



Practical Considerations for Alternative Fee Arrangements

A White Paper on Fixed Fees
and Transactional Matters

[Contents]

Introduction	1
Facts and Figures	2
Key Issues to Address in Fixed Fee Arrangements	3
1. Demonstrate that you can afford it	3
2. Assign sufficient project management	3
3. Identify appropriate clients and matters	5
4. Ensure daily time recording and tracking, ideally in real-time	6
5. Realistically size the project's scope and discuss fees with your client up front	6
6. Determine if other practice groups are needed	7
7. Establish ongoing training and support for associates to maximize efficiency	8
8. Assess where you can cut costs right off the bat	9
9. Share the knowledge and apply lessons learned	10
Conclusion	10

Change is Here. It's Time to Adapt.

If you need evidence that change is here, just look at Toby Brown's job description at Fulbright & Jaworski LLP: "Alternative Fee Arrangements, Client Teams and Knowledge Management." And Fulbright is not alone. A growing number of US law firms are creating formal and informal positions, sometimes referred to as "alternative fee czars," to help their lawyers succeed with the growing number of matters being handled under alternative billing and fee arrangements.¹

This paper presents key questions to consider at the outset of any alternative fee arrangement, with a focus on fixed fees for transactional matters.² The goal is not to offer the answers to every issue, but instead to ensure that the right questions are being asked. Each firm will tackle the issues differently and have their own unique solutions. In any event, "there are no definitive answers," says James Grayer, corporate partner at Kramer Levin Naftalis & Frankel LLP. Armed with the right questions, however, firms will increase their chances of maximizing and protecting profits, improving client relationships and avoiding surprises and internal problems.

¹"Alternative fees" and "alternative billing" are sometimes used interchangeably but alternative fees (which are the focus of this paper) refer to approaches that have no, or very little, hourly billing components. Conversely, alternative billing refers to another way to invoice and pay for legal services.

²For a discussion on the types of alternative fee arrangements, see "The Legal Biz Dev Guide to Alternative Fees," by Jim Hassett, Ph.D.

Facts and Figures

According to a 2008 BTI Consulting Group survey, after litigation, alternative fees are most commonly used in M&A and corporate finance transactions. In addition, ALM's 2010 Billing Rates and Practices Survey revealed that fixed or flat fees were tied with contingency fees as the most popular form of alternative billing. However, most articles and resources are written in the abstract or tend to focus on litigation. Each practice group has different considerations and must approach the issues separately.

A quick round-up of recent facts and figures shows that alternative fee and billing arrangements are an established part of legal practice:

\$7 billion	The LegalBizDev Survey of Alternative Fees reports that the largest 100 US law firms generated about \$7 billion in revenue from alternative fee arrangements in 2008.
77%	According to a recent ACC survey, 60% of responding general counsels and chief legal officers reported that the best way for outside counsel to improve relations is to offer more alternative billing arrangements. 77% reported that they wished to increase the percent of their budgets spent on alternative fees.
82%	A 2009 American Lawyer and ACC survey found that 82% of firms billed on flat fees for at least one matter in 2009 and there was a 39% rise in the number of companies that paid more in flat fees in 2009 as compared to 2008.
88%	According to ALM's 2010 Billing Rates and Practices Survey Report, nearly 88% of responding law firms offer alternatives to the billable hour.
55%	A 2009 Hildebrandt study revealed that 55% of participating law departments have used or plan to use alternative billing arrangements.
45%	Fulbright & Jaworski's 2009 Litigation Trends Study revealed that 45% of responding companies used alternative fee arrangements.

This paper does not address the prevalence of alternative fee arrangements or how profitable (or not) they are. Regardless, alternative fee arrangements are now a part of the legal landscape. Firms that make it a priority to address the relevant issues and get these arrangements right are best positioned for success.

Key Issues to Address in Fixed Fee Arrangements

Before or during any alternative fee arrangement (especially fixed fee matters) there are several issues that should be addressed to ensure that the matter will be handled as efficiently as possible. The issues range from internal training and resources to client communications and time tracking. As mentioned above, there are no definitive solutions and each firm will differ in its approach, but it is important that all issues are carefully considered. In addition to helping ensure success with these matters, addressing these points can lead to better client relationships and a more open and honest dialogue.

The nine issues discussed below are not exhaustive and certainly there are additional questions that arise, but using these as a starting point will help ensure that you are on track to cover most significant matters.

1 Demonstrate that you can afford it

It's a good idea at the outset of any fixed fee arrangement to demonstrate to the client that your firm can afford to run the transaction this way. "Clients may think that your offer to do a deal on a fixed fee is just a teaser," says Ted Meyer, former managing partner of Seyfarth Shaw LLP and founding partner of Meyer White LLP, a newly established law firm that embraces alternative billing.

When you offer to take on part or all of a first engagement on fixed fee, a new client may suspect that you intend to revert to traditional billing methods down the road.

To help overcome this concern and establish greater trust with your client, consider whether you can demonstrate to clients the answers to any of the following questions to show that your firm can profitably run fixed fee transactions:

- Has your firm eliminated any costly or unnecessary overhead?
- Are there any new training or professional development initiatives for the associates designed to help them practice more efficiently?
- Are your deals staffed as efficiently as possible? Many deals can be run just as efficiently, if not more so, with fewer associates. "Large deal teams can lead to tremendous inefficiencies," says Mr. Meyer.

2 Assign sufficient project management

There is no shortage of articles pointing out that attorneys often lack project management skills. To effectively handle a transaction under a fixed fee structure, there should be an effective project manager in place with the right training and skills to effectively implement and manage the transaction.

What exactly is meant by “project management” in the context of law firms and billing practices differs depending on whom you ask, but generally speaking, this refers to the ability to effectively manage a project and team and the related processes and technologies against a predetermined set of tasks, timetables and budget. A project manager keeps an eye on the big picture while watching the day-to-day activities to ensure that all deliverables are being achieved either on time and budget or ahead of schedule.³

Among the questions to consider when assigning a project management resource:

- Should the project manager be a lawyer?
- Is the person sufficiently experienced in transactional matters to anticipate expected and unexpected issues? For instance, Sheppard Mullin Richter & Hampton LLP has four separate alternative fee czars, with each one responsible for different practice areas.
- What level of authority does this person have when dealing with the partners both inside and outside of the department?
- Is an appropriate person given the sufficient span of control to ensure the entire transaction, from start to finish, is addressed efficiently as opposed to hoping that each sub-team performs its part efficiently on its own?
- What are the skills needed by the project manager?

“Absent [project management training], a lawyer working on an alternative fee arrangement matter striving to be efficient may run into complications when another lawyer without such exposure will work the ‘old way.’”

— **Timothy Corcoran,**
Senior Consultant, Altman Weil, Inc.

According to Timothy Corcoran of the legal consulting firm Altman Weil, Inc., while a firm can have a good project manager in place, training all lawyers on a project management approach is the optimal way to drive efficiency. “Absent this,” says Corcoran, “a lawyer working on an alternative fee arrangement matter striving to be efficient may run into complications when another lawyer without such exposure will work the ‘old way.’”

“Think of a tax, employment or environmental lawyer performing an isolated piece of acquisition due diligence. If their piece is inefficient and overbilled, it would disproportionately impact the overall economics of the matter,” Corcoran says.

³For a good discussion on legal project management, see Timothy Corcoran’s Law Biz blog: <http://corcoranlawbizblog.altmanweil.com/2010/04/05/legal-project-management-qa>.

3 Identify appropriate clients and matters

Identifying Appropriate Matters

Not all transactional matters are equal candidates for fixed fee arrangements. This is especially true if trying a fixed fee with a client for the first time or with a new client. It's a good idea to identify matters with track records of predictability and to stay away from multi-layered transactions or novel types of deals with which you or your firm do not have significant experience.

For instance, Ian Goldstein, a vice-chair of the Corporate & Securities Practice Group at Drinker Biddle & Reath LLP, focuses on breaking down transactions or other matters into different components prior to establishing a fixed fee arrangement. He then works with his clients to establish a working understanding of the scope of work and the responsibilities for each matter component, after which he is better able to establish a fixed fee arrangement for each component part of the matter. "Establishing a clear understanding with the client of all of the different aspects of a transaction or other matter and my firm's role and responsibility for handling such matter is a critically important element in a win-win fixed fee arrangement," he says.

According to Mr. Corcoran, firms that apply legal project management principles and offer fixed fee arrangements to matters they know well and have studied in order to deliver efficient services tend to maintain or improve profitability. A great fear among firms is that a fixed fee matter will become a loss leader by default. This does not need to be the case. It is the less routine matters that have more unknown variables that can spiral out of control if the firm has not sufficiently envisioned the parameters and captured them in the matter, particularly a fixed fee, and the engagement letter or project management approach does not include sufficient latitude to make adjustments if the scope grows beyond the mutual assumptions at the beginning.

"There is a natural element of give and take in structuring alternative fee arrangements. Trust and open communication between the firm and its clients are key elements that allow this give and take to develop into mutually acceptable alternative fee arrangements."

— Ian Goldstein, Partner, Vice-Chair of
Corporate & Securities Practice Group,
Drinker Biddle & Reath LLP

Identifying Appropriate Clients

In terms of choosing appropriate clients, it often comes down to elements of trust and good working relationships. If clients and partners enter into alternative fee arrangements suspicious of each other's motives there is obviously less chance of success.

“There is a natural element of give and take in structuring alternative fee arrangements,” says Mr. Goldstein. “Trust and open communication between the firm and its clients are key elements that allow this give and take to develop into mutually acceptable alternative fee arrangements,” he says.

4 Ensure daily time recording and tracking, ideally in real-time

Traditionally, attorneys and other time recorders input their time with no established deadlines and reports are circulated to the billing partner on a weekly or monthly basis. Under alternative fee matters, time entry is as important as it ever was, and faster time entry and analysis is critical. The billing partner and project manager (if different people) need real-time information. In an alternative fee arrangement where the firm bears the burden of overruns, you cannot afford to wait a month and a half to view pre-bills. It is critical to track time on a daily basis and much less important how you are tracking time.

Consider technology solutions to track data in real-time. For example, a recent article in *American Lawyer* reported that Crowell & Moring LLP has an alternative billing program that is integrated into the firm’s matter management system. Winston & Strawn LLP is developing a dashboard system so that its attorneys can regularly analyze where they stand on alternative fee matters. Questions to keep in mind include:

- What solutions are available to you if the firm does not have the appropriate technology in place (for example, having the attorneys send you daily time logs or manual reports)?
- How will you foster an internal culture of daily time recording and reporting?

5 Realistically size the project’s scope and discuss fees with your client up front

It is critical to avoid surprises, both internally and with the client. It’s best to uncover a project’s details early on, rather than midway through or after the engagement. Otherwise, you will be in the uncomfortable position of justifying why your proposed fee is different than the one originally contemplated.

Issues to consider with your deal team and client include:

- Have all deal documents, including ancillary agreements, been considered and planned?
- Will any regulatory consents or filings be required?
- What post-closing matters will be required?

- How is the deal being staffed?
- Have you discussed risk protection measures for both you and your client if time goes significantly over or under the anticipated timeframe?
- How are you dealing with hard costs and disbursements? For example, consider excluding hard costs from a fixed fee arrangement or even having such costs billed directly to the client. Fees for UCC searches and filings, good standing certificates, among others, are hard costs over which you have little control, so it can be a good idea to take them out of the picture. Clients also often have preferred vendors, so it is good to check with them in advance.
- Are you sharing time reports with the client? It may make sense to share time reports with your client, especially where you can demonstrate the savings that client is receiving on the fixed fee versus traditional billable hours.

“It is essential that both the firm and client have absolute clarity on the scope of the matter and how the law firm’s time is being spent,” says Mr. Meyer of Meyer White. “Getting to the bottom of these issues is also great for establishing a better client relationship.”

Mr. Meyer suggests starting a fixed fee matter with a few hours of traditional billable time (three to four hours) to ensure that the transaction is fully understood at the outset. He recommends that this be taken on by a partner or another senior lawyer and that ideally this meeting happens at the client’s premises.

“It is essential that both the firm and client have absolute clarity on the scope of the matter and how the law firm’s time is being spent.”

— **Ted Meyer, Partner,**
Meyer White LLP

“The deeper you get into these discussions earlier on, the better you can demonstrate to your client your competence in fixed fee arrangements,” says Mr. Corcoran. “Also, it’s a way to differentiate from the competition offering a lowball price without realistic planning. If they haven’t explicitly defined the scope with the client, there’s a risk that what they plan to do for that reduced rate is not all the work that will ultimately be required.”

6 **Determine if other practice groups are needed**
Different departments have different billing and discounting practices. Before undertaking a corporate transaction on a fixed fee basis, consider any assistance that may be needed from other practice groups and that you have valued your internal resources appropriately. Corporate transactions often

require input from various practice areas, such as employment, tax, real estate, IP and environmental. Coordination and cooperation between and among all relevant practice areas is important to avoid internal problems and surprises for the client. Questions to consider include:

- Have you discussed the practice group's involvement with the relevant department chair?
- How will your billing arrangement impact the time required by the other practice area(s)?
- Is the matter's project manager aware of the required assistance from the other practice area(s)?
- Do you understand the scope of the required assistance, in terms of time, process and staffing and has the client been informed?

7 Establish ongoing training and support for associates to maximize efficiency

Key to success in alternative fee arrangements, especially fixed fee matters, is the hard and soft training provided to your associates and deal team. It is essential for everyone to get up to speed quickly and for the partners to know that there is a reliable and consistent quality across the associate ranks.

Clients are often concerned that increased efficiency or fixed fees means that the quality of the associates will suffer. However, firms that take smart approaches to training will be able to demonstrate increased value from both a financial and intellectual point of view.

Hard Skills

Hard skills refer to the substantive legal skills that your lawyers should have. Law school has traditionally prepared associates to litigate, not to be deal lawyers. Clients are no longer paying for junior associates to learn on the job, in both billable hour arrangements and in alternative fee arrangements. However, in the latter arrangement it's especially critical to ensure that junior associates have the skills required to add value and work efficiently.

Questions to consider include:

- Have the transactional practice groups identified the core substantive skills its associates should have? For example, in order to run an M&A efficiently, all associates should receive up-to-date resources and training on conducting due diligence, how to run a closing and how to prepare closing documents. Very few students come to a firm having heard the words "secretary's certificate," "change of control clause" or "working group list."
- What resources does the firm have in place so that its attorneys do not consistently have to reinvent the wheel on each deal? Firms can no longer

have associates spend hours stripping down and rebuilding basic transactional documents. The most innovative firms have taken a blended approach of combining firm-specific materials and supplementing them with appropriate third-party content.

- How will trainings be delivered and who will deliver them?
- How is the training being maintained and reinforced between sessions?
- What resources are available to your attorneys to help get them up to speed quickly?

Soft Skills

In addition to the hard skills, firms should consider boosting their attorneys' soft skills, including:

- Time management.
- Project management.
- Client service skills.
- The ability to discuss fees with clients. Many attorneys are good at discussing legal issues with clients but feel uncomfortable or unprepared to discuss fees and money matters.

[8] Assess where you can cut costs right off the bat

Have you identified or considered parts of the transaction that can be limited in terms of time, scope or cost? Some examples:

- Is a legal opinion necessary or can it be limited?
- Are there any ancillary agreements that can be eliminated or reduced?
- Can the scope of due diligence be limited? Of course, this is an area that must be approached with caution as it impacts other aspects of the deal.
- Can the parties agree to less turns of the documents?

“When you understand the project’s scope together with the related fees and time allocation, it helps you discuss the deal in a much smarter way with your client.”

— **Toby Brown**, *Client Teams*,
Fulbright & Jaworski LLP

Toby Brown, the alternative fee advisor for Fulbright & Jaworski LLP, notes that “when you understand the project’s scope together with the related fees and time allocation, it helps you discuss the deal in a much smarter way with your client. Coming to the table informed and prepared can be terrific for that client relationship.”

[9]

Share the knowledge and apply lessons learned

Anyone undertaking alternative fee arrangements will undoubtedly learn things along the way. It's important that lessons and experiences are shared so that opportunities to maximize success are not lost. Among the issues to consider:

- Has the firm chosen a point person to collect all relevant data and information?
- How is the information being disseminated across the firm?
- Who is doing the financial analysis on each type of alternative fee arrangement?
- How do you foster a culture of sharing information?
- How do you monitor progress?

[Conclusion]

While it's uncertain how the legal industry will settle and whether alternative fee arrangements are here forever, it is certain that those firms best prepared to handle alternative fee arrangements will be at a significant advantage to those that are not. One way to be prepared is to face the issues head on, build on strengths and improve on weaknesses.

Many firms have already significantly changed the way that they are doing business and are adapting to client demands, calls for innovation and efficiency. While few firms have addressed all the issues raised above, the ones that are on the path of adapting to change will be poised to take advantage of the opportunities created by firms that remain stuck in the past.



ABOUT THE AUTHOR

Ian Nelson is the VP of Business Development for Practical Law Company. Prior to joining PLC, Ian was a corporate attorney in NY with Kramer Levin Naftalis & Frankel LLP, during which time he also practiced in London with the English law firm Berwin Leighton Paisner. Ian frequently writes and speaks on the topics of alternative fees, efficiency, training and innovation in the practice of law and also started PLC's law school and summer associate programs that are designed to help better prepare students for transactional practice.

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