



BY AUDREY H. RUBIN

ALTERNATIVE BILLING *ideas*

Legal administrators can and should play a pivotal role in making alternative fee arrangements succeed in their organizations.

One of the hottest topics in the legal profession is alternative fees. Stories abound of law firms adopting alternative fees, corporate counsel asking for alternative fees and experts expressing their opinions on whether alternative fees work.

If partners and other billing attorneys are considering offering a client alternative fees, or are being asked by a client to implement alternative fees, law firm and legal department administrators need to understand what alternative fees actually are. They also need to know how to run a project management process to determine the best pricing and staffing plans.

Administrators are ordinarily asked to assess the alternative pricing benefit or detriment, and they may be called upon to set or approve the alternative fee plan. Angela M. Hickey, Executive Director of Levenfeld Pearlstein, LLC, in Chicago, Illinois, and a member of the Association of Legal Administrators (ALA), says she has direct input into that firm's alternative fee arrangements.

"I work with the partners to define the scope of the engagement," said Hickey. "I ask the questions to ascertain who will be doing what work and what exposure the firm will have if something with the engagement does not go according to plan. Then I apply those business assumptions to the scope in order to get a good quote to the client that is also profitable for the firm."

The world of alternative fees is evolving daily. Law firm partners typically don't thoroughly understand the best metrics to use to set alternative fees, and most general counsel aren't sure whether to ask for alternative fees from their law firms and how to measure the success of alternative fee structures. Therefore, an administrator could be leading the pricing project, all the while not receiving clear direction from superiors who aren't sure what to ask for.

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DEFINING ALTERNATIVE FEES

There are many variations of alternative fees, but the simplest definition is, "A fee plan that is anything other than straight, unlimited billing by the hour." Common current practice is for matters to be charged according to the hourly rates of the lawyers and paralegals working on that matter. If a matter takes 10 hours of a partner's time, and that partner's hourly rate is \$300, then the invoice will be \$3,000. This is what alternative billing is NOT! Alternatives (hence the name "alternative billing") to the straight billable hour include:

- **Caps.** This is really just traditional hourly billing, but with an agreed-upon maximum charge.
- **Discounts.** This, too, is no different than hourly billing. In this case, the firm provides the client a discount off of standard hourly rates. Presumably, a firm would do this for its best clients, or because it wants to start doing business with a new client and will supply discounted rates as a "loss leader" to commence the relationship. Hickey noted that "most general counsel simply want discounts when they ask for alternative fees," and ALA member Steven W. Smitham – Chief Operating Officer at Butler, Rubin, Saltarelli & Boyd LLP in Chicago – concurs with that assessment.

"At our firm, I am involved in the analysis and approval of all alternative fee arrangements, be they straight discounts from standard rates or more innovative approaches," said Smitham. "It seems that increasingly, however, clients are opting for straight discounts rather than success fees or other, more unusual fee arrangements. My assumption is that the clients feel this gives them the best of both worlds: a discount, but

also the familiarity of the billable hour as the basis for the legal services provided."

- **Volume Discounts.** This variation is identical to discount billing, but with the twist that a client can earn a greater discount if it provides more work to the firm. For example, a firm may offer a client a 5 percent discount off of standard hourly rates for the first \$100,000 of business performed by the firm in a year, a 10 percent discount on all business that year between \$100,000 and \$500,000 and then a 15 percent discount on all business in excess of \$500,000. The beauty of this arrangement is that it encourages the client to give the firm more work and cements the client's relationship with the firm. Also, based on prior practice with that client, the firm can realistically predict its revenues from that client.
- **Value or Success Fee Billing.** This form of alternative billing is based on a "bonus" concept. In one version of this plan, a firm tells a client to pay 80 percent of the amount of its invoices and, only if satisfied with results, to pay the held back 20 percent. In another version, the firm tells the client it will charge 80 percent or regular rates, or 80 percent of what the matter will cost, but the client has the discretion to pay an additional amount, like a bonus, for a job well done.

The key to this kind of billing is for the firm to manage its investment in a matter so that if a client does not think the outcome was valuable, the firm will not lose too much money. Interestingly, research shows that very few clients refuse to pay the held back amount. Furthermore, it is critical with this type of billing for the firm and the client to agree on what defines "success." To some clients, it might be a pretrial adjudication of

a case. For others, it might be a deal that closes within a certain period of time. For yet others, it might be a jury win.

- **Flat or Fixed Fees.** This fee arrangement is what you would expect: a pre-established fee for a particular piece of work. Importantly, fixed fees can have a built in adjustment factor. In other words, an engagement letter can state that the fixed fee will be “x” assuming no material change of events. If, for instance, a party discontinues its U.S. operations, the extra amount of time spent handling the matter due to international laws and practices would justifiably cause a reassessment of the flat rate. Similarly, if a party in a transaction is sold, the flat rate could change while relationships are established between the lawyers and the new buyer. Fixed fees can also be quoted in phases of a matter, which often is the best way to go.
- **Historic Alternative Fees.** Some areas of the law business have been charging alternative

fees for years. Examples of this are bond counsel, who charge based on arrangements with financing and underwriting parties; personal injury plaintiffs’ lawyers, who charge a percentage of what they recover; real estate tax counsel, who charge based on a percentage of reduced tax amounts; and estate planning lawyers, who generally charge per will or per estate, often even according to the estate’s size or complexity.

PROS AND CONS OF ALTERNATIVE FEES

Most clients want certainty. They have budgets. They have CEOs to whom they report.

“When clients ask for an alternative fee, what they’re really asking for is predictability,” said ALA member Louis S. Bury, Executive Director of Chicago-based Freeborn & Peters LLP.

Many of the aforementioned forms of alternative fees allow clients the ability to predict legal fees. In an “old” billable hour system, a client wouldn’t

he's really going to like working for that firm

out client loved him

how can I find the right firm?

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know how much a matter was costing until it received its monthly invoice. The client also couldn't tell how much more money was going to be spent because it couldn't predict how much additional time was going to be put into the matter – and by which lawyers at which rates.

Likewise, the billable hour can breed inefficiency in the law firm. To put it bluntly, lawyers charging by the hour are not encouraged to be efficient. According to typical firm finances, an associate who spends five hours to draft a complaint is preferred to an associate who spends only three hours generating the same work product, because the firm can charge the client for five hours of work instead of three.

On the other hand, clients may worry that in order to meet a pre-set flat rate, the firm will cut corners. Or the client may be concerned that discounted hourly rates mean less experienced lawyers will be providing the service. Some clients believe it is worth it to pay large hourly rates without a cap in order to obtain the best counsel from the most experienced partners.

Also, law firms may fear that they will lose money on matters that become more complicated due to no fault of their own. A

stereotypical example of this problem is a lawsuit in which new documents or witnesses emerge late in the game, requiring unanticipated new rounds of depositions and other expensive discovery.

THE ADMINISTRATOR'S ROLE

Administrators can be significant assets in the process of setting alternative fees. The most important thing an administrator can do is get the lawyers to invest time up front and set alternative fee plans based on solid information rather than guesswork. According to Bury, alternative pricing works best when there is a large portfolio of a certain type of case at a firm, such as a quantity of product liability work. But even without long client histories, firms and companies possess a lot of data that are reliable indicators of what certain types of projects ordinarily cost.

Additionally, there are excellent consultants, many of whom are "reformed" lawyers, who work with administrators to develop a practical pricing process. These experts understand the legal work and can assess what type of work is highly variable and what type of work is subject to high fluctuation. Successful alternative fee arrangements must build in mechanisms to identify and handle potential time overruns. Such a risk-based approach allows the partner in charge to assign attorneys to a matter and to manage the work in a manner that matches the firm's financial assumptions. A fee that is developed collaboratively among the administrators and practicing lawyers – after consideration of the matter's risks, the client's goals and the firm's



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actual cost and profit metrics – limits the risks of non-hourly billing.

Equally critical is the administrator's role in ongoing management of the work and fee structure. Chief operating officers, chief financial officers, business managers, executive directors, office managers and other administrators who have access to the firm's financial data should track the firm's progress against the stated or expected fees to be sure the firm isn't getting too much "in the hole" and, if it is, determine why and what to do about it. Here, too, a project management adviser can help the administrator to set and meet expectations.

The same is true for law department administrators: they need to understand expectations and the value proposition of the alternative fee arrangement. They also need to vigilantly monitor matter progress and whether the expected fee structure is proceeding according to plan. Clearly, they will want to know whether the alternative pricing is producing better-than-anticipated service and financial results.

Some alternative fee approaches are not dramatic departures from the kinds of fee arrangements many administrators have already been handling. But the best, most effective arrangements for both sides involve frequent and open client communications and a solid assessment prior to the engagement of the relevant cost factors.

The bottom line is that administrators can and should play a pivotal role in making alternative fee arrangements succeed in their organizations. ✱

about the author

Audrey H. Rubin, Founder of Chicago, Illinois-based Rubin Solutions, has considerable experience in the legal profession, having served as a law firm chief operating officer, partner and general counsel. She now concentrates on developing and implementing profitable alternative fee programs for law firms and corporate law departments. Contact her at audreyrubin@rubinsolutions.com.



The advertisement for Simplicity Managed Services for Law Firms features a clean, minimalist design. At the top, there is a photograph of green bamboo leaves. Below this, the title "Simplicity™ Managed Services for Law Firms" is displayed in a serif font. To the right of the title is a photograph of three smooth, light-colored stones of varying sizes. The main body of the advertisement contains text describing the services, their benefits, and optional services. At the bottom, there is contact information and the logo for Advanced Legal Systems, which includes a stylized icon of stacked books or pages and the tagline "CREATING TECHNOLOGICAL CALM®".

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