

Fee Agreements and Bills That Clients Will Pay



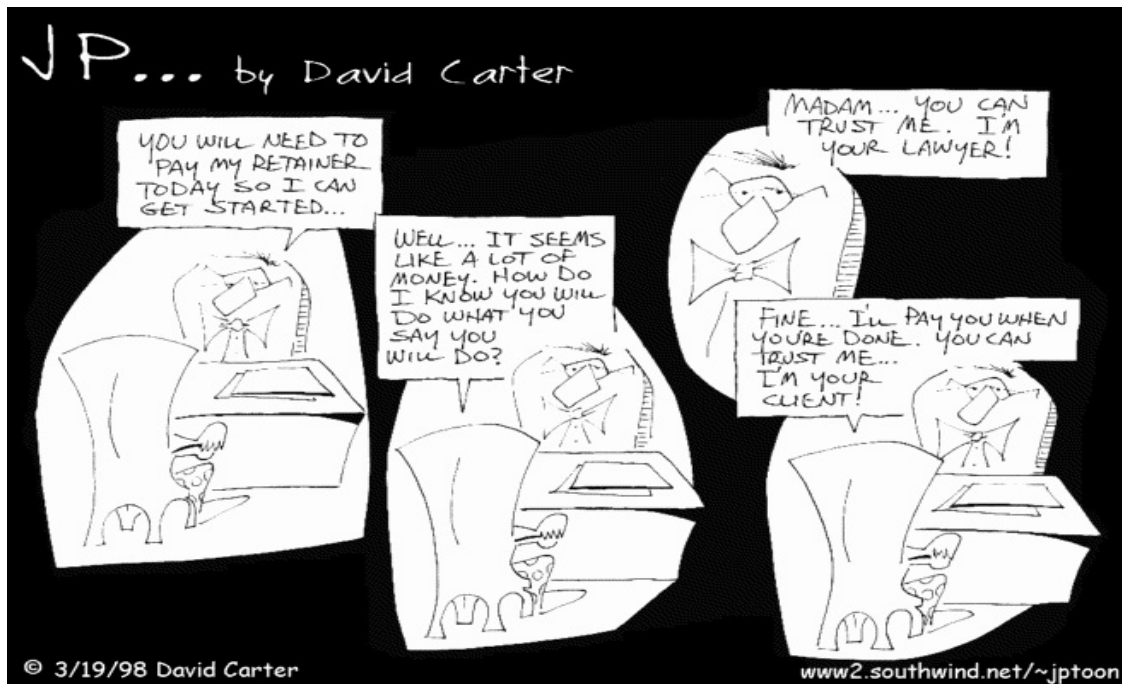
By James A. Calloway, Director
Oklahoma Bar Association
Management Assistance Program

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*Management
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By James A. Calloway, Director
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(Author's Note: The above cartoon was reprinted with permission of the author, David Carter. His regularly updated cartoons can be found on the Internet at www2.southwind.net/~jptoon)

Collecting attorneys fees is a critical issue for any law firm. The primary reason for running any business is to generate profit.

Before we can determine how to improve client payments on bills, we should examine why clients would not pay the bills from their attorneys.

Why clients don't pay their lawyers:

1. They cannot afford to pay.
2. They are unhappy with the result in their matter.
3. They are unhappy with their lawyers.
4. They do not believe that the bill is fair.

1. **The client who cannot pay:** Guarding against a client's inability to pay is one reason for requesting a significant retainer fee or deposit. Many lawyers have now started a policy of requiring the client maintain a balance in the trust account at a certain level and replenishing it when it falls below that balance.

Monthly billing is an important component of good law office management and also helps to identify the clients who cannot afford to pay. You should assign someone in your office to identify past due accounts and

make appropriate professional contact with your clients. If a client falls behind in payments during the early stages of a process, it is time to examine your options. Withdrawing from a case just because a client is economically challenged may be difficult. But, it is certainly preferable to keeping responsibility, but not working on the file because the client is not paying.

“I do lots of pro bono work, it just didn’t start out that way,” joked one attorney. Nothing in this discussion should discourage one from fulfilling the pro bono responsibilities of an attorney. One has to be careful, however, to avoid the confusion and inter-mixing of pro bono cases with regular work, including normal attorney work for clients of limited means. Without care and careful examination of billing records, the generous attorney may find himself in the position of writing off literally thousands of dollars in income for less fortunate clients. The problem with writing off these amounts is that the money comes directly from the lawyers profit or take home pay. Overhead and other fixed costs and expenses are not effected in any way by a write off. Consider whether you should discharge your pro bono obligations by notifying Legal Aid that you will accept one or two referrals in a specific area per year. That way you have the assurance that this person has been through a certain screening process and is hopefully truly deserving. Then you can feel more at ease when you decline representation where clients cannot pay your fees.

2. **The client is unhappy with the result in their matter:** Obviously, when disputes are taken to court one or both of the litigants may be unsatisfied with the result. Lawyers even oftentimes feel aggrieved by certain court decisions that go against their client.

However, the lawyer/business person must receive the agreed upon compensation whether or not the client is satisfied with the result, and, as we all know, many clients have unreasonable expectations about their cases.

To guard against the problem, the lawyer should make sure and state that there is no guarantee made with regard to the outcome in the case. This should be stated both orally in the initial client interview and in writing in the attorney/client agreement or engagement letter.

Certainly it is both necessary and appropriate to discuss with your client the probable outcome of a case in court. An attorney could not expect to maintain a client base who simply told the clients that he had no idea what would happen and everything would be decided by the Judge. Predicting within a given range the outcome of litigation or the result of a proposed transaction is, after all, one of the lawyer’s duties. But, it is important to keep reminding a client that the Judge or jury will determine the outcome in litigation not either of the lawyers or their clients.

It is also important to speak up when a client voices those unrealistic expectations in front of you. When a client talks wistfully of getting \$100,000 in a case that you believe is, at best, worth \$20,000, it is easy it remain silent. After all a jury might.... Do not remain silent. Do your best in candidly and fairly directing your client’s expectations in a reasonable

direction.

One of the best methods to ensure that an attorney is not left with a large difficult-to-collect receivable when a client is unhappy with the result in a matter is not to have a large balance when the matter nears completion. Periodic monthly billing and paying close attention to the payments or lack thereof from clients will reduce greatly the exposure of an attorney to nonpayment by the disgruntled client.

3. **The client is unhappy with the lawyer's efforts:** Too often in today's fast paced legal environment we run the risk of forgetting how important the human aspect is in an attorney/client relationship.

Clients often base their opinions of their attorneys on factors that have nothing to do with the professional services delivered or even the result obtained on behalf of the client.

The most common complaint against lawyers is failure to return their clients telephone calls promptly. Other matters may also color the client's perception in a negative way including the attorney making the client wait in the office past the time for the scheduled appointment, the lawyer's tone of voice when responding to a client's questions, the lawyer appearing to be overly friendly with the opposing counsel, the lawyer always seeming to be in a rush when the client is attempting to talk with the lawyer on the phone, or the lawyer dismissing out of hand an interesting legal theory the client heard about from her hairdresser.

Remember that the issue here is not the validity of a stupid legal theory, but the client's perception of the respect and treatment they receive.

Certainly we have all had clients who too frequently called the office for no apparent reason. However, we must constantly bear in mind that while this is a daily experience for us, it is often the clients one in a lifetime exposure to the judicial process or legal system.

Lawyers in a solo or small firm practice generally tend to represent more individuals than companies. A necessary part of that legal career will be explaining the same thing over and over again to client after client. You may have explained how a discharge in bankruptcy works to five previous clients that week, but the client sitting in front of you has never heard your explanation.

We at the OBA/MAP believe that more frequent use of generalized form letters to clients will help reinforce the attorney's in-person advise to the client and reduce some unnecessary telephone calls from the client.

- 4 **The client does not believe that the bill for attorneys fees is fair:** What constitutes a fair attorney fee for a given service is a somewhat nebulous concept. It would differ from one lawyer to another within a given community or geographical locale. It would certainly differ between a client who has a six figure income and laborer-client who takes home \$283.00 per week. If the client believes by his or her own subjective standards that the bill is fair and the lawyer's services have been good,

then he or she will make a much greater effort to pay the bill than otherwise.

You are certainly aware of the negative perception concerning lawyer's bills and lawyer's billing practices across the country. If you were to informally poll a few dozen people off the street and ask for their response to the phrase "Attorney's fees" you would probably hear such things as "expensive," "I couldn't afford them," "_____ lawyers," or worse. Convincing a client that the lawyer's fees are fair and the bill for legal services is fair is perhaps one of the greatest challenges facing the legal profession, particularly those members of the legal profession who represent individuals rather than businesses.

Before embarking upon a detailed discussion of the processes involved in convincing a client that a bill is fair. Perhaps we should take a few minutes to review the law concerning attorney's fees. The Rules of Professional Conduct Rule 1.5 governs fees. Emphasis has been added by the presenter.

The applicable rule states at 5 Okla Stat. Appendix 3-a Rule 1.5:

"(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances
;
- (6) the nature and length of the professional relationship with the client
;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. **A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined,** including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, whether the client is to be liable for reimbursement of litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written

statement stating the outcome of the matter and, if there is a recovery showing the remittance to the client and the method of determination.

(d) **A lawyer shall not enter into an arrangement for, charge, or collect:**

- (1) any fee in a **domestic relations matter, the payment or amount of which is contingent upon the result obtained**, other than actions to collect past due alimony or child support; or
- (2) **a contingent fee for representing a defendant in a criminal case.**

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer **or**, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all of the lawyers involved; and

- (3) **the total fee is reasonable.**
(Again, we added the emphasis.)

We also should review the Official Comments to the Rule. With our emphasis added, the comment states:

“Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. **In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established.** It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. **A written statement concerning the fee reduces the possibility of misunderstanding.** Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

A lawyer shall not charge a fee contingent upon securing a divorce or upon the amount of alimony or support or property settlement or obtaining custody of a child or children. The statement that a lawyer's fee shall be reasonable prohibits only unreasonably high fees, and does not restrict lawyers from charging less than a reasonable fee or no fee at all. Regardless of the amount of the fee charged, Rule 1.1 remains applicable.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the

litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.”

It appears that the first thing for lawyers to bear in mind is that the fee *is*, in fact, fair and reasonable.

“Just Exactly what is this going to cost me?”

The Initial Client Interview: Virtually every new client that comes into the lawyers office will have on his and her mind the question of how much this is going to cost. The client has the right to know how much the attorney's fees will be, to the extent that the lawyer can tell the client. Although the Rules of Professional Conduct only require a written agreement in a contingency fee case, *it is clearly the best business practice for the lawyer to have a written agreement with every client*, at least where there is not an ongoing attorney/client relationship and a history between the

parties.

Some lawyers are reluctant to discuss fees very bluntly and directly with potential clients. However, it is an item that must, in our judgment be, always covered during the initial interview, unless for some reason you cannot determine the fee at that time. Hourly fees are by nature difficult to forecast and may vary depending on many factors outside of the attorney's control. It is suggested that if one gives a quote for a possible fee range, one must be sure that neither the high-end or the low-end is an unlikely low number. Clients will always do a better job of remembering the lowest possible number that you quoted them rather the highest.

Some lawyers differ as to whether an attorney client fee agreement should be in the form of an engagement letter or contract signed by both parties. The arguments in favor of sending an engagement letter after the initial interview are that it appears less formal, that the client does not feel like he needs for hire another attorney to review the "contract" with his first attorney, and that the client has more time to review the engagement letter in the privacy of his home. In favor of a contract or agreement signed in the lawyer's office is the immediacy, if the client has any question about the contents he cannot discuss it with the attorney immediately and the convenience and clarity. Whichever method you employ, it must be in writing and signed by the client. (Remember Contracts I?)

Whatever the form of the written documentation should take, it should, at a minimum, include the following:

- A. Specific tasks that the attorney is undertaking. Merely scrawling domestic matter on a blank line in a contract form may leave the matter open to interpretation as to whether in addition to the client's new divorce, the attorney has also agreed to represent the client on a child support collection matter from his first ex-wife.
- B. Timing, all fee agreements should clearly state that the lawyer will not commence the representation or have responsibility to provide services until after the client pays the retainer fee.

Most non-contingency cases should always involve a retainer fee. The moment of the initial interview is the time when the client is most anxious to do something about the pending legal matter. Experienced lawyers will tell you that clients who do not financially invest in their own cases become more difficult to deal with in later stages of the case and often refuse to cooperate in certain areas.

- C. How the fee will be charged or determined. In hourly billing cases not only should the attorney's hourly rate be set forth but also any charges for legal assistants that will be billed to the client. Remember that some clients will be uneducated and have poor literacy skills. Even a fairly literate client may not be familiar with such terms as contingent fee, retainer fee and non-refundable retainer fee. A sentence explaining in plain English the various terms can be most helpful in the event of a dispute (e.g. "A 33% contingency fee means that if the recovery is \$100,000 the attorney will receive a fee of \$33,333.33.")

- D. Payment terms. If the client will be billed monthly and payment is expected monthly specify that. We have already discussed several reasons why that is a good business practice.

We all learn in basic contract law in the first year of law school that any ambiguities in a contract will be held against the drafter of the contract. We also all know from experience that a potential client will typically sign whatever the attorney's "standard contract" is. But, an overly lengthy contract full of fine print and legalese may disturb the client or create other problems. Clear simple language usually serves the best. However, since the attorney is drafting the contract which will be used in many, many cases, it is incumbent upon the attorney to make sure that the contract says what you want it to say.

Some additional consideration in drafting an attorney fee contract

Office sharing-Modern law office economics has resulted in many "office sharing" relationships between solo attorneys. This raises the issues of whether a disgruntled client may later sue all of the lawyers for malpractice under an implied partnership theory.

An easy safety measure would be for all of the attorneys to enter into an agreement which says:

The undersigned lawyers agree that they are all solo practitioners who are pooling to share office expenses but are not a partnership. Each attorney agrees to use his best efforts to ensure that all clients that he or she represents understand that there is no existing law partnership. All attorneys agree that they will not represent clients without a written fee agreement and that all such written fee agreements shall all contain the following language:

"Client understands that he/she is contracting only with the attorney whose name appears herein and that the attorney is not in a partnership with the other attorneys located in the same office suites. Said other attorneys are not responsible for the client's case. Only the attorney whose name appears herein is responsible for the client's case."

On its face, it would seem to be much harder for a client to argue an implied partnership after signing the above.

Expenses--Will the client be charged for faxes, computer assisted legal research and other items? Some lawyers do not want to "nickel and dime the client to death" by charging for certain copies and expenses. This is a personal decision. However, a contract which indicates that a client will only be charged expenses may be fairly interpreted to refer to only out of pocket expenses. If your office has a policy of charging \$1.00 per page for faxes sent where there is essentially no out of pocket cost, or other types of overhead reimbursement it is probably appropriate to consider

whether the contract should read “client agrees to pay for expenses, standard facsimile charges, standard photocopying charges”.

Drafting Bills that Clients Will Pay

Keeping track of the time, proofing the client’s bills and getting the billing out is a task that is approached with varying degrees of enthusiasm from different lawyers. It is not usually viewed as a very creative process and yet it is where the money is generated.

A lawyer may keep exacting time records accounting for each minute, be very efficient when performing tasks for the client and have a very liberal rounding down or writing off policy. The attorney may know in his or her heart that time has been taken to ensure that every aspect and detail of the bill is totally fair and in questionable situations or judgment calls the decision was always made in favor of the client.

Nevertheless, when the client opens the bill, he or she approaches the bill from a totally different perspective. You may assume that most clients turn immediately to the bottom of the last page to see what the total bill is and then review the various time entries. A client approaches the bill from the “what did I get for this money” standpoint rather than the exacting accuracy of the bill.

Attorneys, often in a rush for time, tend to economize on their billing statements and produce sparsely worded bills. **This is an error!**

At the conclusion of these materials are a list of suggested reading materials which the lawyer who has an interest should direct his or her attention.

One of these books is “*How to Draft Bills Clients Rush to Pay*” by J. Harris Morgan. This has been an extremely popular book, judging by the number sold by the ABA Law Practice Management Section. Mr. Morgan’s central thesis is very simple. He believes that attorneys fail to recognize that bills are an important and integral attorney/client communication and should be treated as such. It is the obligation of the attorney to communicate to his or her client exactly what service was rendered and what necessity or benefit the service was to the client’s matter.

In an effort to be efficient, we lawyers have taken to drafting minimalist billing statements, oftentimes with cryptic abbreviations or shorthand. Put yourself in the position of the client who received these bills and notes a dozen four or five word entries referencing several dates with a total figure of several hundred or several thousand dollars at the bottom.

If you look at this bill from the client’s point of view, you can understand why a negative reaction would be likely.

After all which of the following two sentences sets forth charges that you would be more likely to pay?

Statement of Legal Services From Joe Lawyer

Researched S/L

\$250.00

OR

Researched 14 cases involving the statute of limitations issue in this case from five jurisdictions, made copies of four of the cases for the file, also consulted a major treatise on statute of limitations issues, determined that the majority position supports our client's position.

\$250.00

While this example could be a bit of an exaggeration, it is obvious that a client will feel that he has received more value from the latter example. This will be particularly true if in fact the case is dismissed on a statute of limitations question. The client would, without further explanation from the attorney, understand the reason for and the necessity of the legal research and the charge of \$250.00.

Examine the cumulative effect of more descriptive billing in the sample bills on the next few pages.

**N. E. Lawyer
555 Courthouse Row
Oklahoma City, OK 73101
1-800-GOOD LAW**

May 1, 2005

Mr. John Lee
ACME Corporation
1234 Maple Drive
Oklahoma City, OK 73999

RE: ACME Corp. v. Daystar Inc.

Date	PROFESSIONAL SERVICES RENDERED	Hours	Rate	Amount
3/16/05	Conference with client - Re: Contract	1.50	\$100.	\$150.00
3/17/05	Draft demand letter to Daystar	.40	\$100.	\$ 40.00
3/20/05	Telephone conference Daystar manager	.75	\$100.	\$ 75.00
3/21/05	Telephone conference with client	.50	\$100.	\$ 50.00
3/23/05	Draft Petition, Summons and Subpoena	1.00	\$100.	\$100.00
3/25/05	Conference with client to sign Petition	.75	\$100.	\$ 75.00
3/28/05	File court documents	.50	\$100.	\$ 50.00
	TOTAL	6.40		\$640.00
DISBURSEMENTS				
3/27/05	Copy Fees		\$ 2.75	
3/28/05	Filing Fees		<u>\$ 85.00</u>	
			<u>\$ 87.75</u>	
Total Fees			\$640.00	
Total Disbursements			\$ 87.75	
Total Charges for this Bill			\$727.75	

**N. E. Lawyer
555 Courthouse Row
Oklahoma City, OK 73101
1-800-GOOD LAW**

May 1, 2005

Mr. John Lee
ACME Corporation
1234 Maple Drive
Oklahoma City, OK 73999

RE: ACME Corp. v. Daystar Inc.

Date	PROFESSIONAL SERVICES RENDERED	Hours	Rate	Amount
3/16/05	Conferred with Mr. Lee regarding terms of the contract and discussed options regarding non-compliance by Daystar. Discussed attempt to negotiate prior to filing suit.	1.50	\$100.	\$ 150.00
3/17/05	Draft demand letter to Daystar regarding non-compliance with contract giving 10 days to respond to attorney	.40	\$100.	\$ 40.00
3/20/05	Telephone conference with Mr. Johns of Daystar. Attempted to discuss options. Mr. Johns advised Daystar had no intentions to negotiate.	.75	\$100.	\$ 75.00
3/21/05	Telephone conference with client (Mr. Lee) advising him of Daystar's position that all terms of the contract have been met and their unwillingness to negotiate	.50	\$100.	\$ 50.00
3/23/05	Draft and review Petition, Summons and Subpoena Duces Tecum for clients review and signature	1.00	\$100.	\$ 100.00
3/25/05	Met with client, Mr. Lee to review and signed the Petition and other court documents. Discussed service and initial stages of litigation.	.75	\$100.	\$ 75.00
3/28/05	File Petition with the Oklahoma County Court Clerk, Oklahoma City, Oklahoma. Have clerk issue summons and subpoena	.50	\$100.	\$ 50.00
		6.40		\$ 640.00
DISBURSEMENTS				
3/27/05	Copy Fees		\$ 2.75	
3/28/05	Filing Fees		<u>\$ 85.00</u>	
			\$ 87.75	
Total Fees			\$640.00	
Total Disbursements			\$ 87.75	
Total Charges for this Bill			\$727.75	

Another way to impress the clients that the bill is fair and appropriate is to make hand written notations on the final version of the bill. This personalizes the client's bill and also assures the client that you have reviewed it directly and cuts down on the likelihood of a call questioning whether your "billing department" may have made some error. It is certainly not necessary or desirable to personalize every bill and that would be extremely time consuming.

However, a few written notes here and there, especially on final billing, like "Appreciated your confidence in us", "Happy Holidays," something relating to the client's profession, such as mentioning a school teacher being off for summer break or something relating to a client's common interest with you such as a local sports team, would create a significant positive effect, especially on the very large bill or final bill.

The Non-Refundable Retainer Fee

Many attorney fee contracts (including some forms in the appendixes attached hereto) provide for a minimum retainer fee that is deemed non-refundable. The rationale behind requiring a non-refundable retainer fee is that it could be immediately deposited in the attorney's operating account as it was deemed earned when it was received as opposed to the traditional retainer fee which must be deposited in the attorney's trust account and then withdrawn as the hours are billed in the case.

Is a non-refundable retainer provision in an attorney-client contract valid and enforceable under Oklahoma law?

Although the Oklahoma Supreme Court has not yet ruled on this specific question, a reading of the only appellate decision, Wright v. Arnold, 1994 OK CIV. APP.26, 877 P2d 616 should be enough to give any attorney pause as to whether the practice is enforceable and legitimate. One of the problems regarding the non-refundable retainer fee is that it is deemed to unfairly limit a client who decides to change attorneys for whatever reason. We have attached the full text of Wright v. Arnold and suggest that those who are utilizing non-refundable retainers read it so that you can be aware of the issues and other jurisdiction's holdings.

It does seem somewhat unreasonable for an attorney to interview a new client (possibly on a free initial consultation) and then go to the expense of opening a file, docketing and other office operations only to have the client reappear and demand back the retainer money before any time had been billed. There are additional costs to the attorney in terms of being conflicted out of other legal work by being retained, even briefly.

One can also understand the Court's critical examination in the Wright case where an attorney in a child support collection matter was discharged between six and thirteen days after he was hired and took the position that he should retain the entire \$4,000.00 retainer.

The client, of course, claimed that she had not read the contract prior to signing it.

One suggestion to deal with this problem might be to have a specific *reasonable* file opening fee that was stated clearly in the attorney/client contract and charged in addition to any hourly fee. This could be deemed to be non-refundable and could better withstand court scrutiny.

One can more easily imagine an appellate court upholding an \$150 file opening fee as reasonable based on the mechanics of file opening, the expense and the possible conflicting out of other business. One must seriously entertain doubts as to whether any court would arrive at any different decision under the facts of the Wright case no matter what label was attached to the non-refundable fee.

The Non-Engagement Letter

A few years ago only the most paranoid lawyers would write a client who did not retain the firm after the initial interview to document that they had not been retained.

Unfortunately we have now seen many malpractice cases filed against attorneys where the attorney disputed ever having been retained. This is, of course, a fact question and so the jury will decide whether the injured party whose statute of limitations has now run or the attorney is at fault. Trial lawyers know what this may mean.

We have reached the point where the ease of generating non-engagement letters and the growing possibility of a malpractice claim combine to make it a suggested business practice, especially in personal injury cases. We have included several forms for your review. One form, from consultant Nancy Byerly Jones, is very appropriate for keeping at the desk for distribution at the close of the interview. Be careful in generating these letters in every consultation, however. Some cases, such a domestic consultation where the parties still reside together, have more potential for harm than good.

Alternative Billing Strategies

Lawyers have and will continue to labor long and hard to produce documents. However, one of the benefits of the increased computerization of the law offices is the accessibility of automated document assembly processes, including such applications as macros, templates and document assembly software.

A question therefore arises as to how these applications can be fairly integrated into a law office environment with the primary billing method being based on the hourly fee.

The simple answer is that in a lot of situations they cannot. If lawyer A and lawyer B are of equal experience and capability and both labor two hours to produce a certain document, they will have approximately the same charge for the document.

If lawyer A then invests time and money in purchasing document automation software, the latest computer hardware and training his staff to utilize these improvements, he may reduce his time that it takes to prepare a certain document to an incredible extent. If we assume a \$100.00 per hour billing rate, is it now appropriate that lawyer A who has made this investment will now bill his clients for 3/10 of an hour or \$30.00 for the same service that lawyer B, with his more antiquated methods, will continue to bill clients at the rate of \$200.00?

Can it be that lawyer A has significantly reduced his income by modernizing his office? Or is lawyer B committing an ethical violation by continuing to charge his

clients \$200.00 where modernization would allow him to drastically reduce his rates as well?

This is the major dilemma facing law office in the immediate future. Many writers have called this the Productivity Paradox. Since lawyers continue to become more efficient in their law firm operations they will greatly reduce the time required to produce certain types of legal services, particularly routine documents.

Before lawyer A embarked on his procedures both attorneys were charging \$200 for a service and the clients (through the workings of the market place) viewed the fee as appropriate for the service completed. Has the value to the clients changed in any way due to the method of production of the document? In fact, the converse can be argued - relieving the lawyer from the monotonous and repetitious work of routine document drafting actually frees the lawyer to deliver more personalized service to the client.

This paradox simply cannot be avoided as long as there is a complete reliance on hourly billing to determine the value of legal service. As a practical matter, lawyer A cannot raise his hourly billing rate high enough to compensate for the increased productivity and decreased time involved, even if he tries to charge \$300 per hour instead of \$100 per hour, he will still end up with less attorney fees than lawyer B for the same task, plus he will be at a decided marketing disadvantage if clients obtain hourly price quotes from both attorneys. This is somewhat ironic because his service would actually be less expensive even though he quotes a higher hourly rate.

Examine, if you will, the traditional law firm structure. A young associate right out of law school was assigned a billing rate of X dollars per hour. Her work was supervised and she became more efficient and able to complete tasks in less time. As a senior associate she was assigned a billing rate of 2X dollars per hour, but by then tasks could be completed in half the time and so the typical fee paid by the client remained virtually the same. As a partner in the law firm her billing rate might be increased to 2 1/2 or 3X, but even more improvements in the attorney's abilities still kept the fee for a certain task charged to the client to roughly the same.

This tiered structure allowed routine and mundane tasks to be assigned to associates at the lowest billing rate where they were most effectively handled and complex matters to be handled by senior partners where they too were most efficiently handled. (Obviously, this is an over simplification of law firm structures made for the purposes of example.)

The net result was that the client would pay essentially the same amount for comparable services and that the attorney who was most efficiently utilized for a particular service was so utilized. Would a senior partner at a large law firm be expected to file numerous documents at the Court Clerk?

Filing of documents is a perfect example of the problems of relying on hourly billing. When an Answer is filed to a Petition on behalf of a client there is a certain value the client receives. How does this value to the client differ whether the document is filed by a runner, the secretary, the legal intern, the associate attorney or the managing partner? In fact there is no difference to the client, but there could be a significant difference in the charge made to the client depending upon who does the filing.

Why wouldn't it make sense to charge the client a flat fee (say \$35) for filing a document with the Court Clerk that did not need to be set for hearing, no matter who filed the document? The value to the client is the same and the practice leads to the law firm utilizing the employee most appropriately suited for the task to perform it.

It should be noted that this observation is a personal opinion of the writer and not an official policy of the Oklahoma Bar Association. However, the logic appears inescapable. In order to encourage law firms to effectively and efficiently utilize technology, there should be a blending of the methods for services and this blending should be clearly delineate in the attorney contract.

For example, the court appearance, telephone conversations with the client, depositions and office conferences will be an area that may well always be billed on an hourly basis because that is an objective and fair way to determine the value of the services involved. Other managerial tasks such as routine document drafting, especially those prepared through sophisticated document assembly procedures, filing with the Court Clerk, and routine letters may be billed on a flat fee basis based on their value to the client.

This may be difficult for lawyers to accept, given the significant popularity of the hourly billing rate, but some parts of its adoption appear inevitable as we continue to make giant strides forward in the ability of computers to do operations virtually instantly that used to take large amounts of attorney time.

Conclusion

No one really gets excited about paying a bill. But doing your best to remove any uncertainties, to communicate the value of the services to the client and to communicate the effort your expended on behalf of the client should help to expedite payment of your bills. I appreciate J. Harris Morgan teaching many lawyers these important lessons.