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**Should You Take that Non-Hourly Case?**

**Erica W. Harris**

Author contact information:  
Erica W. Harris  
Susman Godfrey L.L.P.  
Houston, TX

[eharris@susmangodfrey.com](mailto:eharris@susmangodfrey.com)  
713-653-7810

## SHOULD YOU TAKE THAT NON-HOURLY CASE?

By Erica W. Harris

Taking cases on a non-hourly basis means you are taking on risk. You are investing your time and, if you advance expenses, your money. Even if your client prevails, the value of the time you invest in the case may exceed your hourly rate times the hours invested. As a result, evaluating whether to take a case on a particular non-hourly basis is extremely important and requires significant work.

Historically, pre-engagement case evaluation work was primarily the realm of plaintiff side contingency lawyers, but that's not the case anymore. Alternative fee arrangements (AFAs) have caught on. According to Norton Rose Fulbright's 2018 Litigation Trends survey,<sup>1</sup> fifty-six percent of corporate counsel say they use alternative fee arrangements; ninety-six percent reported they "were satisfied with the quality of work provided under AFAs;" and thirty-seven percent of survey respondents said they planned to increase their use of AFAs.

As an increasing number and types of clients use AFAs, an increasing number and type of litigators need to understand how to properly evaluate whether and on what terms to propose or take a non-hourly case. For purposes of this paper, an AFA includes any non-hourly attorney fee structure, including but not limited to, flat, fixed, contingent, blended, capped, or hybrid fees.<sup>2</sup>

### 1. How to evaluate a non-hourly case

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<sup>1</sup> See <http://www.nortonrosefulbright.com/files/20171025-2017-litigation-trends-annual-survey-pdf-157870.pdf> (last visited Aug. 23, 2018).

<sup>2</sup> A flat fee is one fee for the entire matter. A fixed fee is a fee that is fixed at the outset of the case but not flat; it may be paid monthly, and the amount may change over the life of the case. A contingent fee is a fee that is earned only upon some defined success. A blended fee is the blended hourly rate of the partner, associate and/or paralegal that will likely work on the matter for each hour of work regardless of which of the partner, associate or paralegal works the hour. A capped fee is a fee that may be paid by the hour or some other basis until a certain cap is reached at which point no additional fees are paid. Hybrid fees are a mix of other types of fees. For example, 70% of hourly rates plus 10% of gross sums recovered is a type of hybrid fee.

- (a) Determine likely costs
  - (i) Consider your firm's cost profile

Your starting point is to know your firm's fee and cost profile. How much does it cost your firm to take a particular type of case from start to final judgment? What is the average monthly burn on a particular type of case? Given the type of case and venue, is this likely to be a one week or six week trial? Are hearings likely to be limited or a necessary feature of every motion, at set times or part of a wait-all-day-to-see-if-you-can-be-heard-docket? If you do not know the answers to these questions, then you will not know whether you can afford to take a case on contingency and will not know at what fixed fee rate you are likely to cover your time on a case.

Knowing that another law firm passed on a case or offered to take the case on a particular AFA is not a short cut to knowing whether you should take a particular non-hourly case. Because hourly rates, efficiencies and office overhead vary between firms, the same case may be uneconomical for one firm but a great opportunity for another.

- (ii) Define the scope of work

When you are thinking about how much time a case will take, you need to consider the scope of work you are pricing. If you are representing a patent holder in a patent infringement suit and defendants throw the patent into reexamination through an inter partes review, are you going to be defending the patent in that forum? Are you going to defend counterclaims as well as prosecute affirmative claims? While counterclaims often involve the same facts and circumstances, sometimes they can require discovery of a different set of facts and presentation of additional witnesses. A suit for breach of a franchise contract due to a circumstance in 2017 might lead to a counterclaim of breach of the contract for something totally unrelated that

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