

# VANDENACK WEAVER LLC

LEGAL | TAX | BUSINESS COUNSEL

## ALTERNATIVE FEES FOR THE PROCESS ORIENTED LAW FIRM

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## STEP ONE – UNDERSTAND ALTERNATIVE FEES

### WHAT IS AN ALTERNATIVE FEE?

- An alternative fee arrangement is a way to provide compensation to law firm based on a structure other than strictly traditional hourly rate billing.

### WHY CONSIDER USING ALTERNATIVE FEES?

- Clients want to know how much something will cost.
- An attorney using alternative fees can achieve benefit from achieving efficiencies.
- Combining efficiency and technology with flat fees will allow a firm to provide affordable access to the legal system.

### FACTORS IN MOVEMENT TOWARD ALTERNATIVE FEES

- The American Bar Association is pushing to improve access to the legal system to those that are currently under-served and the legal system is responding to that push.
- technology is becoming an increasingly significant factor in the legal industry.
- Technologies have developed that have replaced some functions that were previously accomplished by lawyers or legal assistants. For example, there is document review software, will preparation software and software for preparation of employment manuals and various types of contracts.
- Various forms of competition have grown in the legal industry, especially relative to commodity legal services.
- Labor costs in the legal industry have escalated.
- Clients are willing to look for alternatives to traditional legal service delivery models.
- Lawyers desire to be able to achieve benefits for making the effort to be efficient. Many lawyers would like to be out from under the billable hour eight-ball and be able to focus on quality work and manageability.
- Smaller law firms must compete with brand names, alternative services providing commodity legal services, sophisticated marketing, consumer bargaining power.
- There is a real need for legal fees to correlate with consumer perception of value.

### TYPES OF ALTERNATIVE FEES

- Flat/Fixed Fee – A specific amount is quoted for an identified service (e.g. trust, power of attorney, contract review). A flat fee can also be provided for segments of total services. A flat fee can be combined with hourly or contingent fees.
- Percentage Fee – A percentage fee is based on a percentage of an amount involved in the project. For example, it is fairly common to see probate attorneys charge a percentage based on value of estate. Some attorneys charge a percentage based on transaction size for real estate transactions or a bond issue.
- Fee Range – A fee range is provided that includes a minimum and maximum. This type of fee may still rely on billable hours but provides the client information about the

expected cost. A fee range should clarify what will result in the fee being on the lower or higher end of the range. It is important to let clients know where they can take action that will help control their own costs. It is also important to be clear what would be outside the scope of services provided in the fee range and that separate fees would be quoted for those additional services.

- Fee caps – Hourly rates are charged up to an agreed maximum. This arrangement creates the risk of diminishing the quality of service when maximum is exceeded but some firms consider this an important approach in obtaining certain types of work.
- Task Based Fee – The task based fee is essentially a variation of the flat fee but takes a complex project involving many steps and breaks the project down into tasks and assigns a fee to each task in the process.
- Availability Retainer - This is typically a set amount (often paid monthly) for which the attorney agrees to be available to handle certain types of issues. This type of retainer is sometimes used to provide a base level of certain human resource services.
- Pure Contingency Fee – Law firm receives a fixed or scaled percentage of a recovery in a lawsuit. A contingent fee may be combined with a flat fee.
- Partial Contingency/Success fees – Firm receives a base amount of fees that is not subject to contingency and the balance of the fee is dependent on success. Such fees can be used in a lawsuit or in relation to a business transaction.
- Risk Collars – Hourly billing arrangement is used but bonus is paid to law firm for being under budget. Client receives a discount if firm goes over budget.
- Sliding Scale/Income Based Rates – Fees vary based on income of client. This would be a fee type typically used in a socially conscious or “low-bono” law firm.
- Blended Hourly Rate – Rather than using a different hourly rate for all providers, one rate applies for all hours billed to a matter. (This is more typically an approach found in large firms.)
- Combination Fee – Any of the above alternative fees might be used in conjunction with another alternative or a traditional approach.
- Structured Settlement Fees – An attorney working on a contingent fee matter can agree to assign fees to a structured settlement company and receive an annuity over a period of years rather than a lump sum payment. This results in the deferral of taxes and the leveling of income. The structured settlement is more of a form of payment than a type of alternative fee. The approach can only be used in contingent fee situations and the attorney must plan ahead and enter into the agreement before the final settlement.

#### **ALSO CONSIDER UNBUNDLING FEES**

- In unbundling fees, as an alternative to full representation, which allows an attorney to perform a discrete task for a client, while allowing the client to be recognized as pro se for all other tasks in their matter.
- There are many considerations as to when and how to unbundle fees that go beyond the scope of this presentation but Shantelle will provide more details to those interested.

## STEP TWO: CONNECT CLIENT PERCEPTION OF VALUE TO FEES CHARGED

### UNDERSTAND WHAT CLIENTS VALUE

- Attorneys should not assume that their clients perceive value from attorney efforts. It is important to be clear about what is of value to the clients. Different types of clients value different aspects of legal services. What is valued by the client may depend on the type of service being sought as well as the client's category as a consumer.
- Possible Client Perceptions of Value:
  - Avoiding risk (loss of assets, going to jail, dying without a succession plan, not being indemnified in a business deal)
  - Specialized knowledge or expertise.
  - Confidence that routine needs are being handled automatically.
  - Timely turnaround
  - Communication about the process and timeframe.
  - Communication about options and costs.
  - Community reputation, integrity, reliability.
  - Brand Name.

### AS PART OF MOVING TO ALTERNATIVE FEES, SEEK WAYS TO INCREASE YOUR VALUE

- Exceed expectations.
- Be proactive.
- Take the time to know your client and your client's business.
- Develop and communicate legal service plans.
- Be clear about the responsibilities of the client and the lawyer.
- Develop excellent communication skills.
- Be proactive about client needs.
- Reward employees who provide excellent client service.
- Be efficient.
- Be accountable.
- Educate your clients.

## STEP THREE – KNOW THE LEGAL INDUSTRY

- What does the legal business currently look like?
- What forces are impacting the legal business?
- How are consumers currently making buying decisions?
- Are generational issues impacting the industry? If so, how?
- What aspect of the industry will you compete in?
- The more you know and understand the current status of the legal industry, the more you will be able to determine the elements that will help your firm stand out.

## STEP FOUR: MOVING TO ALTERNATIVE FEES – KNOW YOUR SPECIFIC BUSINESS – MAKE DATA DRIVEN BUSINESS DECISIONS

## BE CLEAR ABOUT YOUR BUSINESS

- Know and understand the categories of services you provide. Are some of your services commodity services? What services do you provide that are unique niche services not readily available? Do you have experience in particular industries? Does your firm have a brand name?
- What type of alternative fees is likely to work for the services that your firm provides?
  - Expungement
  - Entity Formation
  - Trust and Will
  - Contract Review
  - Litigation is a process
- Spend time and energy clarifying where and how you add value to clients from the perspective of the clients that you serve. One current consumer trend is for the consumer to look to the lawyer to handle the issues where the lawyer has the edge over alternatives. That edge might simply be that the lawyer does something all of the time. Alternatively, the edge might be niche knowledge of the lawyer in an area that impacts the client's business.
- Be clear about what clients are looking for from your services. Take the time to clarify client objectives in the first meeting to be certain that your focus will satisfy those objectives. This is a common disconnect in the legal service industry.

## MAKE DATA DRIVEN BUSINESS DECISIONS

- Salary Decisions – In the legal field, there is a perception that our salary should be commensurate with how long we have been out of law school, what part of town we practice in, specialties – pretty much everything but what the business can afford to pay. Rather than making those determinations arbitrarily, consider running projections of revenue, setting a goal for your profit margin, THEN determining salaries. Be sure to take into account revenue-producing employees versus liability employees (those who are administrative and do not directly generate income).
- Hiring New Staff – Again, the perception is that if we have a law firm we need to have staff. For a solo who is business or tech-savvy, administrative personnel might not be worth the lost revenue. Data can help you identify your weak spots. If you are missing a large majority of prospective client phone calls (something that can be devastating to conversion), but it's only for 2 hours a day, the data says you need a part time receptionist, not a full time paralegal. If you are constantly running up against filing deadlines or spending more time building trial binders than doing substantive legal work, the data shows (if you track it properly) that it's time to hire a paralegal. Pay attention to what your actual needs are, by looking at the data, and you can avoid falling into the trap of a big staff and a small profit margin.
- Subscribing to Services -- Software companies - just like attorneys - love residual income and recurring business. When Microsoft moved to 360, they intentionally built the product with the goal of getting you hooked (so you can never escape). This kind of

vendor lock-in is common, and makes those companies a lot of money. Before you decide to go with one of these services for your practice management, web hosting, SEO, accounting, office suite, or other type of tools, take a hard look at whether you actually need the service, and what you will do if you decide to stop using it. Will your data be available to move to a new platform? Are you stuck in a contract? Do the results of the tool justify the ongoing expense? Is there a one-time desktop version of the software available that will meet your needs?

- Grants/Loan Applications – The beauty of data collection is that when you apply for grant or a small business loan, those statistics are exactly what you will be asked to produce. Find a way to do what Open Legal Services calls “sneaky data collection”. Build processes and workflows that when followed, capture the data you need for later use. For example, in a good practice management software, your employees might enter the date a file was opened or a case type. Now without even trying, they have entered information that can be used to run statistics on how many new cases (and of what type) you are getting in a week/month/year. A loan office would love that information, because it helps project future billing.
- Marketing Strategy – Much like software companies, marketing consultants love to be given a blank check to work on your business. If you don’t know the right questions to ask, or have the data to check their success, you are forced to rely solely on them. When deciding whether to outsource (and at what budget) a close look at your business is crucial, otherwise you just dump money into an area that might not need it. Some things to consider include:
  - What channels you are currently getting work from and which could use more development (Facebook? Twitter? Word of mouth? Professional referrals?)
  - Which referral sources are actually costing you money (high-risk clients, wrong practice area referrals, long intake processes, etc.) and might be worth abandoning or correcting
  - Which campaigns have the highest return on investment (ROI)
  - Which clients have the lowest/highest cost of acquisition
  - Are your current campaigns generating clients but also building your brand
  - Which campaigns cost more to maintain/run than the ROI

## **STEP FIVE - DEVELOP A PROCESS ORIENTED STRATEGIC PLAN FOR YOUR BUSINESS.**

### **DEVELOP A PROCESS ORIENTED BUSINESS STRATEGY**

- Business strategy involves formulating, implementing, and evaluating cross-functional decisions that will enable an organization to achieve its long-term objectives.
- Consider services that will be offered.
- Make Process and Automation part of your competitive strategy.
- Be clear about who you are going to serve and what services you will provide.
- Become an expert in processes. Adopt the perspective that all legal work is part of a process. Avoid the “Nothing I ever do is the same” syndrome.

## DEVELOP PROCESSES FOR EVERYTHING THAT IS PREDICTABLE AND REPEATABLE

- It is easier to establish an alternative fee for a process that is clearly laid out.
- Practice breaking down every legal service into the specific steps and tasks required. Use a process map. A process map can help identify the steps in the process. (You may also discover steps that are being taken that are not adding value to the process.)
- Consider what processes apply to all projects regardless of subject matter of project. For example, there is always a new matter opened and some form of intake process.
- Find the similarities of the steps that apply to all matters regardless of type. Identify. Automate.
- Consider what is similar in each TYPE of matter.
  - What is involved in taking on a new litigation matter? (Issue identification, jurisdiction, discovery, trial preparation, trial, appeal)
  - How can the litigation tasks be broken down into further categories?
  - What is involved in taking on an estate subject to probate and estate tax? (Intake, initial inventory, probate filing, 706, inheritance tax, income tax filings, asset transitions)
  - What is involved in assisting a client with purchasing a commercial building?

## DEVELOP BUSINESS METRICS

- Understand your ROI for advertising campaigns, referral building and networking efforts.

## STEP SIX - ENGAGE IN KNOWLEDGE MANAGEMENT

### CAPTURE KNOWLEDGE THAT FACILITATES PROCESS DOCUMENTATION

- Capture information that helps people do their jobs.
- Create efficient approaches to acquiring, storing and retrieving information.
- Knowledge management captures information in a way that the information can readily be utilized or made available by others.
  - Save sample forms.
  - Save information that will be useful to clients.
  - Save memos in a way that you can readily find them when you run into the same issue again.
- Create an organized electronic library to save information.
- Capture information and data in a way that they can readily be recaptured and built into automated processes.
- Knowledge management is about capturing information about legal processes that makes it easy for you to do your job or for someone else to learn how to do their job from the resources that exist internally. For processes that are engaged in regularly, create standardized checklists and forms. Save and organize research, documents, and forms.

- Adopt the approach that “If you can read, you can form a new business even if you have never done it before because I can hand you idiot friendly directions.” Avoid any tendency to hold on to how complex what we lawyers do is. Some of it is certainly complex but much of it is not. Automate that which is not.

## STEP SEVEN - MOVING TO ALTERNATIVE FEES – LOOK FOR OPPORTUNITIES TO AUTOMATE AUTOMATE AUTOMATE AUTOMATE

- Actively look for opportunities to automate. Are you still printing out and mailing correspondence that can readily be sent by email? If you need to have something signed and returned, consider providing documents by email with an electronic signature application.
- Do you still receive a pile of incoming mail that has to be sorted and routed? Consider how to get that transitioned to electronic mail?
- Are you still convinced that you absolutely need paper files for something? Get over it and go paperless. Consider the fact that if you scan documents into a document management system, you can then convert them to OCR and search them far more readily than having someone read through them.
- Are you still creating hard copy minute books? Go electronic. Create portals.
- Create systems and checklists.
  - Checklists help break down projects into tasks simplifying the ability to assign values to each aspect of a project.
  - Checklists also facilitate training a new person in the office. This is particularly useful in a small office.
  - Checklists help avoid malpractice by ensuring that nothing is overlooked.
  - There are checklists someone else has created for almost every legal task. If creating one from scratch is not your strength, use someone else’s as a starting point.
- Create Forms
  - If you are still pulling up a document you created for someone else, JUST STOP IT!!
  - Something will get left in that shouldn’t be.
  - Something will not get put in that should be.
- If you don’t have a form, then pull up an old document and make it into a form. Then use that form to create the client document.
- Form Automation
  - Word Styles
  - Word Templates
  - The Form Tool
  - Hot Docs

## INVEST IN A PRACTICE MANAGEMENT SYSTEM AND A CONSULTANT TO MAKE IT WORK FOR YOUR PRACTICE

- The best practice management system for your law firm is one that you will actually use.
- Spend the time to find the right system for your practice. Hire a consultant who isn't tied to one system.
- Once you buy, make the investment in a good consultant to help make the system work for you.

### STEP EIGHT - MOVING TO ALTERNATIVE FEES - KNOW YOUR TRUE COST

- To be able to establish a profitable alternative fee structure, you must understand all of the costs that go into the legal services provided relative to a specific issue.
- Costs:
  - Attorney Time
  - Realization (are you recovering all of the time?)
  - Paralegal/Staff Time
  - Direct Costs
  - General Overhead Factor
  - Supplies
  - Does something go out by snail mail instead of electronically?
- To develop the information to establish alternative fees that are profitable, you need to track all of the costs relative to the projects that are being considered for alternative fees.
- Give careful attention to rate adjustments, billing adjustments and write-offs. Know where these are coming from.
- As you analyze the cost of services, look for opportunities to control the costs.
- Ultimately, you want to be able to do cost accounting for the firm, by lawyer, by practice area, by staff, by use of technology, by designated matter or package of services)
- What are the average number of hours spent on a matter time?
- How do non-billable hours factor into your business?

### STEP NINE - MOVING TO ALTERNATIVE FEES – USE YOUR BILLING SYSTEM TO ORGANIZE DATA

- Almost all computer billing systems provide the ability to categorize and subcategorize billing entries.
- Develop a consistent coding system. Have attorneys diligently use the categories.
- Useful Data to Have to Assist With Determining How to Price:
  - How many LLC's have you formed in the last five years? How much time and cost has gone into the formation of each? What did you recover? Were there variances between LLC formations? What were they?
  - When setting up a new entity, create an "Entity Formation" matter to track all times and costs of formation. Create a separate matter(s) for work unrelated to the formation.

- For those doing estate planning, consider categorizing estate plans into categories such as: Single person with no children and no estate tax issues; Single person with children and no estate tax issues; Married Couple with No children; etc. You can then develop data for each type of estate plan that you do.
- For real estate transactions, consider categorizing various types of purchase agreements and leases.
- Track time and costs for different aspects of the litigation process.
- Keep in mind that flat fees are not necessarily about a fee for the entire project but may be about fees for each portion of the project. The more you can develop an understanding of the costs for each portion of a project, the more effectively you can develop fees that are both fair to the client and profitable for the law firm.

### STEP TEN - ESTABLISHING ALTERNATIVE FEES – MAKE THEM PROFITABLE

#### KNOW THE PROFITABILITY FORMULA – IT IS SIMPLE MATH

- The Formula: Price Less Cost = Profit
- In establishing an alternative fee, break out the components. Do this in writing for the client.
  - Value the intake process. (There is a cost to it.)
  - Value initial conference.
  - Value analysis and preliminary recommendations. This is often where your real value is. Thus, break this out as an item in your fee structure. Also, provide the preliminary recommendations to your client in a written format that reflects the analysis and value. (Don't write a law review article but do reflect the work that went into arriving at your recommendation.)
  - Value Drafting of Documents. (BUT BE CAREFUL HERE.)
  - Value Follow Up Work.
  - Quote costs for any follow up maintenance.
- Assume a client approaches you about drafting 15 Section 105 plans for its 15 subsidiaries.
  - The primary value of your time will be in clarifying the employer objectives, evaluating the demographics of the employer's employees, and developing the structure for the proposed plan that will make the most sense given the employer objectives and employee demographics.
  - Do Structure a Proposal as Follows:
    - Analysis of Client Objectives and Employer Demographics to Determine Cost Effective Benefit Plan Design that will attract and retain employees \$7,500.
    - Drafting of each plan \$250
    - Provide client detailed operational procedures for compliance \$2,500.
  - Don't Structure a Proposal as Follows:
    - Don't Quote \$950 per plan. (The client will have you do one and copy the other 14.)

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- Seek to engage the client before providing the total fee plan. Avoid the client that brings you a \$10,000 project, gets you to quote it and then gets another firm to agree to do it for \$9,500. Your fee proposal, and your initial meeting, should focus on your unique skills; however, you should also try to determine whether a potential client is only interested in the lowest price, in which case they may not be the client you want to spend a lot of time on.

### ADDITIONAL STRATEGIES FOR MAKING ALTERNATIVE FEES PROFITABLE

- Seek a higher realization rate.
- Develop a firm brand relative to the practice areas and service types at which you excel.
- Engage in activities that result in client loyalty. Develop relationships rather than seeking client fees.
- Improve your expertise. Be ahead of the pack in terms of your knowledge and skill.
- Publish. Blog.
- Develop niche practice areas.
- Improve Quality
- Reduce the Cost Per Unit of Service – training, practice management controls
- Make technology your friend.

### ETHICAL ISSUES INVOLVING ALTERNATIVE FEES

- Basic Rules of Fees
  - The Basic rule is that a lawyer's fee must be reasonable.
  - Factors:
    - Time and labor required, novelty and difficulty of the issues
    - Customary fees in the locality
    - Amount involved and results obtained.
    - Experience and ability of lawyer.
  - Timing of the Fee
  - When the Fee is Earned.
- Communicating About Fees
  - Have the conversation about fees and costs at the first meeting. You might not be able to give a specific quote at the first meeting but you should always explain how the fee will be determined.
  - Never be in the position of sending a bill that a client wasn't expecting. The last thing you should want to do is work really hard on a project, send the bill thinking you have done a good thing only to find out the client would have never engaged you had the client known the cost. (This is the taxi-cab problem.)
- Always use an engagement letter and customize to the client issue.
  - Define the scope of representation.
  - Explain fees.
  - Explain billing procedures and terms of payment.

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- Specify if a retainer is required and how it is handled.
- Clarify how communications will be handled.
- Attorney should avoid taking stakes in the outcome of a matter such as literary or media rights.
- Lawyers Must Disclose Self Interest
  - Fee must be objectively fair and reasonable to the client
  - Fee should not be structured in a way that it is cost prohibitive for an attorney to change attorneys.
- Alternative Fees
  - When is the fee earned by the attorney?
  - What happens if the relationship ends prematurely?
  - Reasonableness of fee is determined at the time of entering into a fee agreement.
  - Engagement letter should clearly specify the services that will be provided for the flat fee and state that additional or different services will be subject to additional charges.
- Alternative Financing
  - Do not accept referral fees.
  - Avoid conflicts of interest. Be wary when asked by the client if the client should enter into an ALF transaction.
  - Recommend client receive independent counsel on the issue.
  - Select a trustworthy funder who is aware of, and complies with attorney's obligations to the clients.
  - Be mindful of the attorney-client privilege.
  - Execute a third party confidentiality agreement.
  - Be mindful of attorney's duty to exercise independent judgment, regardless of the opinion of the third party funder.