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The Ethical Compass

Show Me the Money: Part One

By Elayne E. Greenberg

Introduction

Until now, the discussion of how to ethically monetize "the value added" that settlement savvy attorneys bring to the client has been one of the few remaining taboos that is rarely, candidly discussed among lawyers. *How should settlement-proficient lawyers calculate the value of efficient, quality outcomes? How does a lawyer who bills by the hour ethically deal with the inherent conflict of interest between his desire to make as much money as he can and the economic disincentive to be settlement-proficient? What are some creative billing incentives to more closely align the clients' desire for contained legal costs with a lawyer's desire to be fairly compensated for the value he adds for efficient, quality settlements?* Especially during these constricted economic times, when consumers of legal services are scrutinizing more than ever the value of legal services, this conversation invites a timely re-consideration of different, more creative billing paradigms beyond the "hourly billing."

This column takes "lawyer billing" for settlement-proficient attorneys out of the closet, and invites a public discussion about the ethics of creative billing alternatives. First, I will introduce three alternative billing regimes that capture the "value added" that lawyers bring by early settlement. Continuing, I will review the existing ethical and legal contours that shape the parameters to be followed when considering any fee incentive structure. Then, applying this ethical guidance, I will offer how settlement-savvy practitioners should implement these innovative billing regimes. Finally, this column concludes by offering the next steps practitioners might want to contemplate when exploring creative billing incentives.

Innovative Billing Ideas

In his new book *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*, Professor John Lande, a respected leader in the development of ethical dispute resolution, tackles the problem of monetizing the "value added" for early settlement by proposing innovative billing incentives that help capture the "value added" in efficient quality outcomes.[1] According to Professor Lande, those lawyers who are facile in effectuating early settlements might also consider offering clients billing alternatives that allow clients and lawyers to share in both the risks and savings of settlement.[2] Professor Lande suggests several innovative billing models, three of which will be discussed here: combined hourly and contingent fees, value billing, and premiums for early settlement.

The combined hourly and contingent fees arrangement, as the name implies, incorporates the benefits of contingency billing with the certainty of hourly billing.[3] According to this billing method, the lawyer lowers her hourly rate but adds a contingency fee for a portion of the settlement.[4] By way of example, a settlement-proficient lawyer who has agreed with her client to employ the combined hourly and contingent fee billing arrangement, may reduce her customary $400 rate in half to $200 hour in addition to 16.5%, or one half, of her customary one-third contingency rate. Clients may elect to opt for this method because it lowers their hourly billing obligation while giving them a greater share of the settlement.[5] For some lawyers this option may be preferable to tradition "hourly billing" because this fee arrangement affords them the opportunity to capture a desired mix of predictability and "value added."

> *"How should settlement-proficient lawyers calculate the value of efficient, quality outcomes?"*

Value billing is another type of fee arrangement that incorporates the "value added" to early settlement.[6] Attorneys and clients using this type of billing decide at the beginning of the representation the range of the lawyer's fee that the client might agree to pay at the conclusion of the case, dependent on the client's satisfaction with the value of the legal services received.[7] The range may be based on a fixed fee or multiples of the hourly rate. In one example, the attorney and client agreed that the attorney would receive compensation within a range of a minimum of 70% of the attorney's usual rate up to 150% of the attorney's usual rate, based on the client's satisfaction.[8] I suspect that some of our more cynical colleagues are snickering at the thought that a client would opt to pay an attorney on the higher end of the agreed upon range. Although this bill arrangement may not be appropriate for every client, it may be an option for some.

A third billing alternative is providing for a premium for early settlement.[9] Under this fee arrangement, clients agree to pay the attorney a pre-determined premium above the lawyer's customary rate for achieving a specific settlement amount within a specified period.[10] If the attorney is unable to settle the case for the specified amount within the agreed upon period, some clients and attor-

neys also include a declining premium billing agreement. A variation of premium billing, in declining premium billing the client will pay the attorney a lesser, declining premium if the lawyer settles by other pre-determined, agreed-upon dates and settlement amounts.[11] Premium billing is one billing system that helps align the economic interests of lawyers and clients.

Ethical Parameters of Fees and Billing

The New York Rules of Professional Conduct Rule 1.5 Fees and Division of Billing informs us that reasonableness[12] and transparency[13] shape the ethical contours of any billing structure that incentivizes settlement. Specifically, Rule 1.5(a) provides that any fees charged must be reasonable.[14] Relevant factors that determine the reasonableness of a fee include "the skill requisite to perform the legal service;"[15] "the amount involved and the results obtained;"[16] "the experience, reputation and ability of the lawyer or lawyers performing the services;[17] and "whether the fee is fixed or contingent."[18] The concept of "the amount involved and the results obtained," mirror the standard the U.S. Supreme Court articulates in determining the appropriate fees to be awarded to prevailing attorneys in a Title 42 U.S.C. Sec. 1988 case.[19] Moreover, the Court guides that an award of a premium or enhanced award is permitted "in cases of exceptional success" if the hourly rate multiplied by the actual number of hours worked alone does not arrive at a reasonable attorney's fee.[20]

Our New York Rules of Professional Conduct also inform that outcome-based compensation or contingency fees are ethically permissible[21] except for criminal matters[22] and certain domestic relations matters.[23] Interestingly, contingency fee arrangements are not considered to implicate the personal, financial or business conflict prohibitions contemplated in Rule 1.8 Current Clients: Specific Conflicts of Interest.[24] Thus contingency fees are allowed with specific exceptions even though we know that in practice, contingency fee arrangements may at times create a conflict between the client's and attorney's interests. In fact, this tension becomes magnified when clients and attorneys have different risk preferences and different economic goals.

As with any agreed upon billing regime, lawyers have an ethical obligation to fully explain the agreed upon billing regime to their client. Before representation begins or within a reasonable time thereafter, lawyers must communicate to clients the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible."[25] Moreover, "in domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement."[26] If the representation is based on a contingent fee, then "the lawyer must provide the client with a writing stating the method by which the fee is to be determined…and any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon the conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."[27]

Ethically Implementing Innovative Fee Arrangements

As explained in the previous section, lawyers who are considering implementing any of the suggested billing alternatives must ensure that the process of calculating the fees be transparent and the resulting fees be reasonable. In order for the resulting fees to be reasonable, they must clearly comport with the Rule 1.5 ethical parameters and the U.S. Supreme Court mandate that instruct a reasonable fee earned is one that correlates with "the amount involved and the result obtained." Again, questions about appropriate value emerge and bring us back to our threshold question about quantifying the "value added" for settlement.

In addition to generating reasonable fees, lawyers using alternative fee incentives must ensure that at the beginning of the lawyer's representation, the client has an understanding of the terms and rationale for such a fee agreement, transparency. The three billing alternatives discussed may be considered a variation of contingency agreements, and thus, like all contingency agreements, must be in writing.[28] The writing should be presented to the client in a way that clearly delineates in writing the terms of the fee arrangement, specific payment obligations of the client and the rationale for the chosen fee arrangement. As was noted, lawyers involved in matrimonial and criminal cases are ethically excluded from contingency fee arrangements.[29]

Next Steps

While writing this column, I previewed these ideas with several colleagues. Although many were interested, just as many were concerned about how receptive their clients would be to these different billing regimes. After all, even though many clients are demanding cost-effective legal services, they may be leery of considering alternative fee structures that haven't been widely used. However, it would be an error for settlement-proficient attorneys to compartmentalize the discussion about innovative billing as an isolated discussion about fees. Rather, it is part of a continued lawyering evolution in which lawyers are responding to legal consumers' increasing demand for cost-effective legal services.[30] As increasing numbers of lawyers are actively marketing their settlement competence and skill in using dispute resolution, responsive billing incentives are a welcomed part of the lawyering evolution.

Looking at the glass half full, I believe that the global economic tsunami is encouraging our legal profession to become more settlement-proficient and spawn billing innovations that capture the value of early settlement. Responsive billing options allow attorneys and clients to more equitably share the benefits and risks in the sometimes unpredictable road to settlement. However, we have just begun to think of the range of viable responsive fee arrangements that accurately monetize the value skilled dispute resolution professionals offer legal consumers. In future columns we will talk about billing for neutrals. In the meantime, I invite settlement-proficient lawyers, mediators and arbitrators to contact me at greenbee@stjohns.edu to share the billing innovations you have used to capture the "value added" of your early settlement successes.

Endnotes

1. John Lande, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money (2011).
2. *Id.* at 38.
3. *Id.* at 42.
4. *Id.* at 42
5. *Id.* at 42.
6. *Id.* at 43.
7. *Id.* at 43.
8. *Id.* at 43.
9. *Id.* at 43.
10. *Id.* at 43.
11. *Id.* at 43.
12. N.Y. Rules of Professional Conduct, (22 NYCRR 1200.0) R. 1.5.
13. *Id.* R. 1.5(b), (c).
14. *Id.* R. 1.5(a).
15. *Id.* R. 1.5(a)(1).
16. *Id.* R. 1.5(a)(4).
17. *Id.* R. 1.5(a)(7).
18. *Id.* R. 1.5(a)(8).
19. *See* Hensley v. Eckerhart, 461 U.S. 424 (1983); *see also* Blum, Comm'r N.Y. State Dep't of Soc. Serv. v. Stenson, 465 U.S. 886 (1984).
20. Blum, Comm'r N.Y. State Dep't of Soc. Serv. v. Stenson, 465 U.S. 886, 898 (1984).
21. N.Y. Rules of Professional Conduct, (22 NYCRR 1200.0) R. 1.5(c).
22. *Id.*
23. *Id.* R. 1.5(d)(5).
24. *Id.* R. 1.8(c) comment 4C.
25. *Id.* R. 1.5(b).
26. *Id.* R. 1.5(e).
27. *Id.* R. 1.5(c).
28. *Id.* R. 1.5(c).
29. *Id.* R. 1.5(d).
30. Julie MacFarlane, The New Lawyer: How Settlement is Transforming the Practice of Law (2008).

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