



**Understanding the Legal, Ethical and
Emotional Aspects to Billing Practices and
Collecting for Legal Services:
Best Practices In the Estate Planning World**

By: Lou Harrison



Goal

Either to add just 1 better technique to
your billing practices OR
To fundamentally change the way you
approach billing



Tabla Rosa

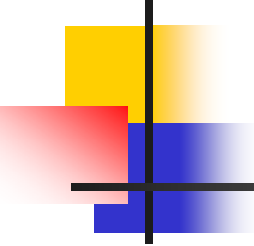
Turn off your thoughts about billing and let's look outside the box at what's really happening and what should be our practices

To do this, we have to enter into the world of behavioral economics



Behavioral Economics

Traditional economics teaches that humans are rational actors who make decisions in ways that maximize their well-being.



Behavioral economics, meanwhile, relies on cognitive-psychology research to relax those assumptions, teaching instead that humans have “bounded rationality”—so make biased decisions that sometimes run counter to their best interests.



To test the theory

Which is easier to collect on billing?

1. Efficient handling of successful resolution of tax strategy (rational consumer)
2. Client perceived substantial accomplishments of results? (mental accounting, not tied to rational exercise)

→ what we learn from this exercise



Morgan/Foonberg

Survey of legal clients:

- A. 47 % listed “effort” as most important element in accepting a fee
- B. Only 6 % listed “results achieved by the lawyer” as most important element.

Source: “How to draft bill clients rush to pay” ABA Law Practice Management Section



And, as an Overlay: First Remember:

Consumer behavior is irrational and not always financially maximizing

- This plan saved you \$1m in taxes and cost \$10,000 does not necessarily mean what you think it does (e.g., worth it...no, not what client wanted)



BEST PRACTICES: BILLING

1. The Engagement
2. Determining the manner in which billing can be based and accepted by the client: hourly, set fee, value added (VAB), contingent
3. Follow through with the bill: timing and formatting



Part One: The Engagement

Don't be Financially Lazy just because the clients like you -- e.g, "meeting is going well so why ruin the spirit by polluting our burgeoning relationship with a fee discussion?"

UGH.



BP 1: Discussing Fees During the Initial Meeting

Foonberg: "You must have a rule that you will never let a client leave the first interview without discussing fees."

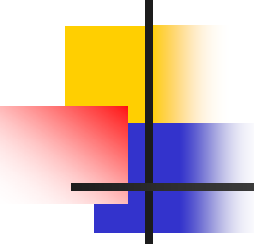


BP 2: Fee discussion at that meeting: timing

Not at the beginning because of the BE principle of “fairness” (to be discussed).

Client must first know that:

1. You can listen;
2. Will be empathetic;
3. Are worth a substantial fee; and
4. Will deliver good service.



So, at about $2/3$ or $3/4$ towards the end of the meeting, this is a good time to discuss fees



BP 3: Delivering the Quote

1. Do we believe this quote to be fair?
2. And, if so, how are we delivering this fairness?

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- Are we looking down when we are providing this quote

BP 4: Setting the Quote at the IM



1. Difference between EP and EA quotes, and in fact, as we will discuss, how we bill;
2. However, don't rush the quote – take a deep breath, have the clients go to the bathroom, work out the stats, deliver a thoughtful quote



BP 5: SIP

Your clients should have some “skin in project” by a deposit, retainer, partial payment, at onset. 10 %, 25 %, 50 %? Not as relevant as the client being vested in the project. Always a good idea.



Part Two: Determining the Method to Bill

We have to figure out what our billing practice will be: hourly, set fee, VAB, or contingent.



Anecdotal Note on Hourly

- ABA commission on billable hours blames the hourly rate “for destroying family life, turning lawyers within a firm into vicious competitors, inefficiency in doing work, inherent conflict of interest,” and so on and so forth.

Source: Foonberg, *infra*.



But that is Irrelevant

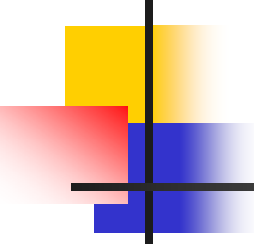
The question is BP in billing, and the effect of the hourly rate on clients.



What the Hourly Rate Means to our Clients?

We fail to understand that consumers are not rational when it comes to hourly billing for estate planning matters.

(Many of us think that if hours are correctly reported, the hourly rate is reasonable, and the project is done timely, the clients will accept the bill as “reasonable” or as “good value.” Wrong my friend.)



The rational consumer does not always make rational choices, but is influenced by his or her own mental accounting, which often changes rational consumers into irrational ones.

Example 3: page 4.



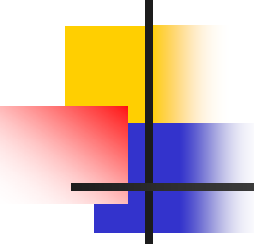
BP #6: Understand that Fairness Matters

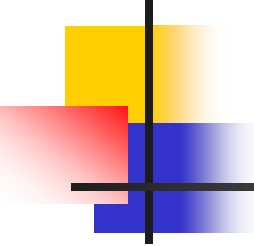
- A service business need not be commoditized.
- If we understand that our billing protocol has to be perceived as “fair,” then this is a start to good practices



Fairness Matters

- *Example 2: You go to the store to buy your favorite movie on a DVD. It is priced at \$14.99. While at the store, your best friend mentions that the same DVD is available for \$4.99 at the Walgreen's about 3 stores over. Will you go to the Walgreen's?*

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- *Compare this to the situation where you are at the Stereo store and the salesperson says the stereo costs \$499. Your best friend says the same stereo is available at \$489 three stores over in the same shopping mall. Will you go to the other store?*

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- *There's no difference financially, but the results have empirically been shown to be different. The consumer's perceptions are different in both situations, reflecting fairness issues.*
 - *In one instance, consumer perceives she is getting taken advantage of;*
 - *In the other, price differential, because marginally small versus total price, doesn't seem unfair*
 - *Conclusion: we have to build in (perceived) **fairness** in our bill and billing practices*



BP #7: How to Make the Hourly Bill Fair? Flat Fees

- Item 6, attachment 4
- Change When Flat Fees are Possible
- Therefore, reduce the bad client reception and reaction in an hourly bill. A shift to flat fee for defined projects wherever possible. To make certain that the client knows that substantial efforts will be undertaken, spend time (how much?) in the outlining of the many aspects of the estate planning project in a detailed cover letter -- what is included, what is not included.



Hourly v. Flat Fees

- Most Estate Planning Projects: Possible
- Estate Administration: Not realistic
- Contest Administration: Not realistic
- Trustee advice: Not realistic
- Complicated Planning: ??
- Funding: Not complicated, but not always easy



Fairness Part Two: And remember

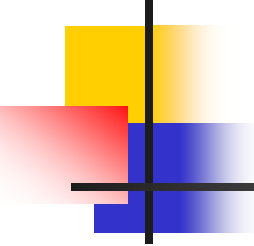
Estate planning is not as simple as you think it is just because you have been doing it so long and are good at it!



"So, Mr. Wealthyguy ...

Here is what we are going to achieve in the draft estate planning documents (or the estate plan that we are working on):

1. Save taxes [big deal, really, for most clients; they are dead...now, if you are dealing with their kids, that's a different story] ...AND [for the group to insert]

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- Tax planning
 - Income tax planning
 - Creditor protection
 - Funeral plans
 - Protection against a child being a spendthrift
 - Providing for the children's education
 - Protecting assets in the event of disability
 - Providing for a child's disability
 - Providing health care alternatives
 - Organ donation options
 - Guardians for the children
 - Providing for the kids' education
 - Providing liquidity at a person's passing.
 - Doing beneficiary designations correctly
 - Reallocating assets
 - Funding for college
 - Preserving tax-free nature of retirement planning
 - Assessing insurance needs
 - Getting rid of household stuff
 - Preserving peace in the barnyard



BP #8: Fairness in Hourly Billing → De-Cliché Clichés

1. What's the deal with casual dress?
2. Why do we have "full" justification on margins?
3. Didn't many techno stocks go down the toilet – why follow these bad practices? It's not what we want; it's what our clients perceive?
4. Are we keeping our love notes and sharing them with other clients (preserving confidentiality of course)?
5. Do our clients know of our intellectual activities like speaking and writing? Standing in the community?
6. Appearance of the office? (Or at least what the client sees)
7. Never re-quote a fee that is too high to a client: "Sorry, Charles, even some of the best tasting tunas don't get to be Starkist." They want to fee shop, clients can be given referrals. Your prices are too low to begin with
8. More...?



BP #9: To Minimize the Pain in Estate Planning of the Hourly “Bug in the Eye”

- (1) You must quote ranges for projects. Let the consumer know how much the project will cost...
- (2) And divide the estate planning into projects over a period of time... (Wills, then QPRTs, then GRATs).

But can't both ideas be taken together to do Staged Flat Fee Billing?



VAB:

Remember, it's the value to the client, not the value to the lawyer.



ABA Model Rules 1.5

“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”

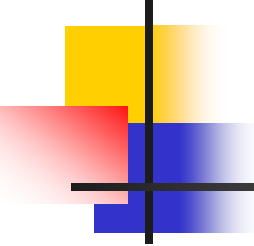
Boundaries: time req'd; difficulty; opp costs to lawyer; custom; result obtained; amount in controversy



Most likely to appear in Tax Planning

- And yet, beware of Circ 230: section 10.27, focuses on fees. Specifically, it provides as follows:

"[A] practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service."



Uncertain in application – we have not yet come to a BP for value added billing, but like Potter Stewart's comments, we know those situations where we should get one...hence, ponder:



Proposed BP for VAB

Consider addressing in the engagement letter an event/result/circumstance that will allow the professional to come back and ask for an additional \$X dollars.

If not put in Engagement Letter, you may or may not get it when requested, but probably not.



Part Three: Formatting and Billing



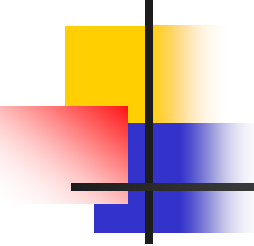
Timing:

- We delay in sending out timely bills and this hurts further
- Does this sound familiar – the ugly pro forma?



BP #10

- Bill, always, at least monthly
- Deal with troubled pro formas as if they were an emergency
- Even better, bill even more strategically if you can, immediately upon success
- Foonberg notes, and I agree, client satisfaction is highest at the time of a good result, why not bill then?



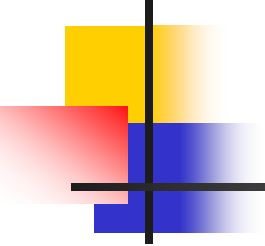
Ponder: Trouble Ahead, Trouble Behind, and You know that Notion...

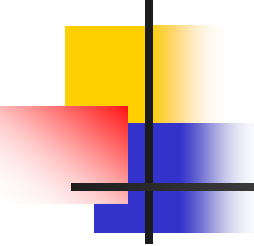
What happens when the hourly charge exceeds our expectation and the client's expectations?

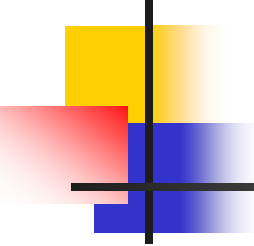


Possibilities

1. Are we: sending out a bill, with a discount? B, B-

- 
-
2. Explaining the overage with a call before the bill is being sent out? B+, B

- 
-
3. Explaining why it is higher and blaming the client cause the client was a jerk and wasted our time and SHE SHOULD PAY! D +/-F



BP # 11

4. Bill what you said you were going to bill. A as a professional (C as to cash flow)



The list continues of understanding Consumer Behavior

The loss function conundrum:

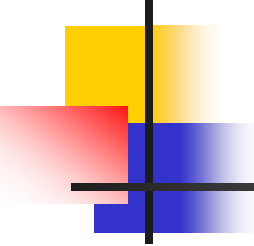
One big loss is easier to swallow than a series of small losses that do not add up to the big loss.

Leading to, if we are stuck with an hourly bill, how will this be formatted?



Demonstrate Value, now, then, now, then, every
opportunity, directly, indirectly, impliedly

- When not possible, format the bill to report effort and day, but not time. See attachment 1.
- SPEND TIME WITH PRO FORMAS. This is not a “watching the TV, contemplating navel, talking to kids, while I read pro formas” activity. How much time are you spending on estate planning bills before they are sent out? If 5 minutes per bill, *res ipsa loquitor*.

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- Foonberg suggests running narrative together.
 - Haven't tried, but interesting



The Predicate Question

1. Is value being connoted with the time entries? For example, do 4 consecutive day entries read: "Update and draft of trust?"
2. Read together, do they tell a story of all the great planning that you have accomplished? Because you have...Can entries be accumulated?
3. Sure you want to have a time entry for each timekeeper for each day? What does the consumer value function tell us about this?



BP #12: Connoting Value in Descriptions

- To the extent bills are detailed in their descriptions, or projects summarized in cover letters, we should not be afraid to frame in the positive versus the negative. E.g., which sounds better: “Draft of trusts to address estate tax issues;” or “Incorporation of estate tax savings trusts.” Or, “Draft of generation skipping trusts” versus “structure of trusts to prevent the payment of estate tax as assets move from generation to generation.”



Decoupling

What we mean...but then, how do we achieve this?



BP #13: Most easily

1. Credit cards
2. Retainers
3. Payment from a closely held entity



Discounting

I'm do, but have wondered, does discounting work?

Foonberg says: "Everybody likes discounts."

Okay he is not going to Stockholm for that one



But, true statement, and the
description that matters



BP#14: When discounting, ponder why and label correctly

- Courtesy discount for long standing client
- Family discount
- Early Payment discount (have not used)
- Accommodation discount
- Discount to Arrive at Quoted Fee
- Other?



BP #15: Demonstrate Caring

1. Above and beyond: the gift concept explained in the context of the Starbucks' card
2. Service
3. Cards of thank you (Holiday)
4. Calls for non business
5. Calls after project finished