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# Jittery Firms Put On Brave Face as Microsoft Targets Billable Hour

Miriam Rozen, The Am Law Daily

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When David Howard, Microsoft's deputy general counsel for litigation, posted [a blog on LinkedIn](#) about his company's new plan for choosing, working and compensating its regular outside counsel, his central message was clear: Bye-bye billable hour.

Microsoft wants 90 percent of the legal work performed by its outside firms to be compensated under alternative fee arrangements, Howard wrote. That's an increase of as much as 35 percent, according to figures [he gave Corporate Counsel](#).

Howard also named the 13 firms that will participate in what he is dubbing the New Strategic Partners Program. And some lawyers at the firms expect the shift away from billable hours to alternative fee arrangements to be dramatic—and possibly financially painful.

"I'm bullish about this, but that doesn't mean we won't lose money on individual engagements as we learn how this works," said Mitch Zuklie, the chairman and CEO of San Francisco-based Orrick, Herrington & Sutcliffe, which has represented Microsoft since 2008. Orrick was included on Howard's list along with Arent Fox; Covington & Burling; Davis Wright Tremaine; Fish & Richardson; Greenberg Traurig; K&L Gates; Latham & Watkins; Merchant & Gould; Paul, Weiss, Rifkind, Wharton & Garrison; Perkins Coie, Sidley Austin and Simpson Thacher & Bartlett.

The Redmond, Washington-based software giant will rely on spreading retainer arrangements—already used in several categories of Microsoft's outside legal work—to other types of work, such as regulatory matters, Howard said in his July 27 post. Still, questions abound for firms expecting to work with Microsoft or [other major clients getting more aggressive on alternative fees](#).

"Is this going to cut into our profitability?" Zuklie asked.

But, he added: "Frankly, [this] is where the market is going ... We have to adapt to it."

Zuklie said Microsoft's new program provides an opportunity for firms like Orrick to explore new fee arrangements "in a relationship where you are a preferred provider."

## Not all talk

In his LinkedIn post, Howard said alternative fees "encourage a stronger alignment between Microsoft and its firms on the scope and goals of an engagement." As part of its initiative, he wrote, "we will have some competition for our retainer work and most expensive matters. We won't necessarily always give our work to the lowest bidder, but through this combination of AFAs and competition we'll help ensure that we are paying a fair price for our work."

Firms competing on the basis of fixed fees allow for true "apples to apples comparisons," Howard wrote.

Microsoft will develop in-house data science capabilities, and it already has launched internal projects focused on identifying legal work that would lend itself to alternative fee arrangements.

Kevin Clem, a managing director with HBR Consulting, advises Fortune 100 companies about structuring programs so more outside counsel agree to alternative fee arrangements. The news from Microsoft is "huge," Clem said, largely because of the percentage of the company's legal spend it expects to be affected.

In HBR's most recent survey, about 77 percent of law departments reported using alternative billing arrangements. Such arrangements only accounted for 15 percent of legal fee spending, however. "AFA has been talked about for 20 years," Clem said, but Microsoft's decision to crank up alternative fee-based work so aggressively shows things may really be changing.

Yaron Dori, the relationship partner for Microsoft at Covington & Burling in its D.C. office, acknowledged that the effect of increased fixed fee work on the firm's bottom line was unclear. Covington has claimed Microsoft as a client for more than 20 years, Dori noted, "We're committed to working with them."

"We're going to have to see," Dori said. "We're enthusiastic about working out the ways alternative fee arrangements work."

But, he added, "it could be that we learn only after the fact that it didn't work."

Many other Covington clients have said, "'We would like you to consider doing this under an alternative fee arrangement,'" Dori said. "Sometimes it works well, sometimes poorly."

Microsoft's program "is just intended to try and focus more frequently on AFA arrangements. I don't know that anyone thinks of it as monolithic"—all AFAs, all the time, he suggested.

Maybe only 90 percent of the time.

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