

Competitive Legal Pricing

The Rise of the Alternative Fee Arrangement
and Determining the “Right” Pricing Agreement

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I am grateful to Kalen Oram, Student-at-Law,
for his assistance in preparing this presentation.

Overview

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Introduction

- “AFAs are not about charging more than what an hourly rate might be—they are about charging an appropriate fee based on what value the client receives and how that client perceives value. Alternative billing should be based on what is fair and reasonable both to the client and the lawyer. Keeping track of time should be the lawyer’s measure of cost, not necessarily a measure of the value he or she is providing the clients in their legal needs.”

Michigan Bar Journal, *Show me the Bill: Alternatives to the Hourly Rate*, (2017) Online:
<<http://www.michbar.org/file/barjournal/article/documents/pdf4article3144.pdf>>

AFAs v. the “Billable Hour”

- AFAs are not new
- Popularity of the “Billable Hour”
 - “*The 1958 Lawyer and His 1938 Dollar Law Firm*” by the ABA
- Rise in Popularity of the AFA
 - Economic recession of 2008
 - Increasing pressure from clients
- Canadian Lawyer’s 2019 Legal Fees Survey
 - 88.56% continue to use the billable hour
 - 62.71% use flat rates
 - 33.56% use contingency fees

AFAs v. the “Billable Hour”

- Advantages of AFAs:
 - Lawyer
 - Optimal for services lawyer the is efficient at
 - Increased value for the client
 - Competitive advantage
 - Promotes efficiency
 - Freedom from the “billable hour”
 - Client
 - Value
 - Predictability
- Disadvantages of AFAs:
 - Difficult to implement
 - Risk
 - Administration Costs

Types of AFAs

- **Blended Rate**

- Time is billed equally on an agreed-upon rate, no matter who in the firm works on the file.
 - Pros:
 - Encourages work delegation
 - Simplifies billing
 - Easy to negotiate and administer
 - Cons:
 - Hides personal contribution
 - Can result in use of less experienced or less efficient lawyers
 - Optimal use:
 1. Client is concerned about average hourly rate
 2. Lawyers expected to work on the matter is easily determined
 3. Work is routine and repeated
 4. Legal services are not advisory work

Types of AFAs

- **Fixed or Flat Fee**

- The lawyer provides a specific service for a set price.
 - Pros:
 - Encourages efficiency
 - Easy to negotiate
 - Encourages delegation
 - Cons:
 - Cost overruns if lawyer/firm misjudges costs
 - Can result in use of less experienced lawyers
 - Optimal use:
 - 1) the scope of the work can be effectively determined in advance
 - 2) the lawyer has completed similar work for the same (or similar) client
 - 3) the work is repetitive or predictable
 - 4) the client wants cost certainty and predictability

Types of AFAs

- **Results-Based or Contingency Fee**

- The lawyer is paid according to results achieved. Payment is based on a percentage of the recovery, settlement or amount of money saved.
 - Pros:
 - Allows clients with little money to obtain legal representation
 - Allows both lawyer and client to determine the exact fee from the outset
 - Cons:
 - The lawyer assumes all the risk
 - If a successful result is achieved with little effort, client may feel the lawyer was overpaid
 - Optimal use:
 - 1) the lawyer's/firm's contribution is key to the client's success
 - 2) a favorable result is achievable
 - 3) the client wants to reward the lawyer/firm with a premium for sharing the risk
 - 4) the arrangement can be seen as open and equitable by both lawyer/firm and client

Types of AFAs

- **Limited Scope Retainer**

- The lawyer is hired to do certain tasks within the full-service package, which are agreed upon in advance by both lawyer and client.
 - Pros:
 - Offers legal services to clients who can't necessarily afford full legal representation
 - Makes it clear up front what tasks the lawyer will perform and what will be charged
 - Cons:
 - More responsibility on client to understand what needs to be done
 - Optimal use:
 - 1) the legal matter can be easily categorized into specific tasks
 - 2) the matter is not highly complex

Types of AFAs

- **Task-Based Billing**

- Categorizes fees according to the type of work performed. Information is grouped according to pre-defined phases and tasks with the associated costs. A coding system makes it easier to track costs, compare costs for different activities, improve budgeting, and create standard software processes to facilitate the review and reconciliation of the account.
 - Pros:
 - Easy to administer
 - provides the client with a degree of certainty of what the matter will cost
 - Codes can provide a database to project future project costs
 - Cons:
 - Lawyers must be able to estimate costs of tasks accurately

Types of AFAs

- **Task-Based Billing**

- Optimal use:

- 1) the scope of the work can be effectively determined in advance with minor variations expected
- 2) the lawyer has completed similar work for the same (or similar) client
- 3) the work is repetitive or predictable
- 4) the client wants cost certainty and predictability

Types of AFAs

- **Retainer Agreement**

- The lawyer enters into an arrangement with the client whereby the client agrees to pay a set sum over a particular time period in return for the provision of specific legal services during that period.
 - Pros:
 - Cost certainty
 - Encourages efficiency
 - Cons:
 - Value to client can vary month to month
 - Difficult to estimate time required for the services provided under the arrangement

Types of AFAs

- **Retainer Agreement**

- Optimal use:

- 1) there is a large volume of work and fluctuations can be distributed over the retainer
- 2) the requirements or type of work have sufficient commonality and can be clearly identified and articulated in advance
- 3) the client prioritizes cost certainty and predictability
- 4) benchmarks are available to estimate the value of each particular service under the arrangement

Types of AFAs

- **Capped Fee**

- The client pays an agreed-upon maximum fee.
 - Pros:
 - Good for law firms that can leverage efficiencies and expertise for high-volume, routine work
 - Clients are happy being able to predict costs.
 - Cons:
 - Risk to the firm if something unforeseen happens or if it misjudges costs
 - Optimal use:
 - 1) the work can be accurately scoped in advance
 - 2) the work is similar to previous work completed for the client, with little variance expected

Types of AFAs

- **Risk Collar (Cuff)**

- The client retains the lawyer/firm to provide an identified service or services for a set price with an agreed upon buffer or contingency fee.
- By way of example, for a fee of \$1,000 for a transaction with a collar of 10%:
 - Client will pay \$1,000 for work between \$900 – \$1,100
 - If under \$900, the lawyer and client share in the savings (i.e. if costs = \$800, the lawyer and client split the \$100 in savings)
 - If over 1,100, the lawyer and client share the cost (i.e. if the costs = \$1,200, the lawyer and the client split the cost of the \$100 overrun)

Types of AFAs

- **Risk Collar (Cuff)**

- Pros:

- More flexible than a straight fixed fee arrangement
- Encourages the lawyer/firm to be more efficient
- Establishes zone of certainty around budgeted fee
- Allows for the sharing of savings and risks

- Cons:

- Lower cost predictability than a fixed fee
- Provides incentive to achieve the lower collar (\$900 in the example)

- Optimal use:

- 1) the client wants cost certainty and predictability
- 2) the matter can be reasonably scoped in advance with minor variances
- 3) the client is interested in a fixed fee, but the parties cannot scope the work accurately enough to determine the fixed fee

AFAs under Saskatchewan's *Code of Professional Conduct* and LSS Rules

- Law Society of Saskatchewan's *Code of Professional Conduct*
 - Section 3.6:
 - “A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.”
- “...misunderstandings respecting fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. The lawyer should try to avoid controversy with his client with respect to fees, and he should be ready to explain the basis for his charges (especially if the client is unsophisticated or unformed as to the proper basis and measurements for fees). He should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make informed decisions. When something unusual or unforeseen occurs which may substantially affect the amount of the fee, the lawyer should forestall misunderstandings or disputes by explanations to his client.”
 - *Cawood v Mirza*, 1981 CarswellSask 423, 13 Sask. R. 428, para 10

AFAs under Saskatchewan's *Code of Professional Conduct* and *LSS Rules*

- Determination of “Fair and Reasonable”
 - the time and effort required and spent;
 - the difficulty of the matter and the importance of the matter to the client;
 - whether special skill or service has been required and provided;
 - the results obtained;
 - fees authorized by statute or regulation;
 - special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
 - the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;
 - any relevant agreement between the lawyer and the client;
 - the experience and ability of the lawyer;
 - any estimate or range of fees given by the lawyer; and
 - the client's prior consent to the fee.

AFAs under Saskatchewan's *Code of Professional Conduct* and *LSS Rules*

Retainer Agreements

- *Rules of the Law Society of Saskatchewan, 1991:*
 - **1504.** (1) Every retainer agreement entered into by a member shall be in writing.
 - (2) A member who enters into a retainer agreement shall ensure that the agreement:
 - (a) specifies in clear and unequivocal language the term of the agreement, whether or not any further fees or disbursements will be charged, what specific matters are covered by the agreement; and
 - (b) does not mislead clients in any way with respect to the services covered by the agreement.
 - (3) Funds received pursuant to a retainer agreement are considered trust funds as defined in
 - Rule 900 and must be treated as such, in accordance with Part 13 of these Rules.

AFAs under Saskatchewan's *Code of Professional Conduct* and *LSS Rules*

Contingency Fee Agreements

- *Rules of the Law Society of Saskatchewan, 1991:*
 - **1501.** (1) Every contingent fee agreement entered into by a member shall be in writing.
 - (2) A member who enters into a contingent fee agreement shall ensure that the agreement:
 - (a) is fair and the member's remuneration provided for in the agreement is reasonable, under the circumstances existing at the time the contract is entered into;
 - (b) states that any party to the agreement may apply to the Court under section 64(3) of the Act for a determination as to whether or not the agreement is fair and reasonable;
 - (c) does not purport to exclude the member's liability for negligence;
 - (d) does not purport to require the member's consent before a client's cause may be abandoned, discontinued or settled; or
 - (e) does not purport to prevent the client from changing solicitors before the conclusion of the retainer.

AFAs under Saskatchewan's *Code of Professional Conduct* and *LSS Rules*

Contingency Fee Agreements

- Saskatchewan Court of Appeal established the following principles:
 1. fee agreements, particularly contingency agreements, must be construed as of the date they are made, not in hindsight;
 2. "fair" relates to the manner in which the agreement was brought about, meaning the client fully understands and appreciates the agreement and no undue advantage is taken; and
 3. "reasonable" relates to the amount payable to the solicitor, the actual work done relative to the work anticipated at the time of the agreement, the risk undertaken, and the particular circumstances of the case, however, some deference should be shown to contingency agreements recognizing that they may assist impecunious litigants to obtain the services of a lawyer.

Speers v Hagemeister (1974), 52 D.L.R. (3d) 109 (Sask C.A.)

AFAs under Saskatchewan's *Code of Professional Conduct* and *LSS Rules*

- **Limited Scope Retainers**

Code of Professional Conduct, 2012:

- **Section 3.2-1A** Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.
- **Section 7.2-6A** Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

Conclusion

- Clients are requesting AFAs
- AFAs may present a competitive advantage in an increasingly competitive legal services market
- Keys to a successful AFA are:
 - development of methods to accurately estimate fees at the outset of a proposed retainer
 - identifying the most appropriate AFA for the type of retainer
 - appropriate delegation to members of the law firm in the delivery of the legal services
 - clear written communication with the client about the scope of the AFA and basis of the legal fee to be charged