

FEE ARRANGEMENTS WITH CLIENTS— **BILLABLE HOUR VS. FIXED PRICING**

While most attorneys would consider their role in the legal profession a “calling,” there is no doubt that all want to get paid for their services. We all need to make a living, and most probably want to make the best living possible. The focus of such thinking, however, is typically on the needs of the attorney.

The legal profession has utilized all kinds of billing methods over the years. The most common billing method is the billable hour. These written materials will provide an overview of hourly billing, and the process most attorneys employ in carrying out the terms of the agreement. It will then seek to encourage the attorney to look at the fee agreement in new ways. Hopefully, you will begin to see how the fee agreement can be a client development tool, a client communication tool, as well as a means of generating income. The hope is that you will at least begin to see the fee arrangement in a different light than in the past and encourage not only a change in how you do your contracts, but how you approach the attorney-client relationship overall.

The Billable Hour

For the past several decades, most attorneys have billed their clients by the hour.¹ The typical attorney-client agreement will have the following elements:

1. It will call for a prepayment up front (usually referred to as a “retainer,” although “legal fee advance” might be more descriptive – given the multiple uses of the word “retainer”);
2. There will be a quoted hourly rate for work expended by the attorney;
3. It often includes an explanation, or definition of “billable time” that such work includes ALL time expended on the client’s matter, including phone calls, interviews, discovery, conferences, drive time, as well as what the client normally thinks of: preparation of pleadings, motions, depositions, hearings, and trial;
4. The billing interval – usually monthly, will be indicated, along with an explanation that once the retainer (advance) has been used up, the client will have a deadline to pay all outstanding bills within a certain amount of time –usually 30 days;
5. It may call for interest to be applied and compounded for each month there is an outstanding balance;
6. Often there is a provision whereby the client agrees that the attorney will have an “Attorney Lien” that can be asserted on any outstanding balance at the conclusion of the legal matter.

There may be other common provisions, but these are the most typical elements I have seen over the course of my years in practice. As with any contract, two goals are: (a) to make sure both sides

¹ This excludes contingency fee arrangements, which are relatively common, but limited to certain types of cases.

understand and agree what the terms of the arrangement are; and (b) to provide for what happens if one side does not meet those obligations. As an attorney, one may be tempted to examine these elements and consider either: how they may be improved upon to provide better protection, or what other clauses may be added to provide even more protections. This has been the standard practice for years, and few have really questioned it. There have been some practice-wide modifications over time whenever there has been an ethics rules change, or an ethics opinion impacting this area of the practice. For instance, despite the existence of Lawyer Trust Accounts and the rules governing them, I encountered many law firms that still believed it was acceptable to: (a) put client retainers in their operating accounts; and/or (b) include clauses in their attorney-client contracts that claimed that all client retainers were “non-refundable.” Hopefully, with the 2004 opinion in *Matter of Kendall*, 804 N.E.2d 1152 (Ind. 2004), most firms caught on and changed their practices.

The practice of attorneys’ hourly billing is not only the entrenched “standard in the industry,” it is commonly known among lay people. Our office routinely receives phone calls from prospective customers who are “lawyer shopping.” They are pretty easy to spot. When they call, they don’t ask to speak to an attorney, and they don’t state the basic nature of their issue and ask for an appointment. Rather, they cut straight to the chase and ask two simple questions: (1) What is the attorney’s retainer; and (2) What is the hourly rate. You might think this comes only from people who have had legal troubles and hired counsel before. But that isn’t the case. Such people have experience and call the last attorney they used and liked – already familiar with their retainer and billing rate. These questions are asked by people who haven’t had any experience with the legal system in years, if at all. They know to ask these things because these practices are so well ingrained in our legal culture, that they have become common knowledge.

Now, look back over the list of common elements in these hourly contracts. As you do so, if you can take off your “lawyer hat” for a moment, and instead, re-examine them wearing a “client hat.” Also, try not to see the non-attorney as a “client”, but as a “customer.” Hopefully you can see some problems from this different perspective. You can come up with your own list of problems with these practices, but the following things occurred to me:

1. Every term is for the lawyer’s protection;
2. The agreement is essentially a contract of adhesion. That is, the terms will be in a pre-printed form, with little or no opportunity for alteration (other than possibly blanks for the name, and nature of the legal matter).
3. There are few, or no, terms that serve to protect the customer;
4. There was no input from the client;
5. It was not tailored to the client’s matter, situation, or needs;
6. The two monetary terms – retainer and hourly rate – are determined based on the lawyer’s experience for what he needs to cover his costs in getting the case started (retainer) and meeting the lawyer’s overhead and profit needs (hourly rate).

The purpose of this paper is to encourage you to consider the possibility that there is a better way. We will examine not just billing, but client interaction as well. The point, once again, is

not to suggest that you should implement some simple practice forms and gimmicks that will improve your legal business. Rather, it is to get you to reconsider altogether your attorney-client relationships and to experience a “paradigm shift,” such that your overall approach to the practice of law is changed in such a way as to enrich the experience for your clients AND you.

The Traditional Representation Practices

(NOTE: Throughout this section, I will use the example of an action for dissolution of marriage to illustrate the points made. However, the principles and observations made apply to most areas of practice).

A. Valuing Billable (Hourly) Legal Services

Initially, young lawyers tend to take on any matter that walks in the door. This tendency is understandable, assuming that on day one, the lawyer has no clients. At that point, any business is at least some business. Also, without benefit of practical experience, there isn’t much basis for determining what is and is not a good client or client matter. Again, this is understandable, and as I have come to recognize as a coach of youth sports, experience is the best teacher. So how do attorneys who charge by the hour set their rates? For the new attorney starting in a firm, the rate will likely be set by the firm. The members will consider their own rates and set it a little less than their own rates, accounting for the lack of experience. For new attorneys with no firm to rely on, they are likely to look around at other attorneys with similar experience, expertise, and practice in the locale and see what those rates are, and set a rate to be competitive with them.

But how are those rates really determined? What are the driving factors? At some point early in their careers, lawyers begin to recognize and adapt to the business of the practice of law. Whether practicing in a firm or on their own, even new lawyers realize that there are bills to pay, and keeping the doors open costs money. Generating income to pay those bills is an obvious necessity. But in determining what the hourly rate should be, there are two driving factors: (a) how much income is expected by the attorney after all the bills are paid; and (b) how much time is needed to put into the practice – for both client matters and firm administration. It takes at least a couple of years to figure out what your actual overhead is each year. It also takes about that time to figure out how much time must be spent on administrative and other business matters to keep the enterprise running. What remains is how much time can be devoted to actually working on client matters that can generate income. Experience will teach the attorney how much of that gets billed, and how much of that gets paid.

In the end, a calculation known as “Cost Plus Pricing” develops in one form or another. It is a basis for setting an hourly rate and consists of essentially three steps that, for a sole practitioner who decides to work only 40 hours a week, might look something like this:

Step 1—Determine Hours Collected On

Work hours in a year (less 2 wks vac)		
50 X 40 =	2000	
Less Non-billable (CLE, pro bono, admin):	300	
= Billable Hours		1,700
Less Pre-bill cuts for inefficiencies:	150	
= Billed Hours		1,550
Less Write-offs for nonpayment:	350	
= Collected/Realized		1,200 Hours

Step 2—Determine Annual Overhead (excluding attorney pay)

Average bills and employee pay =	\$140,000
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Step 3—Add Desired Salary and Set Rate to Accomplish

Overhead plus \$100,00 Attorney Pay =	\$240,000
÷ Hours Collectable for the year	1,200
= Minimum Hourly Rate	\$200/hour

Whether the actual process for any particular attorney is this deliberate or not, the net effect is the same. As the name Cost-Plus Pricing implies, it is calculated to cover the firm's cost of doing business plus a calculated payment to the attorney. If there are: (1) additional hours worked that can be billed, or (2) an upswing in the economy that results in better payment from clients, then there will be better net income for the year. The converse is true for slower workloads, and weaker economies. NOTE THAT EFFICIENCY IS NOT REALLY A FACTOR, AND THERE IS NO INCENTIVE TO BE EFFICIENT.

The focus of the traditional cost-plus method, as you can see, is on the needs of the attorney. It is normal for businesses to focus on their own metrics. But as a legal professional, you need to keep in mind that you are not in the business of selling fungible goods. And more than likely, your customers generally won't be recurring, "regular" consumers. (If they are regular consumers, each successive need for legal services is a little different than the last – unlike the consumer who simply purchases paper towels at the grocery store). Therefore, what offer can be tailored to each client's needs for each legal matter for which you are hired.

A review of law firm websites will reveal a common claim: that at "Firm X, you are not just a number." Rather, "Firm X recognizes that each client's case is different, and treats each client matter accordingly." Of course that is the case. Every law firm wants to be seen as providing more personalized services than the next (as their marketing materials make abundantly clear). Law firms are in business. They compete in open markets against other law firms for business. But such claims tend to be more aspirational and subjective. So long as attorneys bill by the hour, and

Attorney A generally works about the same number of hours as Attorney B, there really is no system in place to ensure that such claims are actually met.

B. What Traditional Representation Looks Like: The Initial Consultation

When a prospective new client comes in to meet with the attorney, there may or may not be a fee for that initial consultation. Regardless, the lawyer's primary objective is to land new, paying business. The client usually will not know which concerns have a legal cure and which ones don't. As lawyers, we tend to limit our assessment of prospective clients' needs based on the nature of their legal issue. As a result, we almost invariably miss opportunities to appreciate the full scope of what it is the person is after. For instance, when a new client comes in, we take limited information based on the legal framework of their legal issues. (Note that we often contribute to this by asking the new customer to state the nature of the legal issue at various early stages). This results in the following types of conclusions about what the client wants from the initial phone call:

- The widow needs an estate opened and property transferred;
- The new business owner needs a simple LLC formed;
- The wife wants a divorce from the heavy-drinking husband who puts her down.

The process typically involves the filling out of a case intake form before meeting with the client to get the most efficient use of the lawyer's time as possible. This is followed by the actual consultation between attorney and client. In my experience, the primary factors from this encounter include: (a) sizing the client up for compatibility; (b) eliciting enough information to determine if the client has a defensible legal position worth taking on; (c) giving the client a basic overview of the legal principles involved so they know what to expect; and (d) getting the client to accept your retainer and fee terms and sign the pre-printed attorney-client contract.

In the case of a divorce, for example, once the attorney determines that this is a client who has reasonable expectations and can pay, he will review the information on the intake form and verify the married couple's names, date of marriage, date of separation, names and birth dates of kids, collect wage information, health insurance information, daycare information, prior support obligations, and any other information needed to pursue the client's goals during the pendency of the divorce. At some point, if not throughout the process, the attorney will try to sell himself to the client – and before the consultation is over, explain the need for the standard office retainer, indicate his hourly rate, and present a contract for the client to sign. Usually, the client is asked to sign on the spot. **In my experience, attorneys typically schedule these initial consultations for 30 minutes to 1 hour at most.** It tends to be a rapid-fire process. The idea is that “time is money,” and the good business person generates new business in as little time as possible.

C. Representation and Efficiencies

Once the client has signed the attorney-client contract and brought in the retainer, the attorney will have a set number of standard forms that almost automatically get filed. Again using dissolution as an example, I have seen attorneys prepare and serve the following:

1. Petition for Dissolution and Summons
2. Interrogatories
3. Requests for Production
4. Motion to Require Financial Disclosure (containing redundancies of the above discovery, used in Counties where local rules don't require financial disclosure)
5. Motion for Provisional Order
6. Motion for Hearing on Provisional Order
7. Petition for Mutual Restraining Order (regarding taking/conveying assets)
8. (Sometimes) Petition for Domestic Order for Protection (where there is any suggestion of violence—I've seen used for tactical purposes)
9. Orders on each, first setting it for hearing, then granting the motion.

Each of these items may be a legitimate filing in any given case. However, some attorneys file the exact same form documents in every single case—with modest changes at best. In doing so, they may be inclined to bill the client a fixed amount of time for preparing and filing the document and proposed order. The attorney generates income that way in the most efficient way possible. There is little drafting or review time – only enough to change the names, addresses, and situational characteristics of each case. With standard word processing equipment, this function can be carried out by a legal assistant with little or no input from the attorney. Nonetheless, the hourly legal bill is likely to suggest that the attorney drafted the document from scratch.

This initial flurry of documents nearly guarantees that the attorneys will be kept busy on the case. The provisional order is entered either by agreement or by the court after hearing. There may be a hearing and a ruling on the Domestic Order of Protection. Throughout the process, the amount of work poured onto the other side coupled with the flying allegations that result from all of this, the parties often become angrier and more entrenched in their positions. Once the provisional hearings and discovery are complete, the parties are worn down and out of money. The attorney moves for mediation, and the case usually settles. By that time, if the attorney has done a good job, the client is impressed with the amount of work the attorney did on the client's behalf, is bitter at the other side for being so litigious, but now owes the attorney unpaid legal fees. This can easily result in an adversarial attitude toward the attorney.

D. The Shortcomings of the Traditional Way

Humans, by nature, are selfish creatures. From birth on, we seek to fulfill our own needs first and foremost. With maturity comes an awareness of other people's viewpoints and interests. As well-rounded adults, we should readily seek to understand and empathize with others we

encounter in our daily affairs – and we generally do. But somehow, the legal profession has failed to progress as well over the years when it comes to client representation. The profession developed a model, mechanically mimicked by successive generations of attorneys, whereby the lawyer seeks to: (a) generate more and more clients; (b) charge higher rates; (c) do more work for existing clients; and (d) leverage efficiencies in client representation to maximize profits. We are a capitalist society, and these principles are calculated to increase profits – the driving forces in many industries – not just the practice of law. However, there is an alternative approach that still seeks to maximize profits, while serving the client better.

The attorney presumes to know the needs of the client. Granted, for accomplishing a legal end such as divorce, the attorney does know more than the client. Through education and experience, we become well-rehearsed in the legal processes to achieve the client’s presumed stated end. If the client arrives with a Summons and Petition for Dissolution of Marriage, for instance, the attorney typically jumps into telling the client what the law is and what the attorney’s perceived “best outcome” is, along with some “tips” being on one’s best behavior until the matter is over. Good attorneys will empathize with the client’s emotions and reinforce what was on their web-site – that their case is different than any other, and it will be treated as such. But most of the talking will be done by the attorney. That’s because we know clients come to us for advice, and we are trained in the law. We think that is why they are there, and we have allotted precious little time to get the necessary facts and we feel we are selling them on our services. (Remember that “time is money,” and where only a small flat fee was quoted for the initial consultation, the incentive is to get them out in close to a half hour).

But we can do better by our clients and still make money – possibly more than before. The problem with the traditional way is that it is focused primarily on the needs of the lawyer rather than the needs of the client. **This is true for both the manner of representation, and the method of client billing.** The better way requires a “paradigm shift.” The focus must be on the client’s needs, not the attorney’s.

A Better Approach – Value Pricing² and Client-Centered Focus

The first thing that must be said is that this is NOT a simple form or new procedure that lawyers can quickly and efficiently implement into their practice and expect results. It requires a new way of thinking about the attorney-client relationship entirely. Ron Baker is a CPA commonly regarded as a pioneer of this approach to modern professional customer representation through his book, The Professional’s Guide to Value Pricing. This section of these materials is my best attempt to restate Baker’s principles in summary fashion. A review of this material is no substitute for reading the full text of Baker’s writings.

² The source for all material in this section is Baker, Ronald J., The Professional’s Guide to Value Pricing, Harcourt, 2000. The book and Baker’s other writings on this topic are essential to an implementation of this practice. Mr. Baker has authorized the use of his basic form of the Fixed Price Agreement found at the end of these materials.

So what is Value Pricing? It is not just an approach to adjusting legal fees. It actually involves a different overall approach to client representation that encourages the attorney to adopt a fresh focus on the client's unique interests and particularized needs rather than the law firm's needs. The *result* is a new approach to valuing and pricing your legal services in each and every case that should result in increased benefits to the lawyer over time as well. Because of our human nature and the ways we were taught as lawyers, this may not come naturally. You may feel that you are putting the cart before the horse. But in the end, if you keep an open mind, are truly interested in giving your clients the best service possible, and have faith in this system, you will find that it does work for the mutual benefit of the client AND the attorney.

We start our discussion with some fundamental observations about the state of the attorney-client market. We will then take a look at what representation might look like utilizing a client-centered approach rather than a cookie-cutter approach that claims to treat clients differently.

A. Fundamental Principles Regarding the Legal Market

1. Technical Quality is Not Enough

Today, the technical quality of our work is not enough. It simply does not create a competitive differentiation. All attorneys generally provide competent service that is technically sound. If they don't, the client will fire the attorney and hire someone else. Similarly, most clients will not be able to distinguish a well-drafted superior Complaint or motion from an inferior one. Customers³ don't evaluate their attorneys based on technical proficiency. Technical quality is presumed. Rather, customers evaluate attorneys based on overall, individual service. This includes things such as their "bedside manner," their availability to address client needs, and recognition of the client's underlying goals, hopes, and concerns.

2. Customers Like to Know the Price of What They are Purchasing

Whether it is a cup of frappe from the local coffee shop, a meal from a restaurant, or a new vehicle, customers generally know the price of what they are buying before they make the purchase. Why are legal services different? As a recovering hourly biller, I argued that with those other purchases, the seller already knew what was invested in their delivery and there were very few variables that would change things. With legal services, you don't always know because there are so many variables. I argued this was even more the case in litigated matters, as we have someone "playing defense." (A former boss and mentor of mine from my insurance defense days once compared it to a surgeon trying to do his job while a competitor was trying to bump his elbow. All of that had a bit of truth to it, but assumed the billable hour was the sole basis for getting paid for the work).

³ Throughout his book, Baker encourages the professional to engage in different terminology. Examples include thinking of those who seek your services as "customers" rather than "clients" and "pricing" your services rather than "billing."

But with experience and proper client counseling and input, value pricing is still achievable. There are certain things you know will happen in any litigation. There are options that your side may engage in, and options the other side may engage in. Value pricing of these services can all be done *a la carte*. That is, you can walk through all of the options with the client and together determine what *must* be done and what *might* be done as the matter unfolds. Through more effective client conferences, you and the client can properly determine what a proper value is for what *must* be done and set that as the agreed price. You can then evaluate the value to the client of what *might* happen and place prices on those optional matters. Your clients will have a certain piece of mind knowing what their total financial exposure is under various scenarios.

3. Customers Want to be Treated Individually—Not Equally

The value of your services will vary from one client situation to the next. **This is the basic premise – the fundamental truth – driving all aspects of my practice.** Therefore, what one client is willing to pay for dissolution of marriage will differ from what another client may be willing to pay. The factors differentiating one client’s situation from the next may include, among other things: whether the client is the initiating party or the “receiving” party; the length of the marriage, the value of assets involved, the existence and age of children from the marriage, the depth of those family relationships, the feelings of the client’s other family members, the nature and duration of the facts that led to dissolution, the client’s overall emotional well-being, the client’s moral and spiritual attitudes about marriage and divorce, etc.

Going to a lawyer and going to a restaurant are two different things. If I purchase a burger from franchise restaurant, I don’t want to be charged more than the last person paid. That’s because I know I am purchasing exactly what the last person purchased. The only difference is I can ask for less (i.e. plain cheeseburger) and pay the same amount. However, I can’t create my own burger with new toppings – it isn’t even an option.

Legal services are different. Each client’s case really IS different. But attorneys tend to try to fit them all into the same cookie-cutter processes as the last client with the same type of legal matter. The client’s specific facts are not just different – so are their concerns, agendas, and goals. Taking the time to dig a little deeper to understand what those things are will set the stage for changing the way you approach the client matter, the way the client perceives you as an attorney, and the way the two of you agree to price your services.

4. True Differentiation Involves Focusing on the Client

As attorneys, most of us seek to improve our practice focusing on four things: (a) getting more clients (at least at first, then it is more about getting the better-paying clients); (b) leveraging our work by paying staff or associates less to complete it than what gets paid in; (c) increasing billing

rate; and/or (d) lowering overhead – all with the goal of “improving” our practice. What these things are really calculated to do is improve profits. At the same time, we will all seek to differentiate our practice by claiming to recognize that each client’s case is different and that in hiring us, they will see that. But we tend to run each type of case through the same process. Why? It is because the focus is on our needs and success.

The better way is to focus not just on the client’s immediate legal needs but the client’s underlying interests – their hidden, underlying interests (that is, their motives, fears, hopes, concerns, and goals). ***The key to doing this well is recognizing that these underlying factors may not be limited to the legal matter for which the client seeks representation.*** This will take time. But taking that time will give the attorney the opportunity to add value. Not every client motive, fear, hope, concern, or goal has a legal principal or form to file. We need to stop seeking to gather enough information to fill out and file the right forms for the client’s matter and start taking the time to listen to the client. We all think we listen to our clients and consider their needs – I know I did. But until I fully changed the way I viewed clients and restructured how I approach each client encounter, there was a limit to what I could really do.

B. What It Looks Like: Starting with the Initial Consultation

The process starts at the initial consultation. We can’t go in having already concluded what the legal issue is and use the consultation to sell ourselves and get just enough information to fill in our legal forms based on that conclusion. We cannot go in with a goal of squeezing it all into a half hour block of time. For those that offer free consultations, the value pricing model of representation may force you to give that up. We can’t change to a truly client-focused practice without some fundamental structural changes in the way we operate our practices. At my office, we advise that initial consultations will cost a specified flat fee, which covers up to an hour and a half. If it goes a little over, that’s okay. (Remember, my goal is to focus on getting not just the client’s stated legal position, but the backstory. I need enough time to develop clients’ trust and explore their fears, frustrations, and concerns -- the actual “interests” they are trying to protect). If I determine that it truly is a simple issue with a simple legal solution, then the consultation may be abbreviated – in which case I generally will offer a discount.

1. Establish the Preliminaries

At the time of the initial phone call and during that initial consultation, we first do what every lawyer does to make sure we can competently and ethically take on the matter:

1. Explain the confidential nature of the discussions;
2. Learn the customer’s perception of their legal needs;
3. Discover all the key players and verify that there is no conflict of interest; and
4. Determine the full scope of those needs and evaluate our competency to handle it.

We do try to elicit the basics in the scheduling phone call, but often clients aren't as forthcoming with the stranger on the other end of the line as when they get into their appointment.⁴ So we go over it again during the consultation. If we don't take their case, we issue a refund of their consultation fee. The above information is essentially the full scope of what I used to get during my old half hour consultations. But for effective value pricing practices, so much more should be elicited.

2. Ask Questions and Listen – Don't Dominate Talk

Lawyers are excellent at solving problems. Sometimes they may even be too good, because they tend to jump right into their surmised solution without first discovering what the customer really wants and expects, almost completely ignoring the creation of the good feelings that are so essential to developing long-term relationships. Simply offering solutions to problems is not enough. All of the above conclusions may be justified, and they may even be spot on. But there may be much more to the story, which means there may be many more—or even better—ways to service the customer.

The first rule is to listen – don't talk. We lawyers generally think we are good listeners, but as a rule, we aren't. This will probably take practice. Although the new customer has already indicated the nature of the legal issue in the initial call and on the intake form, I try not to look at that and, after introductions, simply ask, "So what's going on?" Often, there are multiple legal issues or concerns, and they only identify one or get it wrong altogether. It is surprising at the number of times new customers have incorrectly circled the nature of their legal issue on their consultation form.

It also takes time for the new customer to relax and open up. Your job is to guide the discussion with questions. The goal should be to get beyond their own conclusions about their legal needs and legal positions. Don't just seek the "relevant facts" that you have been trained to get as a lawyer. Get the client's "backstory." You can't just care that they are there to get a divorce, for instance, you have to explore the ways that this divorce is going to affect them personally. Follow-up questions tend to be along the lines of: "What is your biggest fear?", "Why does that bother you so much?", "Are there other areas of your life this affects?", "Are there other people impacted by this?", etc. **Write down their responses to these questions. They are what make each customer's case unique. They also give you an opportunity to add "value" and actually provide that tailored approach that your marketing materials tout.**

3. Seek Opportunities to Add Value

Let's take a look at the list of new clients from the earlier section:

⁴ Scheduling calls are the best place to try and eliminate conflicts of interests, and if staff is used, eliminate the issue of counsel discussing any facts with a potential client who has a conflict. It does not always work, but should be a goal at the initial contact.

- The widow needs an estate opened and property transferred;
- The new business owner needs a simple LLC formed;
- The wife wants a divorce from the heavy-drinking husband who puts her down.

Now also consider the information that a longer, deeper initial consultation might yield:

- The widow’s husband always took care of their finances and never shared any information with her. She is very insecure about her ability to make investments with the money left, to pay her bills, and to take care of the house. She is also very depressed and has morbid thoughts of death—sometimes wondering about ways to end it all. Wouldn’t it be rather important to know these things? Could we also offer to teach her to diary her bills and write checks and review her bill payments and checkbook reconciliations for the first couple of months after the estate matter was concluded? Could we also refer her to a financial advisor to get professional advice and options for investing—possibly providing security with a fixed-income investment portfolio that guaranteed she would not have to sell the house and cut back on groceries? Maybe we could even help her calculate the minimum she needed each month to accomplish those goals? Do we even know if these really are her goals? And finally, wouldn’t we also want to refer her to counseling for her depression—much of which may be alleviated simply by erasing her fears that we have helped address already?

When she first came in, she didn’t know that she needed letters testamentary and notices to creditors—which we did know (along with every other lawyer were prepared to provide technically sound forms to achieve). But she did know she lost her husband and was worried excessively about her ability to survive the next 20 years. After we created and file our modified forms and go through the statutory process of opening, handling claims, and closing the estate, she won’t really know or care what we did, but she will still be just as scared about the next 20 years alone. It doesn’t have to be that way, and we can change that by changing the way we do business.

- The new business owner is from out of town and has neither a place to live yet nor an accountant. He doesn’t know the local banks or child care providers. We can negotiate the lease agreement for her new business, set up the corporation, or whatever the business legal work needs are. Or, we can pause to think about what her total needs might be—professional, personal, and emotional. We can spend the initial consultation *listening* to her and exploring these things. We don’t want to be objectionably nosy, but we can ask typical questions about interests and *listen* to the responses. Then we could ask follow-up questions, helping to find solutions to some of the concerns and issues she raises.⁵

⁵ Caution should be shown between the corporate client and the person as a client—keeping in mind who the client is and avoiding conflict situations.

In both examples, we find out what the potential client really needs. Sure, there is a legal need, or they would not be in our office. But there is always more. Discovering those underlying needs, or the interests the client is trying to protect, allows us to:

- (a) know the client better;
- (b) understand the “whole” of the client’s needs; and
- (c) discover the value to the client of servicing these underlying interests and needs.

This does not stop after the initial consultation. As representation continues, opportunities for adding value beyond legal conclusions will still exist. Let’s take the third example from our list:

- The wife has been married for years. Not long after they got married, they had a son who went to the hospital with a serious medical issue. Serious complications resulted and led to over a year of in-patient care. The wife quit her job to stay most evenings at the hospital. She also quit taking classes at the local commuter campus. Upon his release, the now special-needs son required 24-hour care, and the wife stayed home with him. There was a need for someone to sit through school with him as he got older. The husband became the sole breadwinner and demanded to control the finances. With their son requiring so much of their attention, they had little time for each other – increasing the financial and other stresses and affecting their marriage. He began drinking more and more, until ultimately, total intoxication was a nightly ritual. He also became verbally abusive and often sought affection elsewhere.

They had lived in an older house that needed regular maintenance. The husband usually had the skills to take care of that in the past. But because it had been modified to the child’s needs, she concluded that she needed to have it out of the divorce. She also needs income, but with no formal education and no real work experience, her only prospects are barely over minimum wage. If we simply seek to pursue her primary two goals – to get primary physical custody and keep the marital residence, it should not be a problem under the facts. We also have arguments to make about asset division and maintenance. Those are traditional substantive legal issues a divorce lawyer would explore. But given her current part-time, low-wage work, wouldn’t it be better to help her budget? In discovery, collect the utility bills for the last year, look at her average take-home pay and forecast whether she even can afford the keep the house once you get it for her? We haven’t really provided good service if we get the house for her if she loses it in foreclosure or tax sale a year or two after the divorce is over. Additional areas of service include helping her explore other job opportunities, job training, and covered services that allow her to work more – both in and out of school.

4. Be Goal-Focused Rather than Process Focused – Help them Develop a List of Goals and Expectations from the Representation

Through the detailed exploration of their individual stories, you should be able to help them develop a list of their goals that are calculated to protect the underlying interests they revealed. You will jointly explore the ways you can help them achieve those goals. Go over those goals with the client and work those into your fixed-price agreement. You also need to explore what the customer's expectations are and what you can do to meet those expectations. You cannot guarantee outcomes, but you can control your diligence and responsiveness to the client's needs. Be willing to hold yourself to a high standard to make yourself available for questions, return phone calls, give updates, etc. The final agreement should also include those agreed elements of what the customer expects from you as the attorney.

5. Seek Customer Input: What is Expected from the Attorney, and What is a Fair Price?

It should be clear by this point that value pricing is not about establishing a “menu” of fixed prices for different legal services we offer. It is about determining every need we can meet for the client and determining what value the client would put on that total service. This takes some practice and some skill. But it is where attorneys who set their price based on their costs may leave money on the table. Clearly, this means that some clients are going to pay more than others—that is, there is some degree of “price discrimination”. Lest you think that this is unfair business practices, consider a few points:

1. First of all, we don't want to provide the exact same service to any two different clients. We aren't selling fast food sandwiches. We are catering to a client's individual values and needs.
2. Second, this model provides unlimited access to the attorney and staff for a fixed value. Lawyers often underestimate the anxiety created in the client when developments occur. Over the years, I have had clients tell me that they debated whether to notify the attorney of relevant developments or to ask for a better explanation of their legal options. Why? Because they knew that each phone call would result in an additional charge. And because they had no idea what the bill would be each month, they had no idea whether they would be able to afford it. Having unlimited access to the attorney for a previously-agreed price brings value to the client.
3. Third, value is based on the perception of the client – not the cost to the attorney. These are unrelated concepts that we must not confuse. Observe that other businesses do it all the time. It is a normal product of capitalism where a willing buyer and willing seller negotiate an acceptable price for their transaction.

Take a look at hotels. Does it cost the property manager more to rent out a room in Panama City, Florida during spring break than it costs them the other weeks of the year? No, it does not. But that does not stop them from charging more—substantially more. How do they justify this? It is because of demand. The customer is willing to pay it. It is not as if the raise their

prices by 100% and everyone is so turned off that they decide to boycott their senior year spring break trip with their friends. The fact is, the demand is so high for that service, that the customers are still willing to pay that much more. It is worth it to them.

Other businesses – from restaurants, to theme parks, to airlines – do the same thing. When demand for their services is higher, they charge more. Whether it is NCAA tournament weekend in Indianapolis or the week before school starts at the theme park, prices tend to go up. Have these businesses' costs gone up? No. It cost them the same amount to offer their goods or services the prior week. The difference is simply what the customer was willing to pay—because the customer valued one over the other. It is fair, and it is ethical. And because we are attorneys providing customized legal services that differ from the services being provided to any other person or business, it is arguably even more distinguishable.

Many objections can be raised by attorneys new to this concept. Those objections fall into a couple of categories: (a) a single price won't allow for unforeseen developments; or (b) I can't possibly know what price will cover my costs and profit needs. There is truth to both objections. But overcoming those is paramount to accepting your new, client-centered approach. Remember, this is not just a new gimmick or form to make you more profitable.. It is a new way of client service.

Handling unforeseen developments is fairly simple. As we touched on in a previous section, there are certain things you know that are going to happen, and there are various foreseeable developments that “might” happen. For the things that you know will happen, those can be put into a base price for services, specifying the goals and expectations discussed in the last section. The contingency items can be handled in a couple of ways. You can agree up front what the price will be for any given contingency. Or, you can simply agree that in those cases, or in the case of unforeseen developments, there will need to be a “change order.”

The second concern – the difficulty of determining the minimum price to cover your costs – is a different creature altogether. Merely raising this objection shows a continued focused on the needs of the lawyer rather than the client. Focusing more on the client's needs will result in a shifting of the “risks” of the cost of representation to the attorney. With hourly billing, all the risk was borne by the client. (If something took longer than expected, the lawyer did the additional work and billed the client for it). With an agreed fixed price, that risk shifts to the attorney. Nevertheless, with some experience in the practice, any attorney should have a basic familiarity with the time and costs associated with various types of cases that have been handled over time. Certainly there will be times when the attorney underestimates the time and costs of a given client matter. But having that agreement with the listed expectations and goals—all for a fixed price that the customer had input into – will force the attorney to be efficient and should create at least as many opportunities to be even more profitable than before.

6. Develop a Customized Fixed Price Agreement Specific to the Client's Goals

Ultimately, you will seek to provide an agreement that you and your new customer can sign that sets a fixed price for the services offered. The details of the resulting Fixed Price Agreement should be specific to each client. But certain elements unique to your practice will develop over time. Ronald J. Baker, author of The Professional's Guide to Value Pricing, has included a basic Fixed Price Agreement format in his book. That basic agreement is attached to these materials with the author's permission. Some general concepts in this basic agreement include:

- a. Listing client goals
- b. Specifying the negotiated price and detailed scope of services
- c. Providing contingency pricing for specific contingencies (fixed or hourly)
- d. Setting forth a payment schedule (possibly discount if paid up front)
- e. Providing a money-back guarantee

Note that this will result in a fee agreement that: (1) is unique as it is specifically tailored to that particular client; (2) focuses on the client's needs not the attorney's needs; (3) shifts risk to the attorney for inefficiencies; (4) was done with client input and agreement—making it hard to challenge. Perhaps even more importantly, such an agreement actually **demands that the attorney's approach to pursuing this client's matter truly is tailored to that client's end goals.** It forces me, the attorney, to live up to the marketing materials that claim that "at our firm, we recognize that each client's situation is different and will treat it accordingly."

The Skeptical Attorney: Applying Some of These Principles to Hourly Billing

If you are like me, even after having read up on the subject, you may be skeptical and hesitant to try Value Pricing in at least some types of client matters. Or, if you are like some of my informed clients who come in expecting to sign an hourly contract, it may be the client who is skeptical. I have had clients tell me that the final cost will be lower than the numbers you talked about in your attempts to reach a fixed price. Whatever the source of resistance, you should at least look for ways to take baby steps in the direction of a Value Pricing practice.

My first suggestion is that you might just try Value Pricing on a limited basis with specific types of cases to see it in action. A multiple-party contract action might have too many variables to account for. If you are concerned about the unforeseen litigation issues that may arise, consider trying it on matters with limited potential for unforeseen developments, such as:

- a. An unsupervised estate with few or no known creditors or heir disputes;
- b. An agreed guardianship;
- c. Estate planning documents;
- d. A divorce with no children and no retirement or pension plan issues.

In all of these matters, there should be no anticipated litigation and few surprises. Therefore, you can determine what types of fees you have earned in the past from similar cases and use that as a guideline.

If the representation is going to be litigation-oriented, you might think that the scope of work is too unpredictable to allow you to arrive at a fair fixed price that adequately protects your risks. (Although that objection is addressed elsewhere in value pricing theory, I include this because I know these objections will persist). Therefore, you conclude that you must bill by the hour. In such cases, my second suggestion is that you consider ways to implement some of the client-centered principles of the Value Pricing method into your practice – even if you stick to the billable hour. For instance, consider a divorce from the client’s perspective. You represent someone who:

- a. Has never hired a lawyer before;
- b. Is faced with losing:
 - i. their spouse/one-time best friend;
 - ii. their house;
 - iii. their kids;
 - iv. half of everything else they own;
 - v. their friends; and
 - vi. their sense of security and some pride.
- c. Not only has to pay for another residence, but under your contract, now must somehow come up with a retainer and face legal fees of an unknown total amount, payable in full each month in an amount that cannot be predicted – at least according to their new attorney.

As you look at these things from the client’s perspective, you can empathize with their sense of fear and foreboding. So much is unknown, and even more of it seems to be out of their control.

In my cases where, for whatever reason, the billable hour is still the method of payment, I attempt to take a client-centered focus anyway. I have an extended initial consultation that serves as an extensive listening session to try to get to the “story behind the story” and understand the underlying interests the client is trying to protect. I also commit to being as informative and responsive to their questions, concerns and needs as I can. I still charge for my initial consultation, but I spend around an hour and a half with them, and the clients routinely express their relief following the session and tell me that the amount paid was well worth it.

One of the lost benefits would be a fixed price that the customer does not have to worry about. Remember that there are two primary benefits to this. First, the customer had input into the goals and expectations, and then on placing a set value on that representation. That input from the customer is paramount in significance. It was not shoved down their throat, it was something freely considered and negotiated at the conclusion of a very informative initial consultation. Second, the customer has confidence in the amount and that there will not be any surprises. No matter how

much time is spent on anyone's part within the scope of the agreed representation, the price and payment terms have been set.

Where the method of payment is still based on the billable hour, there can be no certainty about the total fee to the client. However, there are some things the attorney can do to alleviate client concerns to some degree:

1. One is to give an estimated range of costs based on your experience.
2. You might even accept some of the risks of representation and provide a "maximum" fee that will not be exceeded.
3. If you do #2, you might want to consider a "Scope of Services" clause that limits what you are agreeing to work on during the course of the matter.
4. Seek client input and set a fee schedule calling for fixed payments at agreed intervals.

→ This is a very popular feature I have utilized with great success. Although it does not set an agreed total price, it does alleviate the customer's concern over unexpected legal bills and financial uncertainty. It allows for a negotiated fixed payment at regular intervals that the customer agrees is affordable.

→ For example: Suppose a client comes in for a divorce. She has never been to an attorney before. Like most of my clients, she considers herself as living paycheck to paycheck. Now, instead of one household monthly payment, there are two. To make matters worse, she and her estranged husband each have the financial burden of coming up with the finances to hire an attorney. She is scared enough about her unknown future and what it will look like. The last thing she needs is added uncertainty about her ability to pay her attorney. How much will each monthly bill be? How much will it vary? What will happen if she can't pay it off each month?

→ I will ask the customer what she can pay up front and what she can afford each month (or each paycheck). Usually, a contract calling for hourly fees can be structured to fit the customer's budget. For instance, consider a divorce case that on a "cost-plus" basis I estimate is likely to take 5 months to complete and generate \$3,000 in fees. The consultation discussion about finances may reveal that she can come up with an initial payment of \$800, and can spare \$150 each bi-weekly paycheck. She will pay the \$800 up front (placed in IOLTA), and no matter how much attorney time is spent in any given month, pay a fixed \$150 every two weeks. If it goes as predicted, she will make payments for 7 ½ months. If payments exceed her legal bill (usually only in the beginning of representation), they are run through the IOLTA account. If she is behind, she just carries a balance on her bill. NOTE THAT THERE IS NO INTEREST, OR "LATE" PAYMENT UNDER THIS PLAN AS LONG AS AGREED PAYMENTS ARE CURRENT. Payments are made until the outstanding balance is satisfied.

None of this is meant to dissuade you from engaging in value pricing practices. I believe that the required paradigm shift results in more client-centered representation. Because of the fixed price, it shifts the risk to the attorney. This incentivizes the attorney to be more creative and more efficient in looking for practical resolutions. At the same time, it can lead to better efficiencies and profits for the attorney. The result, over time, is better overall feelings and outcomes for both the client and the attorney.

Finally, these seminar materials provide merely an abbreviated overview. There are many articles and books on the topic today. Ron Baker's book, [The Professional's Guide to Value Pricing](#), is a must-read. I cannot recommend that you try to implement value pricing into your practice without a thorough review and grasp of the underlying principles. Baker does an outstanding job of exploring the micro-economic, marketing, and social-psychological aspects of this approach to providing professional services.