

Alternative Fees 2.0

By Evan R. Chesler

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Behaviorists will tell you that the first step in solving a problem is recognition that you have one. That was what Alternative Fees 1.0 was about: recognition that the prevailing model, hourly-based fees, was no longer acceptable to a growing number of clients; that it often leads to unpredicted, and probably unpredictable, results; that it is vulnerable to inefficiencies and misalignment of client and lawyer incentives.

Recognition is typically followed by “reaction,” not to be confused with “solution”. Reaction is the range, sometimes wide, of things people do once they have recognized that they have a problem. That is what Alternative Fees 2.0 is about.

The reactions have ranged from denying that there is a problem (those who haven’t crossed the recognition line), to sticking to what you know (the billable hour), to “progress-based” alternatives, to “value-based” options.

In “progress-based” alternatives, the billable hour remains a key part of the fee metric but some of its issues are addressed – such as smoothing out volatility to deal

with predictability. There are many variations on the theme: collars, rolling adjustments, milestones, to name a few. The common denominator is that time and hourly rates are still part of the formula, but simple multiplication is no longer the only step in arriving at the result.

“Value-based” alternatives is a term that has emerged to describe a variety of billing methods that have less to do with how long it takes to do the work and more to do with the value of the effort. In its simplest form, such approaches ask the question, “What is X worth?” In that equation, “X” can be anything from a discrete project to an entire case. The value of X is based, in whole or in part, on consideration of the client’s circumstances and need. It is intended to reflect the value of, and therefore the price for, reaching a particular goal, or even achieving a particular outcome. And since the ability to assume particular results is typically less than perfect, value-based billing often involves different fees for different outcomes.

Going back to problem solving basics, “reaction” is usually followed by “solution”. From the process of



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reacting to the recognized problem, solutions eventually emerge. That is what Alternative Fees 3.0 will be about.

I believe that the ultimate solutions will be refinements of the more constructive reactions developed, and to be developed, in the marketplace. To be sure, the billable hour will not disappear. It was, after all, originally promoted by clients who wanted greater transparency than what was provided by the traditional “for services rendered” description. For clients who wish to have the transparency afforded by knowing who is doing what and for how long, as well as using that same mechanism to price the effort, the billable hour will be part of the landscape. But I believe that it will reside on the menu along with a number of alternatives that, to varying degrees, depart from time-based valuation.

That leads to a final point about the fee conversation that presently occupies so much attention. It is “the D word.” Underlying much of the conversation, and sometimes bubbling to its surface, is the issue of discounts. Is the entire discussion of alternative fees simply about discounts?

Surely, the cost of legal services is a prime mover in the fee discussion. But I do not believe that discounting is the goal of many who are engaged in the discussion. I believe that for several reasons. First, discounts have long been a topic of conversation in the billable hour context. Clients have generally not been reluctant to take on the issue and have not needed to change the entire system to get there. Second, my own discussions with clients have underscored the real need to address the volatility/predictability problem. The element of surprise may be critical to winning on the battlefield but it is not favored by clients and, more particularly, by law departments who then must deal with unhappy finance departments. Third, many clients are willing, and often interested, in discussing success fees which, under appropriate circumstances, will result in a higher fee than would have been paid on a billable hour basis. The issue is more about aligning interests.

So we appear to have moved from level 1.0 to level 2.0 on the alternative fee front, and are hopefully on our way to level 3.0. Perhaps the most important feature of this progression is the collaborative attention and effort by clients and their law firms to find practical solutions. ☒

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