

Navigating the Waters of Alternative Fee Arrangements: Three Tips for Smooth Sailing*

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Despite the rumors of its demise, the billable hour won't be found in Davy Jones' Locker—not just yet, anyway. Truth be told, the billable hour is unlikely ever to give up the ghost, in no small part because it is so familiar and easy to understand. Still, that venerable measure of value no longer commands the high seas like it once did. Both in-house and outside counsel are beginning to navigate the waters of alternative fee arrangements instead.

Anyone who's been paying attention recently knows the allure of the alternative fee arrangement. It has the potential to provide great improvements over the billable hour. At its best, an alternative fee arrangement is a win-win relationship that aligns the interests of the client and the attorney, providing predictable costs and recognizable benchmarks of success. But without proper planning and preparation, the allure of the alternative fee arrangement can turn into a siren's song, leading the unwitting client and attorney toward an undesirable end. Dashed expectations—not to mention needless frustrations—await those who fail to plot their course with care. To ensure smooth sailing for an alternative fee arrangement, keep the following three tips in mind.

Tip Number One: To avoid choppy waters, and the accompanying seasickness, a clear understanding between the parties is absolutely crucial. The billable hour has been around for so long that everyone already understands exactly what it means. Not so with alternative fee arrangements. For one thing, the very term "alternative fee arrangement" encompasses a number of different possible structures. These include flat fees, capped fees, success hold-backs, and blended rates, to name but a few. When parties begin discussing an alternative fee arrangement, they should be sure that everyone is referring to the same basic structure.

A shared understanding of the basic structure becomes even more important when parties explore the possibilities of additional customization. An alternative fee agreement can be further tailored to reflect any and all concerns of the parties. For example, many alternative fee arrangements include an opportunity for renegotiation if the work unexpectedly exceeds the original scope. Others provide incentives in the form of bonuses when outside counsel reach a certain goal, such as dismissal or settlement, within a certain period of time. The possibilities are limitless. Such flexibility can be a boon, but it can also make the parties a little green around the gills if they are not communicating effectively.

Effective—and extensive—communication between the client and the attorney is key to determining which particular arrangement is appropriate. From the start, each side should understand the ultimate goals and agree on the best way to reach them. To make such discussions manageable, especially when the matter is a large one, it is often helpful to break the representation into segments. Both sides should remain flexible and recognize that certain types of arrangements might work better for certain types of tasks. Routine tasks are often perfectly suited for a flat fee basis. On the other hand, when a matter seems likely to be complicated, the agreement might include a fee cap, which, if reached, automatically triggers a renegotiation of the fee arrangement. If both sides clearly understand where they want to go and the vessel that they will take, the trip is more likely to be a pleasant one.

Tip Number Two: The course has already been charted—no one has to set sail without a map. A clear map, in the form of good pricing information, is already available. Law firms have all the information they need to price cases and matters, and they have been perfecting this exercise for years. Experience has taught lawyers what tasks a given case or matter is likely to require and how much that work is probably going to cost. What's more, firms have access to software and analytical models that make the projection of costs and fees that much more accurate. In addition, the ABA provides a wealth of information, both online and in print, on the topic of alternative fee arrangements. No one has to start from scratch when embarking upon alternative fee arrangements—the map has been provided.

To be sure, the unexpected can happen during a representation, despite whatever the parties have learned from previous matters. That's why, for example, fee arrangements for particularly complicated matters should incorporate opportunities for renegotiation. Additionally, at the outset of the representation, the client and attorney should discuss the costs of the best case scenario and the worst case scenario. Even though every eventuality might not be foreseen, the parties will at least be prepared for the most likely squalls.

Finally, Tip Number Three: A successful alternative fee arrangement depends upon a long-term relationship, not just a three-hour tour. Alternative fee arrangements work best in the context of a positive, long-term relationship between client and attorney. It's a fact: on any given matter, either side could end up losing money. And especially in the beginning, a little trial and error will probably be necessary as both sides get their feet wet and become accustomed to the new system. If the client and attorney have cultivated a relationship of trust, and if neither side seeks to abuse the system, both will benefit over the course of the journey.

Saying *bon voyage* to the billable hour can make the long-term relationship between client and attorney a more successful partnership. Attorneys are more likely to approach clients proactively with creative solutions to problems—without the concern that they will be perceived as fishing for more billable hours. Both parties appreciate that they do not have to quibble over decisions such as whether to devote extra time to a research question, or whether to involve an attorney with a higher hourly rate rather than someone “cheaper.” Instead, everyone's energies can be focused on the ultimate goal, providing excellent service to the client. For these and many other reasons, clients and attorneys who have taken the plunge are finding a lot to like about alternative fee arrangements.

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The waters of alternative fee arrangements can be treacherous, but keeping these tips in mind will help ensure smooth sailing. With a clear understanding, good information, and a positive long-term relationship, in-house and outside counsel can stay on course and enjoy a successful voyage.