

Alternatives to the Billable Hour in Business Litigation

By Ronald J. Waicukauski

Our firm in Indianapolis has been routinely using alternative fee arrangements in the litigation of business cases since the 1980's. As a firm that does predominantly complex plaintiffs' cases and is accustomed to taking risks, we have found that alternative fee arrangements work well in many kinds of business litigation. It takes more work on the front end in case evaluation and in developing an appropriate fee agreement with the client, but the additional effort can yield significant benefits for both the client and the law firm. In some circumstances, small companies or individuals would not be able to pursue their business claim without an alternative fee arrangement.

There are many varieties of alternative fee arrangement that can work in business cases. Most such arrangements involve a fixed fee, a contingency fee, or some hybrid of the two. The arrangement that we have most frequently used in business cases involves a Fixed or Capped Fee with a Contingency Bonus. In this arrangement, the client makes an initial payment or payments up to an agreed limit and additional fees are paid only if the case is successful. We believe it is important that a business client have some "skin in the game" and that we not undertake all of the risk ourselves.

The percentage of the "bonus" paid to the firm will vary depending on the amount of the fixed or capped fee and the amount of risk that the firm has assumed. When a fee is capped at a relatively small amount compared to the investment likely to be required in the case, e.g., \$10,000 where a lodestar (i.e., hours times hourly rate) of \$300,000 or more is likely, the contingency "bonus" percentage may look very much like the typical contingency fee in a personal injury case, e.g., 33 1/3 % if settled before trial. As the amount of the fixed or capped fee paid by the client goes up, the percentage of the contingency bonus may go down, e.g., if fees are capped at \$250,000, the agreed contingency bonus might be 15 %.

Contingency bonuses are used most often in plaintiff cases but they can also apply in defending. This will typically require the defending firm to agree to a fee that is initially capped, fixed or discounted with the opportunity for a success bonus if a good result is achieved (e.g., win a motion to dismiss or settle below a specified amount). Another way in which this can be structured is for the client to hold back a portion of the hourly fees, for example 20 %, to be paid with a multiplier (e.g., two times the holdback) if a good result is achieved and if not, the holdback would be permanently withheld.

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A pure fixed fee will provide a viable option only when costs are reasonably predictable. In our experience with business cases, this is most often possible when the fixed fee is associated with discrete phases of the case. Recently, we agreed to appear in a case that was already in litigation and to represent the client through a scheduled mediation for a fixed fee. We could reasonably estimate the work required for this discrete phase. Whenever there are repetitive cases that require similar amounts of work or at least, similar amounts of work during discrete phases, then fixed fees for each phase or for the case as a whole should be considered.

The term “flat fee” is sometimes used when a fixed fee is established for a series of cases. If a client has numerous cases of a particular kind, a law firm might agree to represent the client in all such cases for a specific amount per case, or if the number of cases is predictable, for a specific amount to provide representation in all such cases.

Flat fees and fixed fees can be combined with a collar arrangement to mitigate unfairness when the unpredictable happens. For example, a flat fee or fixed fee with a 10 % collar could allow the law firm to be paid 50 % of its normal hourly rate for additional hours worked when the 10 % collar is exceeded (i.e., when the lodestar exceeds the fixed fee by 10 %) and allow the client to reduce its fee proportionately when the lodestar falls short of the fixed amount by more than 10 %. In this way, the firm and the client can reduce their respective risks.

Which alternative fee arrangement will work best in a particular case depends on a variety of factors including: how much money the client has available to pursue the case, whether the law firm has sufficient experience and information to reliably evaluate the risks in the case, and the amount of risk the client and the law firm are respectively prepared to undertake.

Big firms sometimes talk the talk of alternative fees but don't walk the walk. Like most Primerus firms, our firm is smaller and more agile with lower overhead than the big firms. As a result, we have more flexibility to truly partner with our clients by sharing the risks and ensuring that our interests are aligned through alternative fee arrangements. That doesn't mean the billable hour is dead. But it does mean for many business cases, there are other options that better meet the interests of the client and the law firm.

For the last half century or so, billing by the hour has been the norm for most law firms engaged in business litigation. This billing method, however, has been subject to increased criticism in recent years. In particular, clients have complained that hourly billing leads to costs that are too high for the value received and too unpredictable. They also complain that hourly billing places a law firm's interest in maximizing fees in conflict with the client's interest in early resolution of disputes. These complaints have led many clients to search for alternative fee arrangements.



317-633-8787
1-800-905-2856

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