

CHAPTER 10

Alternative Methods of Billing

This chapter defines 15 different approaches to billing and summarizes their advantages, disadvantages, and characteristics. If used correctly, these descriptions can be a springboard to innovative billing.

Alternative methods of billing as they now exist fall into several general types. The key to selecting a billing method is to pair the client's needs and expectations with the method that will most equitably measure the value of the lawyer's services. For all but the most routine matters, this will involve drafting a case or transaction plan as discussed in Chapter 9.

FIXED OR FLAT FEE

The fixed or flat fee is the price that will be charged for defined services. It may be the total fee for the engagement or may apply to segments of the total services. It may stand alone or be combined with either an hourly fee or a contingent fee. An example might be a fixed fee for incorporating a business or preparing a will or a trust agreement.

Advantages

- Forces agreement between the lawyer and the client as to what services will be required and furnished.

- Requires the lawyer to know the cost of providing the defined services.
- The client knows what the fee will be.
- Can be competitive with the market.
- Can be useful in marketing your services.
- Not dependent on the time spent.
- Can be keyed to the value of the benefits to client.

Disadvantages

- Unprofitable if the cost of providing the services exceeds the fee.
- Unprofitable if the services are not performed efficiently.
- Unprofitable if there is no specific definition of what services are included and the fee arrangement does not account for unforeseen problems which might arise that require extra work, unless that is clearly covered by the representation agreement.
- Should not be used when there are foreseeable uncertainties.

When to Use

- For routine services where experience shows what is normally required so that the lawyer can foresee and define the included services and limit the excluded services.
- When the lawyer can estimate both the time required and the mix of standard billing rates or costs.
- For commodity services in a highly competitive market.

- For volume work on a repetitive basis.
- When the lawyer is comfortable accepting the risk of unprofitability if the cost of production exceeds the fixed fee.

Predictability of Total Fee

- Excellent – enables clients to know what the fee will be.

Incentive for Efficiency

- Encourages the development and use of systems, appropriate delegation of work, and technology.

Recognition of Value to Client

- Can be priced to reflect the value to the client.
- The value to the client rather than the time expended can be the standard in setting the fee (subject to competitive market conditions).

CONTINGENT FEE

The contingent fee is a charge that depends on results achieved. It requires clear agreement as to what the desired results will be as well as what is not covered by the fee. Those results may be positive (direct) in the sense of achieving a desired objective or negative (reverse) in the sense of avoiding exposure to liability. A contingent fee may be combined with a fixed or flat fee, or with hourly billing. A common example would be a fee charged in a personal injury case based upon the recovery. An example of mixing a contingent fee with a fixed fee might be a fixed fee for preparing a securities offering with a contingent or “success” fee if the offering closes and is funded.

Advantages

- The client does not pay the fee unless a favorable result is achieved.
- Clients who are otherwise unable to pay can obtain legal representation since the lawyer assume the risk of providing services without assurance of ultimately being paid.
- Can be lucrative if the lawyer is careful in accepting the representation and properly screens cases before agreeing to the representation.
- Depends on the results, not the time expended in obtaining the results.
- The terms of the representation can be clearly defined in the fee agreement.

Disadvantages

- The lawyer assumes risk of providing services without the assurance of being paid.
- Carrying costs. The expense of litigation may have to be advanced or carried by the lawyer if the client is unable to do so.
- Some jurisdictions are limiting contingency percentages in prescribed cases.
- Uneven cash flow for the lawyer.
- The time and effort required may exceed estimates.
- Inappropriate or volatile of ethical rules in certain types of situations (e.g. criminal defense or marital dissolutions.)

When to Use

- When it is desirable to represent individuals who are otherwise unable to pay.
- When your expertise and reputation attract good cases.

- When you can skillfully screen the desirability of a representation so that you accept only cases with a likelihood of success.

Predictability of Total Fee

- Clear formula for measuring results that determine the amount of the fee, even though the exact fee is not known at the outset.

Incentive for Efficiency

- Excellent, the lawyer's goal will be to maximum results with the least expenditure of time and effort. However, if the lawyer and the client differ as to whether the matter should be settled or tried, complications can arise.
- Not tied to the time spent.

Recognition of Value to Client

- Tied directly to the results achieved, so presumably will reflect the value to the client.
- If the matter is mishandled so that good results are not obtained, the client will not receive value, even though no or a low fee is paid.

HOURLY RATE

Since the late 1960's, hourly billing (sometimes referred to as time-rate billing) has predominated. It is predicated on the keeping of accurate, contemporaneous records of time expended-by lawyers, legal assistants, and other staff members. The hourly rate for each fee charger is intended to cover the cost of production plus a profit factor. Therefore, knowing the cost of production is important (although many lawyers do not have reliable cost data to determine what their costs are to deliver legal services). To some extent, hourly rates are market-driven, particularly at the commodity level, and can reflect lawyer expertise and anticipated value at the high end of the value curve.

Hourly billing has developed some nontime-related aspects such as minimum time charged for particular services—for example, minimum time entries of one-quarter hour or minimum entries for each letter or phone call. These should be (but often are not) clearly explained to clients in the fee agreement.

Many lawyers or firms have different rates for different fee chargers and different rates for a specific lawyer depending on the type of service, the client, the subject matter, or other variables. These variations recognize that the value to the client will differ and that time spent per se does not accurately measure the fee to be charged.

This method can be combined with contingent fees or fixed- or flat-fee billing.

Advantages

- Lawyers and clients have become accustomed to the hourly method of billing and are, therefore, comfortable with this method and how it operates.
- Rate schedules can be set, quoted, and used by the lawyer, and checked, monitored, and compared by the clients.
- Billing can be somewhat automatic, particularly with computerized billing systems that multiply time recorded by pre-established rates per hour to produce statements.
- Subjective judgments in billing are not required.
- Detailed itemized statements based on contemporaneous time entries are a chronology of work done and can be a means of communication between the lawyer and the client.
- Detailed itemized statements, when regarded as tangible evidence of work done, create the appearance of objectivity and evidence of the services provided to justify the charge being made.
- All risks (except the risk of nonpayment of the fee) are placed on the client.

Disadvantages

- The client is unable to know what the total charges will be.
- The fee charged may have little relationship to the value of the benefits received by the client.
- Discourages efficiency and the incentive to reach an early conclusion and provide cost-effective services.
- Clients are resisting the high cost of legal services they perceive to result from hourly billing.
- Clients must accept all of the risks, including lawyer inefficiency.
- Time spent does not recognize the benefits of the use of systems and technology, nor does it compensate adequately for the cost of developing such methods.
- The lawyers are not adequately compensated in high-value and high-responsibility matters.
- Does not recognize extraordinary, priority, or emergency services.
- There are finite limits for billable hours per year and for hourly billing rates, so there is a cap on your gross income.
- Does not promote finding better ways to provide legal services at a reasonable cost to the client.

When to Use

- When the client demands hourly billing and will not consider alternative methods.
- When there are variables that cannot be foreseen with reasonable accuracy.

- When no reasonably fair alternative method can be utilized.
- When the lawyer is willing to accept the representation but not willing to accept any risk.
- In situations requiring court approval of the fees, where the court recognizes only hourly billing in approving fees.

Predictability of Total Fee

- Difficult unless there is a guaranteed maximum.
- Sophisticated clients who have experience with similar matters and/or with the use of the same lawyer may be able to anticipate the range of the fee that will be charged.
- Limited, even with case control by the client.
- Depends on the lawyer's willingness to write down a fee for the client based on retrospective review.

Incentive for Efficiency

- Not inherent except to generally please the client and to preserve the lawyer-client relationship.
- Generally perceived to promote inefficiency and disregard for relating fee for services to the value to the client of those services.

Recognition of Value to Client

- Generally unrelated to value to the client, which may penalize either the lawyer or the client.

BLENDED HOURLY RATE

The blended hourly rate is a hybrid of the hourly rate. Instead of specific hourly rates for individual fee chargers, one rate applies to all hours billed on a matter. This fee arrangement is found more often being used by larger law firms in large cases or transactions where the client has negotiated the fee.

Advantages

- Generally the same advantages as for the hourly method.
- Is thought to be simpler to negotiate and administer than the method of having specific rates for each fee charger.
- Can be advantageous to the lawyer if work can be performed by individuals with lower normal hourly billing rates. This depends on the capabilities of those individuals and the retained right of the lawyer, not the client, to direct who will do the work.
- May encourage delegation of work.

Disadvantages

- Generally the same disadvantages as for the hourly method.
- Appears to be simple, but still depends on knowing the cost of production.
- May endanger the quality of the work product through improper delegation unless quality controls are in place.
- Will be unprofitable if the blend in practice is at the high end of the hourly rate structure.

When to Use

- When the type of work involves a typical pattern and the fee charger mix to do the work is reasonably foreseeable.

- Should not be used uniformly if the matters subject to the agreement vary in the required level of expertise and specialization or in the responsibility assumed by the lawyer or firm.

Predictability of Total Fee

- Same as for hourly billing.

Incentive for Efficiency

- The incentive to delegate means there may be more efficient use of individual skills. Care must be taken to ensure quality of product and to avoid increased cost to the client if low-end personnel are markedly less efficient than high-end individuals.

Recognition of Value to Client

- Generally unrelated to value to the client, which may penalize either the lawyer or the client.

FIXED OR FLAT FEE PLUS HOURLY RATE

In this hybrid method, the portions of the services that can be defined as to scope of services are charged on a fixed- or flat-fee basis, and the portions of the services that are not capable of being defined because of variables or uncertainties are charged on a time-rate or hourly basis. It can be used in both litigation and transactional matters. Numerous variations can occur, and the sequence of the method of charging may vary.

To illustrate the use in a transactional matter, in an estate-planning assignment during the initial phase when the objectives of the client are being determined, asset information is being gathered, and tax ramifications are being determined, the method can be hourly. When the plan has been determined and what will be required can be defined, the preparation of documents and services necessary to complete the assignment can be charged on a fixed- or flat-fee basis.

To illustrate the use in litigation, a flat fee can be charged for handling what appears to be routine litigation, with some agreement as to what services are included for that fee. If it is necessary to do extra work, there can be an hourly charge for services beyond the original defined scope.

Advantages

- There is a compromise or balancing in the risk sharing and predictability of the fee.
- The advantages of the hourly and the fixed- or flat-fee methods are accordingly modified.
- If you quote the fixed or flat fee after some of the variables or unknowns have been removed, the client will have an economic basis upon which to decide to proceed.

Disadvantages

- There is a compromise or balancing in risk sharing and predictability of the fee.
- The disadvantages of the hourly and the fixed- or flat-fee methods are accordingly modified.

When to Use

- When some but not all of the contemplated services can be defined so that a fixed or flat fee can be quoted. At the outset, the general approach to charging can be specified even though the precise fixed or flat fee cannot be specified until some of the variables or unknowns have been removed.

Predictability of Total Fee

- The fixed or flat fee portion is predictable; the hourly fee portion is not.

Incentive for Efficiency

- A combination of the incentives described for the fixed- or flat-fee and hourly methods.

Recognition of Value to Client

- Compromise between the two methods.

HOURLY RATE PLUS A CONTINGENCY

By combining hourly billing and a contingency factor, the client and the lawyer are sharing risks within the limitations of the representation agreement. Since a portion of the fee will be hourly, the lawyer is guaranteed a minimum amount. This is true whether the hourly fee is based on regular hourly rates or the agreed-upon hourly rates are lower than the regular rates. That will guarantee the lawyer some payment but leave the client some risk.

As in straight contingency agreements, the client and the lawyer are both motivated to obtain the maximum results, since both will benefit.

It is important to define clearly the way that the contingent fee will be measured. If the achieved result justifying the contingent fee is not directly expressed in dollars, the agreement must spell out the amount of the contingent fee and how it will be measured. For example, the basis for the contingent fee might be obtaining a rezoning, acquiring a business, or obtaining a restraining order, all of which need to be assigned a value or tied to the fee amount that will be paid.

Advantages

- Lawyer and client share some of the risks and the benefits.
- The hourly portion offsets the lawyer's cost of carrying the matter.
- The client will not pay the full hourly rate if the objective is not achieved and will only share proportionately if there are benefits.

- A client who is unable to pay fully may be able to achieve a result for which he or she will be able to pay because of the benefit received.

Disadvantages

- As with any contingency fee agreement, the lawyer must define the chances of success and exercise care in accepting the representation.
- Disagreement can result if the fee agreement does not clearly define how the contingency fee will be computed.
- Except to the extent of the compromise, has the same disadvantages as both the hourly and contingent fee methods.

When to Use

- With carefully selected clients.
- After careful appraisal of the chances of success.
- Where significant potential dollar value exists. (The potential contingent fee must more than offset the reduced hourly fee.)

Predictability of Total Fee

- Raises the minimum total fee and generally lowers the maximum potential fee as compared to the straight contingency fee.

Incentive for Efficiency

- Generally the same as with any contingent fee representation.

Recognition of Value to Client

- Close relationship to value because of contingency factor and the way success will be measured.

PERCENTAGE FEE

Typically, percentage fees have been based on a schedule of fees related to the amount involved in the matter being handled. The amount may be predetermined or may, in some instances, be related to the amount ultimately determined. Examples include a percentage of the value of estates being probated, the amount of a real estate transaction, and the amount of a bond issue. The percentage rate may be constant or graduated.

Advantages

- Relatively easy to state the terms in the representation agreement.
- Reflects the amount involved and the lawyer's exposure to liability.
- Does not depend on the time spent.
- If the percentage and amount of transaction are predetermined, same advantages as for a fixed or flat fee.
- If the percentage is known but the amount of the transaction is not known, same advantages as for a contingent fee.

Disadvantages

- If set too high, may not be competitive.
- If set too low, may be unprofitable.

- If complications arise and extra services are required, the lawyer bears the risk, unless the representation agreement closely defines what services are and are not included.
- If the percentage and amount of the transaction are predetermined, same disadvantages as for a fixed or flat fee.
- If the percentage is known but the amount of the transaction is not known, same disadvantages as for a contingent fee.

When to Use

- In situations as shown in the above examples.
- There is a tendency to use a percentage fee in awarding fees in common-fund fee approvals, in lieu of the lodestar or hourly method.

Predictability of Total Fee

- The method is known even if the amount of the fee cannot be calculated until the amount of the transaction is determined.

Incentive for Efficiency

- Good, because the fee is not tied to the hours spent or the duration of the transaction.
- Provides an incentive to use the most effective and most economical personnel to complete the assignment and to maximize the results.

Recognition of Value to Client

- In some cases (e.g. agent for professional athlete) the result is like the contingency fee, where it is tied directly to the results achieved, so presumably will reflect the value to the client. In other situations, it reflects the responsibility and potential liability associated with the project.

TASK BASED FEE

A hybrid of a fixed fee arrangement where the fee is based on identified tasks or components of the transaction such as the total square feet being developed , the loan amount or tasks or phases of a litigation matter. The measuring method is usually predetermined based upon the task or anticipated development or transaction but may, in some instances, be adjusted based upon changes encountered during the representation. The task based method can also be used in budgeting complex matters even when the billing method is based all or in part upon hourly rates and time spent on particular tasks. Many larger businesses are requiring task based budgeting in litigation matters with approval required before billings can exceed the budget for the defined task.

Advantages

- Relatively easy to state the terms in the representation agreement.
- Lawyer and client share some of the risks and the benefits.
- Does not depend on the time spent.
- Same advantages as for a fixed or flat fee.

Disadvantages

- If set too high, may not be competitive.
- If set too low, may be unprofitable.
- Requires the lawyer has a good understanding of the amount of work required and the costs associated with the work.
- If complications arise and extra services are required, the lawyer bears the risk, unless the representation agreement closely defines what services are and are not included.

- If the tasks in the transaction or case are predetermined, same disadvantages as for a fixed or flat fee.

When to Use

- In situations as shown in the above examples.

Predictability of Total Fee

- The method is known even if the amount of the fee cannot be calculated until the size or amount of the transaction is determined.

Incentive for Efficiency

- Good, because the fee is not tied to the hours spent or the duration of the transaction.
- Provides an incentive to use the most effective and most economical personnel to complete the assignment and to maximize the results.

Recognition of Value to Client

- Client clearly understands the service received in return for the fee.

RETROSPECTIVE FEE BASED ON VALUE

The retrospective fee based on value differs in approach from most of the alternative billing methods in that the exact amount of the fee is not known to either lawyer or client until the matter is concluded. However, the representation agreement can set forth the factors that are to be considered in setting the final fee. Often these are the factors set forth in the Model Rules of Professional Conduct. It is possible to provide either a maximum or minimum fee that will be charged. The amount may be combined with an hourly fee in setting a minimum. The amount of the fee should be determined by the lawyer, not the client.

Advantages

- Allows a retrospective determination of the fee when there are no longer uncertainties and unknowns.
- Attempts to equate the amount of the fee with the value to the client of the services that were performed.
- Depends on the benefits conferred rather than solely on the time spent.
- Because a judgment as to the amount of the fee is subjective, can be more equitable than if some mechanical system is utilized.

Disadvantages

- Neither the client nor the lawyer know in advance what the fee will be.
- Depends on a close and trusting lawyer-client relationship.
- Sophisticated purchasers of legal services are wary of potential abuses and inability to budget or monitor legal expense.
- Should cut two ways, with reduction of fee below normal hourly rates where value is not achieved despite efforts to do so.
- The lawyer's determination of value may differ from the client's perception of value received, leading to disagreement.
- If no payment is made until conclusion of the matter, the lawyer will have the cost of carry with limited cash flow, unless the client has agreed to make partial payments of fees as the matter progresses, subject to final adjustment.

When to Use

- When the lawyer and the client have a trusting relationship characterized by good communication and the client is aware of the work that was done and the true value of the results.
- Use selectively depending on the client and the nature of the matter being handled.
- When the lawyer and the client each have confidence that the other will act fairly.

Predictability of Total Fee

- Difficult, unless a maximum or minimum range is set with clearly defined criteria for setting the fee.

Incentive for Efficiency

- Generally good because the time spent is not necessarily a major criterion.

Recognition of Value to Client

- By definition, if applied fairly and equitably, the best way to relate the fee charged to value to the client.

UNIT FEE

The unit fee is a subspecies of the fixed or flat fee in that the lawyer charges a fixed amount for a specific service, irrespective of the actual time spent in providing that service. For example, a lawyer could have fixed charges for each letter, phone call, and deposition. This approach normally is combined with hourly billing for services not included in the unit billing. Some representation agreements provide that, for a specified service, the lawyer will charge either the unit fee or the hourly rate fee, whichever is greater.

Advantages

- Simplifies time recording somewhat.

- Reduces the time lost from inadequate record keeping.
- Can add a premium over straight hourly billing.

Disadvantages

- Distorts time records if records are used for purposes other than billing.
- May be deceptive if the client believes the lawyer will charge a fee on an hourly basis.
- Requires that the representation agreement clearly explain what the unit charges will be.

When to Use

- When the lawyer has accurate knowledge of the typical time required to provide a specific service.
- When the client will agree to this method.

Predictability of Total Fee

- Same as for hourly billing.

Incentive for Efficiency

- Encourages efficiency as to the services covered by the unit fee portion of the representation agreement.
- Encourages minimum time expenditure for a specific service.

Recognition of Value to Client

- Not keyed to value unless unit price is below hourly rate.

RELATIVE-VALUE METHOD

The relative-value method of billing involves creating schedules that break down the lawyer's services by subject matter and by task and assign a "relative value" or multiplier to each. Each fee charger can be assigned a different basic rate or charge, which is then factored into the equation. There are variations in this method as used by individual practitioners who have developed their own schedules. Proprietary systems also exist.

Inherent in this approach is a determination or judgment in the first instance of the value of each component service or task. This assumes that tasks performed by a lawyer differ in value, whereas straight hourly billing assumes that all time spent in performing various tasks has equal value.

Once the relative-value schedules have been established, the base rate factor can be changed, thereby changing the fee.

The relative-value method combines elements of hourly, fixed-or flat-fee, and value billing.

Advantages

- If uniformly used within a law firm, will tend to provide more uniform or consistent statements.
- Addresses value in the development of the schedules.
- May permit fine-tuning in fee determination.

Disadvantages

- Time-consuming to prepare and maintain schedules of relative value.
- Thought to be cumbersome to use.

- Client's perception of "value" may or may not coincide with values assigned in the schedules.
- Unless final charges are reviewed, may ignore such factors as results achieved or responsibility assumed.

When to Use

- When the tasks to be performed can be classified and are reasonably predictable.

Predictability of Total Fee

- Limited, except in routine matters that fall into a billing pattern.

Incentive for Efficiency

- Depends on whether the system is task-oriented rather than time-oriented.

Recognition of Value to Client

- Inherent in this method is a determination of value in the production of legal services. This may or may not coincide with the client's perception of value.

LODESTAR METHOD

The lodestar method of setting fees had its origin in the federal court system in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), and has been adopted in some states. In an attempt to have an objective system that could be applied by the courts with some consistency, the method involves multiplying the hours spent by a reasonable billing rate per hour to determine the "lodestar." Then that amount is multiplied by a factor, such as 1.4, 1.7, 3.0, or 0.8, to recognize factors other than time spent.

Court decisions have restricted the factors that may be considered as a multiplier, contending that those factors are "subsumed" in the hourly billing rate. For example,

“expertise” originally was a factor in determining the amount of the multiplier but now is generally considered to be reflected by the hourly billing rate. Uncertainty of payment remains a factor for the multiplier.

Courts often set billing rates that are below the market and sometimes will disallow a portion of the hours expended if the court deems the hours unnecessarily spent.

One objection to the lodestar method is that using it to approve fees takes up too much court time.

Advantages

- In theory, the hourly rate can be modified upward or downward based on criteria other than the time spent.

Disadvantages

- Same as for hourly billing method.
- The courts tend to disallow a portion of the hours expended.
- Many contend that this method encourages inefficiency, discourages early settlement, and is too complicated.
- As in any court approval process, it permits second-guessing of what was required.
- Awards may not reflect the market value of the services.

When to Use

- When required by the court.

Predictability of Total Fee

- Little predictability.

Incentive for Efficiency

- Very limited; padding may be encouraged if the lawyer believes the court will most likely not allow all hours recorded.

Recognition of Value to Client

- None.

STATUTORY OR OTHER SCHEDULED FEE SYSTEM

The amount to be paid for legal services is spelled out in some statutory enactments, in schedules for prepaid legal service plans, or by purchasers of legal services on a volume basis. Some fees are imposed, some are negotiated. Some fees may be fixed or flat; some systems prescribe methodology. Some schedules are in fee-shifting situations; some reflect government-imposed social policies.

Advantages

- Lawyers know in advance what the fee will be or how it will be computed.
- The client or the plan can negotiate fee amounts.
- From the client's point of view, this method may aid in cost containment.

Disadvantages

- Often rigid and/or arbitrary.
- May not recognize the cost of production.
- May be out of date if not revised frequently.

When to Use

- When compelled to do so.
- When the fee will fairly pay for services provided.

Predictability of Total Fee

- Reasonably predictable.

Incentive for Efficiency

- There can be an incentive if the fee is fixed and does not depend on time spent.

Recognition of Value to Client

- Typically not much correlation.

RETAINER—AVAILABILITY ONLY

The availability-only retainer, sometimes referred to as a “pure retainer” or “right-to-call retainer,” is characterized by payment to the lawyer of a fee for which no direct services (or limited services as specified) will be performed. In exchange for that fee, the lawyer makes a commitment to be available when requested and to refrain from representing either parties adverse to the client or competitors of the client within a specified time period.

This method is not widely used. It normally is used with a lawyer who has high-level expertise or prestige.

The funds, when received, belong to the lawyer and should not be deposited into the client’s trust account. The majority rule in jurisdictions that have considered the issue recognizes the distinction between “advance fee deposits,” which are client funds and must be put into a trust account, and “retainers,” which are funds paid by a client to secure a lawyer’s availability

over a given period of time. The funds are considered earned at the time of payment and need *not* be put into the client trust account.

Advantages

- The lawyer is not expected to do any work for the fee.
- The client is assured of representation by the lawyer of the client's choice.
- The client is assured that the lawyer will not represent any party adverse to the client or any competitor of the client.
- The client may deem that the lawyer's prestige will add to his or her prestige.

Disadvantages

- The lawyer may be unable to accept desirable work from other clients.
- The client may decide that the amount paid does not bring expected benefits.
- The lawyer's loss of business opportunities may exceed the amount of the retainer.

When to Use

- When the monetary amount is significant enough to justify the disqualification from taking work from other clients.

Predictability of Total Fee

- Entirely predictable.

Incentive for Efficiency

- Not relevant, since no services are provided.

Recognition of Value to Client

- Should be reflected in the negotiated amount of the availability-only retainer.

RETAINER AS A DEPOSIT AGAINST FUTURE SERVICES

The retainer as a deposit against future services differs from the payment of an “annual retainer.”

The retainer as a deposit against future services is not per se a billing method, but actually a credit policy technique to ensure that the client will pay for services to be rendered or for disbursements to be made in behalf of the client. When the lawyer receive these funds, the lawyer must place them into a client’s trust account and may withdraw them only after performing services or making disbursements in behalf of the client. At the conclusion of the representation, the lawyer must return any balance to the client.

Some such agreements require the clients to keep the funds on deposit at a certain level and replenish them when they drop below a certain level. This is done to even out cash flow for the lawyer and to ensure that funds will be available to pay the final bill.

This arrangement can be used with a variety of billing methods, as it is a deposit against future charges, however computed.

Advantages

- Requires the client to make a financial commitment at the start of the representation.
- Minimizes fee collection problems if the retainer balance is kept at an agreed-upon level throughout the representation.

- Enables the lawyer to know throughout the representation that he or she will be paid.

Disadvantages

- The client must come up with up-front funds.
- If the balance at the end of the representation is insufficient to cover the final charges, the lawyer could have a collection problem.
- There may be a timing problem as to when the client can take a tax deduction for legal expense.

When to Use

- From the standpoint of the lawyer, whenever possible for cash flow purposes.
- If there is doubt as to when was hired and obligated to the representation, a representation agreement that specifies that the representation will start only when funds have been deposited will protect the lawyer against certain malpractice claims.

Predictability of Total Fee

- Not relevant.

Incentive for Efficiency

- Not relevant.

Recognition of Value to Client

- Depends on the method of billing chosen.