct responsibilities and the selection of issues for the firms grounded in their strategic strengths (location, strength of practice, personnel involved, etc.). Our purpose was to ensure that all the important issues relative to the appeal and the assignment of its various case elements were clear enough to ensure minimal overlap of work even as a maximum breadth of the effort among the firms was simultaneously pursued.

The lead partner at one of the firms called us to object to the terms of the memorandum and the assignments. (Neither of the other firms raised any concerns regarding the memorandum.) In that partner’s view, ethical responsibilities had to override any limitations on the firm’s assignment as expressed in the memorandum. In essence, that partner claimed that his sole professional judgment had to determine whether to research an issue or pursue a factual inquiry or otherwise represent the author’s company in the context of this appeal. His position discounted the fact that two other significant law firms (each of which was one of the largest in its respective state with a favorable reputation)—one of which included among its partners, and the designated primary appellate counsel for the matter, a former chief justice of its state of domicile—and a law department with dozens of lawyers with considerable experience on staff were also involved in the matter.

This effort included no AFAs for any of the firms involved; their fees were calculated on a time-and-expense basis. Would that lawyer’s position have differed if his firm were on the hook for a successful outcome or the cost thereof by means of an AFA? While one cannot know, the cost-related and other implications of three firms independently conducting themselves in such a manner were, to us, unacceptable. Ultimately, the client did achieve a very favorable decision by the state supreme court in the matter and it was successfully concluded.

Another situation exemplifies the use of project management techniques in the context of litigation in which only a single firm represented the company. One partner handled the day-to-day case matters for an environmental case, but an important hearing loomed before the presiding judge. A partner at the firm with greater seniority had much more exposure to, and experience before, that judge, so we determined that the significance of the hearing justified having the more senior partner also appear at the hearing. Even though the more senior member of the firm was somewhat less familiar with the minutiae of the case, his presence at the hearing contributed (at least) to a favorable result.

Subsequently, an outside fee auditor reviewed the billing details for the case and opined that the more senior partner's time was duplicative of the time spent by the junior partner at that hearing (again, both had attended with our concurrence) and therefore excessive. This view ignored (in our view) the benefit of that senior partner's involvement in that aspect of the case (but not the rest of it, due to cost-efficiency concerns). The favorable result outweighed any concerns vis-a-vis possible duplication of effort because each partner played a distinct and valuable role at the hearing (as planned).

Selecting a team to handle a matter resembles in some respects the assemblage of a sports team. Each member of the team has a discrete, distinct role. To fulfill that role, each possesses certain talents and strengths. In-house counsel should serve as the team's coach. Blending those members' strengths into a cohesive, functioning team requires that the coach have a deft touch, but one worth cultivating, for only such a group of individuals can, in many situations, properly handle all the disparate tasks and assignments that in the aggregate are the typical components of a modern, complex litigation or cutting-edge transaction.

As mentioned above, strategic strengths should play a large role in the process of

selecting members of the team and assigning their responsibilities. What do we mean by this? The roles of in-house and outside counsel are inherently distinct, though they serve the same client. Their strategic positions, and their strategic strengths, differ as well, a fact that impacts which tasks they are best positioned to take on in each matter. Different individual attorneys, whether practicing in the same or different firms, also have discrete strengths. An exploration of those issues will assist in developing an approach to the question of developing an AFA.

Let's turn to that.

Strategic Strengths to Assemble Cohesive Teams of Complementary Skills

What are strategic strengths? They are inherent attributes that distinguish one party from others and that contribute value to that party's performance or role. Those attributes might result from the organizational "place" of the specific person (*e.g.*, inside counsel as opposed to outside counsel). Some of them derive from personal characteristics of the individual (some people being more capable than others of the type of analysis that is necessary in litigation).

If you identify the strategic strengths of the various members of the legal team, you then can harness each member's strengths so as to achieve more than would otherwise be possible. There also may very well be some identifiable weaknesses for which you need to compensate in your planning. On a properly staffed team, the members' skills complement each other.

What are examples of the strategic strengths and comparative weaknesses of inside counsel? Inside counsel generally works closely with a company's business executives and managers on a day-to-day basis. In the course of that daily toil, a staff attorney develops a strong appreciation of the organization's business strategies and

its corresponding legal needs. In turn, that understanding enables the attorney to anticipate how the company's legal position (in compliance, litigation, or otherwise) might later impact the company's operations. He or she will have a sense of which policies, processes, or cases might be problematic for the corporation because they might have a very adverse precedential impact on those operations. An outside attorney might not be as able to make that determination.

Inside counsel generally enjoys greater proximity to the operational personnel of a company, which can then lead to greater integration in the management team and its processes. That integration can be critical to the in-house attorney's ability to fulfill certain responsibilities, one of which is to counsel the business executives and managers on risk. (After all, it is not enough to simply aspire not to get caught!) This counseling is best administered over time, in large and small doses as the opportunities present themselves, often unexpectedly; as a rule, it is not as effectively accomplished merely by infrequent formal presentations. Gardens respond to continuing, low-volume watering better than they do to infrequent gully washers. A due appreciation for legal concerns should be similarly nurtured.

Generally speaking, the attorneys who make up a company's staff acquire, over time, experience representing the company in a variety of contexts and in connection with a variety of initiatives. Whereas outside counsel are typically retained for discrete assignments (*e.g.*, to handle the sale of a property, to represent a company in connection with a corporate acquisition, to represent the company in a particular case), the role of inside counsel spans all situations that might arise.

This ongoing presence creates three distinct strengths of inside counsel: the development of institutional memory over time that provides some context and foundation for subsequent situations; the opportunity to measure the company's responses in those

varying contexts, providing a more "textured" understanding of the company's needs and preferences; and the opportunity to develop a reputation as a valuable contributor in the development of the tactics that support business strategies. All these strengths animate the inside attorney's representation of the organization. They allow that attorney to view each problem and situation in relation to other situations in which the company has found itself in the past, in which it finds itself at present, and in which it might find itself in the future.

Another strength of inside counsel, which is related to several of those already mentioned, is that he or she typically has or acquires a greater commonality of perspective with the business client than does outside counsel. This perspective often manifests itself in a greater appreciation for cost-effectiveness or as a sharing of the business goals, by virtue of which the attitude of inside counsel is usually different than that of outside lawyers (this is not a criticism of the latter, merely an observation). In developing that greater commonality of perspective with the business personnel, in-house attorneys gain opportunities to understand how the business operates and to forge relationships with the business personnel that provide those lawyers a "seat at the table" for business strategy and planning sessions. If something needs to be fixed, attorneys in that position will be able to work with the business unit quickly to right the situation.

This appreciation of the business perspective often leads to the attorneys being considered for senior leadership roles within the business organization. When that occurs, collaboration and cooperation between the legal and business "sides of the house" generally improve, which can further improve the organization's compliance and risk-appreciation profiles.

On the other hand, in-house counsel are generally subject to staffing constraints. They are often geographically removed from the courts and agencies with which they deal.

They may lack the bar admissions necessary to fully perform certain assignments, since corporate lawyers generally do not secure admission in all states in which their employers conduct business or in which they might have to avail themselves of the courts. In those situations, companies must retain outside firms that have the requisite admissions.

What are some of the strategic strengths and relative weaknesses of outside counsel? First and perhaps foremost, a law firm exists because of the attorneys who comprise it. As self-evident as that may seem, it has its own significance for this analysis. The attorneys of a firm direct its activities; its structure is designed to support its mission of providing legal service. In the case of litigation, for example, a law firm is configured to participate in the litigation process; a law department, on the other hand, is only part of a company, and the company's *raison d'être* is not defined so singularly.

The demands for the services called for in the practice of law are not outweighed at a law firm in the way that they may be in a corporate environment. An inside attorney might have to grapple with corporate procedures and other concerns in order to secure appropriate contract assistance for litigation, for example. Such concerns are less significant for a law firm and the desired ends might therefore be more easily achieved.

The single focus of a firm creates other strategic strengths. Outside counsel is likely to be viewed as functioning solely as a lawyer in respect of corporate clients. Some courts view an inside attorney, on the other hand, as serving the company as a businessperson as well as a lawyer. Here there may therefore be implications for the availability of the attorney/client privilege and the attorney-work-product doctrine (even though the analysis as to the availability of the protection is the same), since the commingling of functions can undercut the protection that some courts will accord communications and materials otherwise protectable.

On the other side of the ledger, the cost of in-house counsel is typically lower than that of outside attorneys. A law firm, like many organizations, is oriented to maximize its own profits. Its client business is intended to provide its owners and members with a return above their subsistence needs. On a purely comparable basis, then, a company should be able to save money by having the same services performed by in-house counsel.

However, there are several qualifying issues relevant to that determination that flow from the differing status of inside and outside attorneys. Indeed, the final determination of whether hiring staff is the cheaper alternative to retaining comparable outside attorneys entails a more complex analysis than simply comparing the relative hourly rates. For example, even though more and more companies are explicitly disavowing any guarantee of employment (often expressing an assurance of employability but not employment), an in-house staff of attorneys represents an ongoing financial commitment. By retaining a law firm instead, a company can preserve greater flexibility for meeting its legal needs. The commitment to pay fees is limited, generally, to the services already performed rather than for employment expectations reaching into the future. The financial obligation to outside counsel may be more easily ended.

Outside counsel often have geographic proximity to entities outside the company that are relevant to the company's legal affairs. A prime example is the court systems with which we must deal. In-house lawyers are often located at or near the business operations, regardless of whether that is convenient for dealing with courts, government agencies, or any other constituencies that are external to the corporation. Law firms, on the other hand, often locate near the entities with which they must deal. As a result, familiarity with court procedures and the vagaries of administrative interpretations of statutes and regulations is often greater in law firms than it is in law departments.

Inside counsel have reporting mechanisms that are more closely geared to the company's needs. Whether as to budgeting or as to litigation reserves, management expects timelier reports from inside counsel than they generally do from outside counsel. They often expect the latter to report on a schedule that is less frequent.

Outside lawyers represent multiple clients. Each client benefits from that diversity because lessons learned in one client's context can be applied in another's. However, that diversity can also have negative effects for each client. Despite the best of intentions and the most professional approach, a firm's multiple representations can restrict its pursuit of a particular client's interests, even unintentionally and perhaps only marginally.

There may be other, less obvious issues that can impact the analysis. For some companies, the costs of inside and outside counsel might have disparate ramifications. For example, companies that manage funds on behalf of third-party investors might be able to charge the time of outside attorneys who handle legal issues for those investments directly to the investment accounts. The internal cost of in-house counsel might not be as easily or certainly reimbursable. Each company might have different preferences as to the size and makeup of its staff. Such complexities aren't subject to the generalized analysis of a treatment such as this.

For many (if not all) matters entrusted to a corporate law department, the best, most cost-efficient results are achieved only through teamwork. The team typically includes both in-house and outside counsel (and perhaps other service providers as well). It may even include representatives of the law department's internal business unit clients. Unless the members are carefully selected, though, their talents and strengths may not work together optimally.

Accordingly, careful team assemblage, taking into account a multitude of factors, is

critical. Identifying what type(s) of service the company needs, where that service is available, and in what form and how best to meld those services and team members into a high-functioning team, requires a certain deftness of touch. It also requires careful planning and implementation. In short, it requires the application of many project management techniques.

Yet it is by making those applications that in-house counsel lays the groundwork for designing a fee arrangement that serves the company's value-related goals as well as its substantive objectives. It is a goal worth pursuing. In the final article in this series, we will look more closely at how all these considerations come into play in determining whether an AFA is appropriate and, if so, in designing one. ■

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