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The Price Is Right? Alternative Billing Models for Law Firms

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About the Presenters...

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Kristina Mendez is the owner of Mendez Law located in the fox valley area in northeast Wisconsin. Mendez Law currently has two offices, one in Appleton and the other in Green Bay. She is a graduate of Rasmussen University and Creighton University School of Law. In 2022 she received the Belle Case La Follete Award from the Wisconsin Law Foundation. The areas of law that she practices include immigration, criminal defense, family, civil, and occasional business and estate planning. Mendez law primarily works with the Hispanic community in the fox valley area. Kristina Mendez is also a wife, mother, and the owner of one Border Collie, two Guinea pigs and two rabbits.

The Price Is Right? Alternative Billing Models for Law Firms

Jennifer L. Amundsen, Amundsen Law Firm, LLC

Full disclosure: I've always hated tracking my time. I'd inevitably forget to turn the timer on (or check my watch), get distracted by a phone call for another matter while the timer was running, forget to record time when I switched matters—you name it. (I know I'm not alone in this.) My introduction to law firm work, before law school, was through intellectual property, which is an area where many firms used flat-fee billing even before it was a topic of discussion with the broader legal community.

So with all of those factors swirling around in my head when I started my firm, even though I did (and still do) some work on an hourly basis, I began to consider ways of selling my expertise other than based on the time a given project takes, because let's face it: the client is paying you for a specific work product or perhaps an event. The client does not care how much of the attorney's time goes into producing that product or result, other than as your time relates to the client's cost. One smart lawyer who I worked for years ago always told me to say in an initial consultation, "I suppose you're wondering what all this is going to cost you." The same lawyer told me the fee should always be quoted in dollars, not in hours, because the client just doesn't care about the lawyer's time in that way—the client cares about its own bottom line.

What It Is

The billable hour has long been the customary way to sell one's legal expertise with clients, but there are advantages to exploring the alternatives. Today in my practice, I largely use flat fees (sometimes also called "fixed fees," "value billing," or "project-based billing") along with subscriptions (which I have also heard called "retainer" billing). You have probably heard of other billing models, such as contingent fee arrangements, which are common in some practice areas, but flat fees and subscriptions are the models I will discuss here since that is what my firm uses.

Flat fees are just what they sound like: a flat or fixed fee for specific services. A typical flat-fee project could be the preparation and filing of a trademark application, the drafting of a suite of documents for the client's use, a divorce, or helping the client close a real estate transaction. The flat-fee model can be used in many different areas, though, including litigation.

Subscription legal services are also self-explanatory. The client pays a periodic subscription fee, usually monthly, for specific services that will be provided during that period. For example, a client might pay a monthly fee to have the firm review all of its vendor contracts each month. Sometimes firms include things like a periodic meeting (e.g., quarterly check-ins), access to a document bank, or an exclusive portal for subscription clients only. Specific benefits would depend upon the type of client the firm serves and the price point of the various subscriptions. Like other subscription services, some firms offer different subscription "levels" with increasing benefits. One issue to consider where subscriptions are concerned is the timing of any cancellation by the client, considering the ethical obligation to refund unearned fees.

Sometimes a combination approach is useful. A client might subscribe for certain services that it will use on a regular basis, while other services could be provided on a flat-fee basis as needed.

The Benefits of Alternative Billing Methods – Why Make the Switch?

My firm uses these methods not only because they minimize the hassle to me of having to track my time. There are other advantages to the attorney as well, and the most important of these are that 1) they also minimize the work associated with sending invoices and 2) they facilitate getting paid in advance. Invoices generally consist of a single line item such as: “Mutually agreed flat fee for legal services re. new trademark application as described in Scope of Work dated October 1, 2023.” The key is to make the invoice align with the engagement letter and related Scope of Work.

Using alternative billing methods can also provide big benefits to clients. For clients who are cost-conscious, the certainty associated with a flat-fee project can provide the peace of mind the client needs to move forward with the work they need done. For clients who elect to obtain services on a subscription basis, the associated certainty also facilitates budgeting. Note that the services are not necessarily cheaper than services obtained on an hourly basis; rather, the element of uncertainty is removed. Hourly billing can actually disincentivize the client from contacting an attorney, since they have a feeling the call will be “expensive”—they just don’t know quite how expensive until they get the bill. Since key criticisms of hourly billing from the client side emphasize lack of certainty and the fact that hourly billing does not encourage the lawyer to be efficient in his or her work, clients tend to really appreciate these alternative approaches in my experience.

The Ethics

As noted above, the “billable hour” is the most common way to sell legal services today. One objection to alternative billing models is on an ethics basis and it is true that Wisconsin’s *Rules of Professional Conduct for Attorneys* (“Rules”) require that an attorney’s fee be not “unreasonable.” SCR 20:1.5(a). So how else can we know how much to charge the client? Well, time is only one of many factors to be considered in reaching a determination of reasonableness under the Rules. Among the other factors listed, those that seem especially relevant to flat fees and subscriptions are 1) the amount involved and the results obtained; 2) time limitations imposed by the client or by circumstances; 3) the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer(s) performing the services; and 4) whether the fee is fixed (though in the Rules “fixed” is juxtaposed with “contingent”). *Id.* So clearly many factors other than time can help to determine the reasonableness of a fee. One great thing about flat fees and subscriptions is that the client can decide *in advance* whether they feel the proposed fee is fair and choose not to hire a particular attorney if the proposed fee seem unreasonable, as opposed to an hourly engagement where the client may be left to guess about the cost.

With some exceptions, the Rules also require that the scope of representation and basis of the fee be communicated to the client in writing. SCR 20:1.5(b). As noted above, this is really

easy with flat fees and subscriptions, since you can tell the client exactly what you are going to charge them and, as will be discussed below, you will also describe the services with particularity. Finally, the Rules require unearned fees and funds advanced for payment of fees to be held in trust until earned by the law (and funds advanced for payment of costs to be held in trust until such costs are incurred). SCR 20:1.5(f). Importantly, the Rules provide an exception to allow fees to be deposited to the lawyer's business account if judicial review is available in a proceeding to which the fee relates or where the lawyer complies with certain requirements, consisting of 1) delivering certain advance disclosures to the client in writing at the time the advance fee is accepted; 2) delivering certain notices to the client upon termination of the representation; 3) attempting to resolve any client dispute of which the lawyer is notified in writing and submitting to binding arbitration with an approved arbitration program if the dispute is not within 30 days of the lawyer's receipt of such written notice; and 4) paying any resulting arbitral award within 30 days (unless the client fails to agree to be bound by the arbitral award). SCR 20:1.5(g). (Noting that complying with SCR 20:1.5(g) does not relieve you of the obligation, under SCR 20:1.16(d), to refund any advance fee payment that has not been earned or incurred.)

The Mechanics—Keys to Successful Implementation

While there are many ways to implement flat-fee and subscription billing methods successfully, the recommendations here are intended to streamline the lawyer's administrative burden. With the Rules firmly in mind, the fee agreement is a good place to start. I use an engagement letter with each client (whether using hourly billing or one of the alternative billing methods mentioned here). To the engagement letter, I attach a "Scope of Work" document for each project that describes the services with particularity, usually in bullet point form. The client accepts the engagement letter and Scope of Work by signing each document. (I use an electronic signature platform to do this.) The engagement letter references the current engagement as well as the possibility of future engagements to be governed by the same letter, so for clients with whom I have an ongoing relationship, I can simply create a new Scope of Work document for the client to review and sign for each future project, without the need to create a new engagement letter for each one. This works well for my clients, many of whom are businesses in the tech sector, where a Master Services Agreement with corresponding Statements of Work is a very common format for vendor agreements. As an example, a client might engage the firm on a subscription basis to review commercial transactions and later also need help with a trademark application. Usually, there would be an engagement letter with 2 Scope of Work documents—the original for the subscription services and a later document for the trademark application.

The engagement letter should of course include a statement of how the fee will be calculated (flat fee, subscription, etc.). As previously noted, it is easy to bill clients in advance since the exact cost is known, and you can do this either by using the traditional trust account method or by including the disclosures required under SCR 20:1.5(g) to place the funds in your firm's business account upon receipt. (It is important to note that if the matter involves any expenses that will be paid by the client and those are included in the advance funds, those must be placed into your trust account.)

Whether or not you use a separate “Scope of Work” document, you need to be sure to describe the services in sufficient detail in your fee agreement. This is not only for purposes of complying with the Rules but also because, under an hourly billing model, if the client adds services during the engagement, the lawyer will simply bill more to reflect the increased time commitment. This obviously doesn’t work under a flat or “fixed” fee model. There are ways to account for this, but you do need to consider it in advance. For example, if the firm is engaged to draft a contract, the Scope of Work might include 1) a kick-off meeting, 2) an initial draft for the client to review, 3) a meeting to discuss changes to the draft, and 4) a final draft incorporating those changes. I typically include a statement that anything not expressly described in the Scope of Work is not included, as well as a statement that any additional work will be billed at then-current hourly rates or on the basis of a mutually agreed flat fee. For litigation matters, flat-fee billing can be handled in stages, where there is a single fee for all pre-trial work (perhaps culminating in a mediation), a separate fee for trial preparation and trial if needed, and then (if applicable) a separate fee for any appeal, and these can be listed as separate items in a Scope of Work or could be separate Scopes of Work. For a subscription service, the Scope of Work can state the included services and the period during which they will be provided, together with the fee for that period.

Your engagement letter should also state how and when you will invoice the client for this work. With these alternative billing models, it is equally as easy to send an invoice with the completed work product as it is to send an invoice once the engagement letter has been signed, to secure your services. If billing in advance, you also need to decide whether to place the advance fees into your firm trust account or comply with SCR 20: 1.5(g) (to place the advance fees into your business account).

In addition to describing your services with particularity in the scope of work document, alternative billing models can be most successful when the firm is working in an efficient way. In other words, unlike under an hourly billing model, the more efficient you can be, the more potentially profitable you can be. Thus, firms that use flat fee arrangements and subscriptions also place a heavy emphasis on building systems within their firms to support those billing models. Such systems can include policies and procedures to facilitate intake, client communication, document automation, and the like. For example, the firm may have a policy that requires clients to communicate efficiently by exclusively using the firm’s client portal, or there may be a policy against unscheduled phone calls. Using technology wisely is important in creating these efficiencies. Clearly efficiency will look different for each practice area and each firm but must be a primary goal for those seeking to successfully transition to alternative billing models.

Conclusion

Using alternative billing models can help the attorney leverage expertise to provide a high-quality work product to the client rather than just selling his or her time. These models appeal to the client’s need for certainty and promote healthy communication, since clients no longer fear that such communications will result in an escalating legal bill. Flat fees and subscriptions can be great alternatives. Managed correctly, they can also lower the administrative burden on attorneys, who will spend more time doing meaningful legal work and less time

proofreading invoices. Finally, these models can also help attorneys emphasize a healthy mindset by keeping them focused on the work product that the client is seeking.

Additional Resources

Books:

- *The Happier Attorney*, Brita Long
- *Dumping the Billable Hour*, Mark Chinn
- *Time's Up*, Ron Baker

Online:

- “Attorneys & Flat Fees,” Facebook group for attorneys
- “Lawyer on the Beach,” Facebook group for attorneys
- Fidulegal.com, software for subscription services

Client-Centered Approach to Billing

In law school we are taught the most common type of billing regardless of client's needs. When we first get out of law school or when we are still in law school and working internships, we are also taught again what has been used in the past, but not necessarily what works best for our individual clientele. As times have changed, and clients' needs have changed, billing and billing methods have not changed or adjusted to the changing times. For small firms, we have the ability to adjust how we bill more flexibly than larger law firms. This allows us to focus more on a client-centered billing method that focuses on the needs of our clients as opposed to just what has been done over and over again in the past.

Hourly Billing

Hourly billing is the number one method of billing that we are all taught in law school, in internships and when we first graduate from law school. Hourly billing might make sense in many situations and for certain types of law that is practiced, but it does not always make sense and it does not always work in every situation. Depending on clientele, some individuals struggle with hourly billing because it can be much harder to predict how much attorney fees are going to cost by the time a case is completed. And of course, being attorneys, we like to give vague answers regarding how much the entire case is going to cost so that we do not get in trouble later because we may have overestimated or underestimated our guess as to how much the case would cost.

Another struggle with hourly billing is knowing how much to charge per hour. Of course for newer attorneys the hourly amount is expected to be lower and as time goes on it increases with the attorney's experience. Although this technically makes sense, it can create a challenge knowing when to increase the hourly amount and how much to increase it to. Also, this does not necessarily take into consideration more challenging cases than other cases that are more straightforward. For example, we all know what it is like to deal with a much more difficult client or difficult opposing attorney which makes us feel that our time should be billed at a higher amount as we are dealing with a more difficult case. Hourly does not allow for easy adjustments.

Of course we can't forget how much time it takes to add up our hourly time at the end of each week, month, or even day. Of course the best way to keep track of time is to enter our time spent immediately after we have done the work. That is not always practical, or even possible. In some cases, it makes sense for an assistant or paralegal to do the hourly tracking for us, but again that is not always possible or practical for solo or small law firm attorneys.

In many cases, hourly billing makes sense when a business is the client. A business is most likely going to be expecting hourly billing and in most situations, is much more likely to pay the bill shortly after receiving an invoice. When it comes to an individual client, they are

more likely than a business to want to know or at least be able to have a very good guess as to how much they are going to be spending on their case, unless of course, they have unlimited funds.

Flat Fees

Flat fees are actually my favorite type of billing method. Flat fees can make sense in a lot of different types of cases such as immigration law, business law, and other areas of law where it is decently easy to know how much time is going to be spent on each case, and the amount of work is very consistent case to case. There are attorneys who practice areas of law such as family law, civil law, and other areas of law that are traditionally billed at an hourly rate who are now using flat fee billing.

One aspect about billing at a flat fee basis, is that per Wisconsin law we do not have to put the payments made for work charged as a flat fee into a trust account. This simplifies keeping track of client payments and makes handling money from clients much easier. One of the biggest benefits of billing flat fees, is that clients know exactly how much they are going to be spending on their case when they sign the contract. This allows individuals who may be struggling financially to be able to mentally and financially prepare for attorney's fees.

Payment Plans

Although payment plans are not a method of billing, they are a big part of making attorney's fees affordable for everyone. Payment plans can be offered to clients for any type of billing method. Offering a payment plan allows clients who would traditionally not be able to afford an attorney actually be able to retain representation. In my practice, I have had people who come to me specifically because they are aware that I allow for payment plans. Payment plans can be set at whatever rate the attorney thinks is appropriate for the situation. For example, for a family law case that might take around at least six months until it is finalized, the attorney offering a payment plan can calculate approximately how much they believe the client will need to pay for the entire case and set it to a monthly, biweekly, or even weekly payment plan.

Attorneys that bill at an hourly rate, can also offer a payment plan instead of charging a high up front retainer. Again, using family law for an example, a case usually does not take as much work and time up front as at the end of the case. That gives plenty of time for a client to contribute to a retainer at a monthly rate. While some cases such as a criminal case or estate planning case may involve the majority of the work to be completed within a short period of time, most other cases would allow for some type of payment plan.

A big benefit of offering payment plans, is that it can create financial stability for the attorney and the law firm. Receiving large payments up front for either retainers or flat fee rates does not predict financial stability for the future for the practice. Although starting payment plans can be a challenge because you are receiving only \$300-\$1,000 or so from the client up front, once there is a steady flow of monthly payments, this can assist with creating financial stability for the long run.

There are several challenges with payment plans. The first is that it can be a lot to keep track of how much a client has paid and how much they still owe. Keeping updating records can be very time consuming and stressful. Another challenge is that many clients will find any and every excuse to miss a payment or make a late payment. Allowing flexibility for clients is great, but clients need to understand that communication is very important and that they are 100% responsible for making their payments. We are not responsible for chasing them down and reminding them to pay.

I have offered payment plans since I opened my practice. The reason for this is that my clientele is largely Hispanic families who live paycheck to paycheck. Some of these people support family members in another country, some just make a little cash under the table, and others are single parents. I allow for flexibility whenever I can because I know that sometimes my clients are being forced to choose between paying rent on time or paying me on time. In the two years that my firm has been open, I have had only four clients take advantage of my flexibility with payment plans and still owe for cases that have been closed. Thankfully the amounts still owed have not been much, and I know that it is worth the risk for those clients who would not be able to have a case with me if I did not allow for payment plans.

There is a justice gap particularly within the Hispanic community in Wisconsin and I know that offering payment plans is my way of attempting to diminish the gap. This is not practice and possible for every law firm, but I believe that I have greatly benefitted from being able to offer payment plans as an option for my clients.

Forms of Payment

Most attorneys now accept credit card payments and credit card payments have become the primary form of payment used by everyone. Check payments likely follow credit card payments in popularity with cash payments being much less common than in the past. Many attorneys now only receive client payments in the form of credit card payments. Accepting credit card payments requires a program to run the credit cards and requires the attorney to calculate in credit card fees into attorney fees along with other business expenses. Credit card fees can end up being one of the highest business expenses in a solo or small firm. Most credit card processing programs charge around a 2% to 3% credit card fee.

The form of payment should be dependent on the type of clientele for each individual firm. For example, within the Hispanic community, cash is the primary form of payment as many people cannot or do not have credit cards. For a solo or small law firm, accepting cash payments can create a challenge. Cash payments cannot be mailed and many solo or small firm practices do not have assistance to be able to accept cash payments at a physical office during normal business hours. Especially if cash payments are being made on a payment plan and a small firm or solo practice does not have the usual 8:00 AM to 5:00 PM hours for a client to be able to drop off a payment. One option is to have a mailbox outside of an office to allow for clients to be able to drop off a payment, but then no one is there to provide a receipt or another way to track the payment being made.

Accepting checks is generally a reliable form of payment that does not have the credit card fee or other similar fees. The only issue can be if a check bounces and an attorney is charged the fees associated with a bad check. One of the benefits of accepting check payments is that unlike cash, they are trackable. This way, technically a receipt is not necessary because the client will be notified when the check is cashed by just reviewing a bank account or bank statement. Although checks are most likely one of the least commonly used forms of payment today, they're probably the most convenient, least expensive, and best form of payment for a law firm to accept.

Being able to offer a client a variety of types of forms of payment makes receiving attorney fees for work done or work that will be done much easier. For example, several credit card processing programs allow for automatic payments to be set up, have a user-friendly portal for clients to be able to make changes to their payment methods, and offer other benefits that cash and check payments do not allow.

Conclusion

For law firms accepting any of the above-listed billing methods and forms of payment, I would recommend sitting down and thinking if this type of billing method and form of payment is what is best for your practice. For example, if you bill at an hourly rate only because that is what was done at your last firm, or what you were taught in law school, that may not mean that that is the best billing method for you, your clients, and your practice as a whole. Reviewing other billing methods might allow more flexibility, and be less time consuming. Another type of billing method might end up being what is best for you and your practice. If no other type of billing method is ever considered, you may end up running your business inefficiently and potentially losing clientele.

By adjusting billing methods and forms of payments accepted by your law firm, you may be able to increase your productivity, increase the number of cases that you can take, and financially strengthen your practice in the long run. At the end of the day, no one enjoys billing, and that is definitely not why we became attorneys. Working with the billing method that is best for you, your practice and your clientele, will in the end help you to enjoy your job more and hopefully make your practice more efficient.