

Fixed Fees and Performance

By Richard G. Stock, M.A., FCIS, CMC, Partner with Catalyst Consulting

This is the fifth in a series of articles about how corporate and government law departments can improve their performance and add measurable value to the organizations

In writing about fixed fee arrangements with law firms, Ben Heineman (*Inside Counsel Revolution*) suggests that there are trade-offs. Fixed fees “may drive firms to leaner, more productive staffing. The bad news is that, even though they need to produce a good result, firms may cut resources too far and impair quality in order to get a bonus for coming in under the fixed fee.” I can understand the concern that the General Counsel may have: that she may be getting the “B-team” or that the firm may be cutting corners on resource allocation.



It is common enough for companies to request budgets and caps for individual matters, or for phases of matters. This should be done as a matter of course for all files that are likely to require at least 50 hours of legal work. The budget estimate should detail the number of hours for each fee earner for each phase and for each task within a phase of a legal matter. Planning assumptions should support the estimates with an 85 % probability that each assumption is correct. All of this makes the firm and the client accountable to each other to define the scope of work, the risks, and the anticipated results.

A longer-term commitment to more work from fewer firms, using non-hourly fees, is more complex. Putting more eggs in fewer legal baskets has been a procurement / sourcing practice for 30

years. However, starting to do this in a way that integrates the company and the law firm in a strategic fashion goes several steps beyond managing a panel of firms and running a request for proposals every three or four years, especially if the fees are non-hourly.

I have seen of multi-year non-hourly fee arrangements succeed and I have seen them fail for a number of reasons. The performance of preferred law firms, including those to which a long-term commitment for workflow and work volumes is being made, should be assessed twice a year, as well as when certain milestones are reached for complex matters. There is something to be said for tying performance to part of the fees.

Key performance indicators (KPIs) are essential and must be set out clearly with targets that matter. No company wants to waste time evaluating primary firms on overall performance every six months if it means that part of the hold-back on the fixed fee is invariably released. This type of administrative overhead is resented by corporate counsel who have no time to spare. KPIs will be effective if they are designed to improve results, productivity, innovation in service delivery, and / or costs.

Behaviours and resource allocation must be influenced by the choice of performance activities to be carried out by the law firm and by the corporate client.

It can be tempting for a client that has agreed to a multi-year fixed fee for a volume of regular and complex work with a leading law firm to monitor and to manage the relationship informally or on an exception basis. Heineman maintains that corporate counsel must be held

responsible for the quality and the cost of the legal work of external counsel. For this to happen, then inside counsel must assemble and manage an intelligent performance program for external counsel. The reasons are the same as those which support the evaluation of their own performance within the company.

There are three components for a basic performance program applied to external counsel.

The first is a fee arrangement that combines a base fee with a fee for performance. The configuration must go beyond a hold-back on a base fee to an arrangement which stimulates productivity, results and innovation in service delivery beyond what firms typically provide as part of their non-billable tie investment for their best clients.

The second component of a basic performance program applied to law firms is the right infrastructure and sufficient time from the law department to actually collect input from across the company and the law department, and then to organize well enough to debrief external counsel in a timely fashion every six months.

The third component suggests that you get what you measure and you get what you pay for. It makes sense for the company to spend money beyond the base fee for performance against targets set out in the KPIs. Too many companies prefer to trade on professional relationships only, rather than set stretch goals and performance targets for preferred external counsel.

This traditional “modus operandi” is too easy, too comfortable and much less than a company expects of its own lawyers.

Fixed fees for large portfolios of regular and complex work are cost-effective provided they are combined with a robust performance management program tied to legal fees.

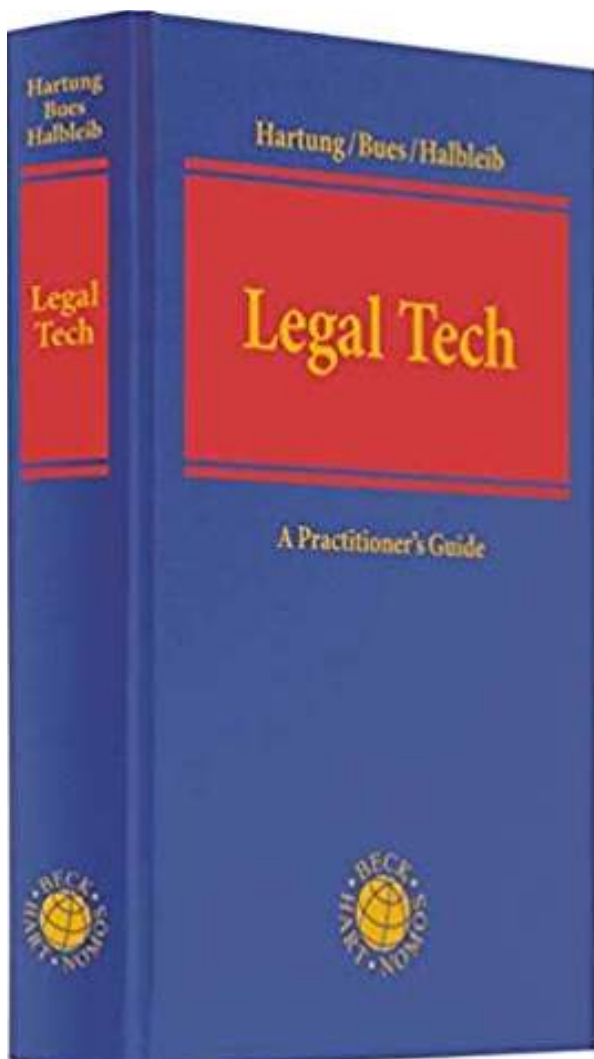
Adapted from an article published by Lexpert Magazine in March 2017.

About the Author

Richard G. Stock, M.A., FCIS, CMC is a partner with Catalyst Consulting and is based in Canada. The firm has advised corporate and government law departments in 20 countries since 1996. Clients include: Shell, Heineken

USA, The Judge Advocate General, Pearson Education, Toyota, SNC Lavalin, Bombardier, National Bank of Canada, TD Bank, Estée Lauder, Intact Financial Services, Ontario Power Generation, DocuSign, Charter Communications, United Steel Workers Benefit Funds, Air Canada, John Deere, Alberta Health Services, Disney, Fairmont, Wal-Mart, USAA, TransLink, Williams, IATA, the Department of Justice, Interac, the Government of Nunavut, and Turkish Airlines.

Richard can be contacted at (416) 367-4447 or at rstock@catalystlegal.com. See www.catalystlegal.com



MUST READ

Markus Hartung, Micha-Manuel Bues, Gernot Halbleib and others

This new handbook comprehensively analyzes the current and future states of digital transformation in the legal market and its implications from a global perspective. It provides a multi-faceted overview of the use of Legal Tech in law firms and legal departments in different parts of the world (including Africa, Australia, Brazil, Canada, China, Europe, Russia, and the United States) and formulates clearcut strategic advice for a successful digital transformation. With concrete examples, best practices and first hand experience reports, more than 50 renowned international experts explain how and to what extent Legal Tech - through automation and technology - will change the way legal services are delivered. The reader learns what strategic decisions and steps are necessary to equip the legal industry for the changes to come. Future developments (e.g. Smart Contracts, Blockchain, Artificial Intelligence) are also explained and analysed in this unique book. *(Click on the book cover to order)*