

BY BEN W. HEINEMAN, JR.,
AND WILLIAM F. LEE

Getting Your Fix

Two veteran lawyers say that now is the time for fixed fees.

IN THESE TROUBLED ECONOMIC TIMES, fixed fees for particular legal matters have appeal both for law firms and their corporate clients. We—a former general counsel of a major company and a current co-managing partner of a major firm—strongly believe that this is an idea whose time has come. For in-house counsel facing tremendous budgetary pressures, the fixed fee addresses the problems caused by the hourly rate, such as unpredictability, high costs divorced from actual value and, most importantly, the maddening law firm definition of “productivity”—defined as more lawyers and more hours per matter.

For law firms facing reduced demand and cash flow problems (if not crises), the fixed fee addresses the issues of increasing overhead devoted to the billing process, clients flyspecking bills and demanding after-the-fact discounts, and delays in payments and falling realization rates.

Seen in its best light, fixed fees thus have significant benefits for both in-house and outside counsel: reduced billing hassles, more predictable cost to the client, more predictable and timely payments to the firm, and, ultimately, better alignment between the cost and the value of the legal service. The credit meltdown and the deep global recession may provide the impetus for real change in this corner of the economy, as in so many others.

Seen in the sweep of recent history, the fixed fee can also address a critical conflict at the center of the evolving inside counsel–outside counsel relationship. The 20-year rise in the talent, experience, and expertise of in-house lawyers has led to co-equal partnering on matters. But significant changes in both law firms and law departments have often led to ill will and conflict over money. As Am Law 200 firms have grown as businesses, they've

faced relentless pressure for revenues, and the new breed of in-house lawyers (often alums of firms) face incessant business pressures for cost control.

During this period, there have been many attempts to find détente on hotly contested money issues: task-based budgeting and billing; RFPs; preferred providers; auctions; discounted, blended, or bulk hourly rates; or some combination of the above. But all have stumbled on the ultimate questions: how to set price with quality and achieve cost and value alignment.

SETTING A FIXED FEE

Historical data should provide the starting point for setting the fixed fee. Both firms and corporations have detailed information on the past cost of different kinds of matters. They can use data-mining techniques to determine reasonable ranges of cost for a wide variety of legal services. These services

range, obviously, from the simple to the complex:

- A single project involving expertise and judgment, but not much risk, such as writing a handbook, creating form contracts, developing a compliance training program, and monitoring developments in evolving areas of law.
- A repeating, routine book of business, which involves expertise and judgment, but not much risk, such as filing a certain type of patent or trademark application, monitoring compliance with environmental permits, and handling routine labor matters in arbitration (as opposed to court).
- A repeating, but more complex book of business that involves judgment, expertise, and risk, such as annual securities reporting, a line of product liability cases, a series of venture capital financings, or more complex multiparty contracts for capital equipment sales.
- A one-off, highly complex, high-risk

ILLUSTRATION BY PETER HOEY



delivering matters on or below budget and with good results. Similarly, this could lead to more productive—and morale-boosting—use of associates

have greater predictability and regularity on billing and payment for both law firms and corporate clients. Beyond economic necessity, the fixed fee provides

money, between in-house and outside lawyers, can serve a broader societal goal in this time when trust in boards of directors and CEOs has been shredded,

Law firms must develop project management capacity that combines sensitivity to quality with sensitivity to productivity.

who will be paid for doing quality work within the fixed-fee budgets on more matters in smaller teams, rather than billing endless busywork hours on overstuffed mega-matters. But fixed fees may not eliminate the tyranny of total billed hours or vexing issues such as professional development for associates [“Lost Generation,” March 2008].

The fixed fee is not an easy answer to the economic conflicts between firms and corporate clients. But the current economic crisis makes it imperative to

the opportunity for better cooperation on money, just as the enhancement of in-house lawyers has made for much better cooperation on matters. This closer alignment between matters and

and when wise counseling is so critical to help corporations better balance risk-taking with risk-management, and better fuse high performance with high integrity.

Heineman, former General Electric Company senior vice president–general counsel, is currently distinguished senior fellow at Harvard Law School’s Program on the Legal Profession and senior fellow at the Belfer Center for Science and International Affairs at Harvard’s Kennedy School. E-mail: ben.heineman@ge.com. Lee is co-managing partner of Wilmer Cutler Pickering Hale and Dorr and teaches at Harvard Law School. E-mail: william.lee@wilmerhale.com. Heineman writes occasional commentary for Corporate Counsel on developments in the law and the legal profession.

Ad size
7” x 4.5/8”