

Alternative Fee Arrangements, Are They Right for You?

Why, When and How for Alternative Fees

Questions?

Text Fred at (704) 491-5669



Agenda

- Legal Marketplace Fee Structures
- Co-Development of Client Service Expectations
- Ethical Considerations: What To Do and Not To Do

Legal Marketplace Fee Structures

Types of Fee Structures

What to Use, When and Why

- Cost certainty
- Risk certainty
- Value-based
- Volume-based

Cost Certainty

Type	Description	Considerations	Advantages / Disadvantages	Examples
Fixed/ Flat Fee	Agreed price irrespective of actual time spent on the matter	<ul style="list-style-type: none">• Certainty about the scope of work and the time required; or• Repeat 'or bundled' work to enable us to price on a 'swings and roundabouts' basis	<ul style="list-style-type: none">• Simplifies billing• Cost certainty for the client• Leverage – staffed with most cost effective resource• Potential for reduced quality due to increased pressure to deliver work within the agreed fee• Reduced profitability if out of scope work not identified and charged	Finance, Corporate, Real Estate, Infrastructure and all tightly scoped projects

Cost Certainty (cont.)

Type	Description	Considerations	Advantages / Disadvantages	Examples
Capped Fee*	<p>Maximum agreed price subject to the lesser of:</p> <ul style="list-style-type: none">• actual hours worked at agreed hourly rates; or• the cap	<p>Clarity about the scope of work and the time required but not sufficient certainty to avoid making the price subject to agreed assumptions</p>	<ul style="list-style-type: none">• Allows for an expansion in scope providing certainty about the maximum payable based on the scope of work and a limited number of assumptions; Cost certainty for the client• Fee capped to what firm would have charged on an hourly rates basis but are not compensated for delivering under the cap and no compensation for work over the cap	<p>Finance, Corporate, Real Estate, Infrastructure and all tightly scoped projects</p>

Cost Certainty (cont.)

Type	Description	Considerations	Advantages / Disadvantages	Examples
Collar Agreements	A "safety valve" built into a fixed or capped fee arrangement, allowing a further level of contingency.	Fixed or capped fee agreed, but still significant uncertainty that may not be covered by assumptions.	<ul style="list-style-type: none">• Flexibility on fixed/capped fees allowing for unforeseen event that result in significantly more work• Risk-sharing element between firm and client• Profitability may be reduced should the fixed or capped fee be exceeded but the safety valve is not triggered.	Two common variations: <ol style="list-style-type: none">1. Fixed fee with a collar that covers a range below and above the fixed fee price point. If legal fees are less than the lower collar, savings are shared. If fees are in excess of the collar, overruns are shared.2. Any excess fees above the capped fee, up until the collar, absorbed by the firm. Fees in excess of collar subject to an agreed discounted rate.

Risk Certainty

Type	Description	Considerations	Advantages / Disadvantages	Examples
Blended Rates	Single hourly rate for any/all lawyers working on a matter or for any/all lawyers within a specified group.	<ul style="list-style-type: none">• Rate determined in a variety of methods: type of work or who performs the work (experience, location, etc.)• Important to link the calculation to the most appropriate or relevant factors.	<ul style="list-style-type: none">• Simplifies billing & rate card – fewer rates and fewer client queries• Client perception – high quality legal work at lower hourly rate• Leverage – staffed with most cost effective resource• Reduced profitability if blended rate assumptions inaccurate• Reduce profitability if clients take advantage by requesting senior lawyers do majority of work	Typically used as an alternative to standard rates or straight discounts off standard rates. Usually requested by institutional clients.

Risk Certainty (cont.)

Type	Description	Considerations	Advantages / Disadvantages	Examples
Retainer	A defined set of legal services provided on an on-going basis for an agreed amount for a specific period (usually on a monthly basis).	Most appropriate for: <ul style="list-style-type: none">• work that can be clearly defined; and• work required over the specific period is relatively consistent	<ul style="list-style-type: none">• Simplifies billing• No "meter" running – clients have ready access to legal advice. Improves client relationships - on-going contact improves firm's knowledge and helps identify opportunities• Reduced profitability if retainer assumptions incorrect• Possibly restricts firm from doing work for other clients	Well-suited for situations where a client requires on-going legal advice to avoid legal exposure or to address day-to-day matters.

Value-Based

Type	Description	Considerations	Advantages / Disadvantages	Examples
Success fee/ Premium	Client pays agreed amount in the event of a successful outcome, usually in addition to "base" fees	<ul style="list-style-type: none">• Involves adding a premium to firm's base fees or a bonus should a matter have a successful result (qualitative outcome).• Important to agree success criteria or benchmarks upfront.• This may be tied to a specific segment of work (versus overall matter).	<ul style="list-style-type: none">• Alignment of firm's interests with the client. Particularly where a specific outcome is desired and/or the matter is "high stakes"• Recoverability of "base" fees may be at risk should there be an unsuccessful result	<ul style="list-style-type: none">• In corporate - where a specific outcome is significant to the transaction (e.g. successful M&A).• In litigation or arbitration matters – agree a diminishing success fee percentage based on early resolution, where the fee would step down as the duration and total fees increased.

Value-Based (cont.)

Type	Description	Considerations	Advantages / Disadvantages	Examples
Holdback Arrangement	Risk sharing approach, whereby firm agrees to withhold a percentage of its fees contingent on a specific outcome. If achieved the percentage is then paid in full.	<ul style="list-style-type: none">• Agreement involves being "made whole" should a matter have a successful result (qualitative outcome).• Important to agree success criteria or benchmarks upfront.	<ul style="list-style-type: none">• Alignment of firm's interests with the client. Particularly where a specific outcome is desired• Recoverability of portion of fees may be at risk should there be an unsuccessful result	A matter where firm's client pays say 80% of incurred legal fees and withholds the remaining 20% contingent on a successful outcome.

Volume-Based

Type	Description	Considerations	Advantages / Disadvantages	Examples
Portfolio	A single "all in" price to handle all legal work within a given area or specialty	A portfolio agreement is most appropriate where there is a low degree of volatility and high degree of certainty around the type, complexity and volume of work within a specified period of time (usually annually).	<ul style="list-style-type: none">• Simple and easy to understand rate card.• No "meter" running – clients have ready access to legal advice• Improves client relationships - on- going contact improves our knowledge and helps identify opportunities• Reduced profitability if assumptions for determining portfolio are inaccurate.• Clients may take advantage by not filtering requests for legal work	Typically used for commodity type legal work and legal advice on matters that are routine in nature

Appendix – Selecting the Right AFA for your Client

When to use each Arrangement

<p>If a Client is looking for cost certainty:</p>	<p>Fixed Fee/Retainer: Defined set of legal services provided to the client for a single or on-going basis for an agreed fixed value.</p>	<p>Collar: A "safety valve" that is built into a fixed fee type arrangement. Parties share in cost overruns and benefits of savings. Less risky alternative to a capped fee</p>	<p>Price Targeting: Similar to a capped fee, the firm will bill hourly up to an agreed fee amount. Fees above that amount will be discounted at increasing levels.</p>	<p>Capped Fee: A maximum agreed price subject to the lesser of the actual hours worked at agreed hourly rates or the agreed capped fee. Burden of risk is transferred to the firm.</p>
<p>If a Client has a matter where the scope or legal guidance needed has not been fully determined:</p>	<p>Hourly/Blended Hourly: Single hourly rate for any/all lawyers working on a matter or banded rates by timekeeper level.</p>	<p>Phased Arrangement (Deferred Pricing): Agree to fee estimate for each phase at the outset of the arrangement with the agreement that fee estimates will be revisited</p>	<p>Hybrid Arrangement: Hourly for uncertain aspects, AFA for phases with more certainty. Flexible to variability in scope.</p>	<p>Retainer: Defined set of legal services provided to the client for a on-going basis for an agreed fixed value for a specified period (usually on a monthly basis).</p>
<p>If a Client has a matter where a specific outcome is the ultimate goal:</p>	<p>Success Fee: Conditional fee agreement whereby the firm would receive a premium for successful delivery of pre-determined criteria.</p>	<p>Holdback Agreement: Conditional fee agreement whereby a portion of client's fees are placed in separate account. Upon reaching predetermined benchmarks, fees may be disbursed to the firm, refunded to the client, or divided between both parties.</p>	<p>Performance Based Pricing: Variation of success/holdback whereby a predetermined price is set with established discount/premiums for each level of satisfaction.</p>	<p>Tiered Pricing: Menu-style pricing which allows the client to choose their desired level of service to be provided.</p>

Co-Development of Client Service Expectations

Let's Talk Turkey

Why Co-Developing Client Expectations is Important

- In any matter, especially in an AFA scenario
- Improves initial communication and planning
- Establishes standard for service
- Reduces write offs and billing questions
- Provides evidence to the client they are heard (fee requests and service expectations)
- Overall health of the client relationship

We appreciate the opportunity to represent you. To ensure the highest level of client service and a clear understanding of your expectations please see below.

Business Drivers

Staffing Model and Team

Success Criteria

Billing Schedule

Scope of Work

Communication Preferences

Matter Timing

Internal Stakeholders

Budget / Fee Considerations

Client Support and Involvement Required

Ethical Considerations for Alternative Fee Arrangements

- Whatever the agreement, a lawyer's ethical obligation to his or her client cannot be compromised. The AFA cannot prohibit a lawyer from zealously defending the client. Most importantly, the lawyer must not use the AFA as "crutch" to avoid fulfilling his or her ethical duty simply because he or she might not be fully compensated for every hour spent.
- ABA Model Rule 1.5 defines the client-lawyer relationship, establishing an ethical framework for AFA's. A Lawyer Shall not Make an Agreement for, Charge, or Collect an Unreasonable Fee or an Unreasonable Amount for Expenses.
 - Outlines the factors to be considered in determining the reasonableness of a fee:
 - Time and Labor Required
 - Novelty and Difficulty of the Issues Involved
 - Skills Required to Perform the Legal Services Properly
 - Fee Customarily Charged for such Services
 - Amounts involved and Results Obtained
 - Time Limitations Imposed and the Likelihood that Lawyer will be Precluded from Other Engagements
 - Experience, Reputation, and Ability of the Lawyer or Lawyers Performing the Services
 - Whether the Fee is Fixed or Contingent

Ethical Considerations for Alternative Fee Arrangements

- General Ethical Concern is Whether the Financial and Business Considerations Inherent in Operating a Law Firm will Interfere with Lawyer's Ethical Obligations to their Clients.
- Other Concerns Include Preserving the Client's Absolute Right to Terminate the Relationship at any Time without Penalty and the Lawyer's Rights and Obligations Regarding Flat Fees or other Fees Paid in Advance.
- Fee Arrangements that Fix or Cap the Client's Fees at a Specified Amount can Tempt an Unethical Lawyer to Curtail Work after the Cap has been Reached.
- Some Firms Might be Leery of "Low Ball" Flat Proposals Knowing that the Actual Cost for the Quality of Work Expected will Exceed the Flat Fee Proposed.
- Clients Might Fear the Firm will "Under Work" the Matter(s).

Ethical Considerations for Alternative Fee Arrangements

- Model Rule 1.3 – Requires a Lawyer to “Act with Reasonable Diligence and Promptness in Representing a Client.”
 - Comment 1 states in relevant part that a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client with zeal in advocacy upon the client’s behalf.

Ethical Considerations for Alternative Fee Arrangements

- Model Rule 1.7 – States that “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”
- These Rules prohibit lawyers from allowing their financial interests to interfere with or supersede their obligations to their clients.
- Model Rule 1.1 requires a lawyer to “provide competent representation to a client.” And Comment 1 provides a non-exclusive list of factors for determining whether a lawyer is “competent” to handle a particular matter:
 - The relative complexity of the matter
 - The Lawyer’s general experience, etc.

Ethical Considerations for Alternative Fee Arrangements

- Rule 1.1 has implications for a Lawyer who is temped to “push work down” to less experienced lawyers when a blended rate is used or a cap is reached.

Contact Information

NAME	POSITION	COMPANY	PHONE	EMAIL
Amy Cisrow-Peterson	Assistant General Counsel	Rack Room Shoes, Inc.	O: (704) 501-4561	apeterson@rackroom.com
Cory Patterson	Of Counsel	Nelson Mullins	(704) 417-3154	cory.patterson@nelsonmullins.com
Fred Wood	Partner	Nelson Mullins	(704) 417-3059	fred.wood@nelsonmullins.com
Evan Souda	Partner	Nelson Mullins	(704) 417-3065	evan.souda@nelsonmullins.com
Ben Chesson	Partner	Nelson Mullins	(704) 417-3117	ben.chesson@nelsonmullins.com