

# Coleman & Horowitz Client Memorandum

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Discussing Issues of Interest to our Clients

Coleman & Horowitz, LLP, 499 West Shaw Avenue, Suite 116, Fresno, CA 93704 (209) 248-4820

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## ATTORNEY BILLING: WHAT ARE THE OPTIONS?

By: Darryl J. Horowitz

Much has been discussed in the media regarding the fees lawyers charge. Some believe that they are excessive while others believe that due to their education and expertise, high rates are expected. What is not discussed, however, are the various methods lawyers use to determine how they will charge and what they will charge. This article will discuss the various billing practices that are available to you, the legal consumer.

### Standard Hourly Rate

The most common billing practice of lawyers is the *standard hourly rate*. Lincoln remarked that a lawyer's time is his stock and trade. Lawyers have taken that and built upon it to arrive at the hourly rate. In charging an hourly rate, the lawyer, based on his experience and the sophistication of the particular legal problem, arrives at an hourly rate and charges the client based on the actual time spent to complete the project. For example, an attorney may charge \$175.00 per hour for a particular matter. For every six minutes, the lawyer will charge one-tenth of an hour (some lawyers charge based on quarter hour increments). Then, as a lawyer works on a particular project, the time to complete the project will be recorded and multiplied by the hourly rate to come up with a fee.

### Discounted Hourly Rate

Most attorneys charge based upon a standard hourly rate. There are, however, other billing arrangements. They include a *discounted*

*hourly rate* based on the amount of work provided. For those particular clients who need an attorney on a regular basis (i.e., use a lawyer in excess of ten hours or more per month), and also have multiple matters to be worked on, a discounted hourly rate should be negotiated to accommodate the volume. Generally, this is an across-the-board discount wherein every timekeeper's (e.g., attorneys and paralegals) hourly rate is discounted proportionately. For example, an hourly rate of \$175.00 may be discounted to \$150.00.

### Blended Rate

In other instances, a client may want to negotiate a *blended rate*. This also provides a discount, but using a different formula. Rather than discounting every timekeeper's billing rate, an average of all rates is created, and all who may bill on the file bill at the averaged rate. For example, let's take a firm with three lawyers and one paralegal whose billing rates are \$175.00, \$150.00, \$135.00, and \$50.00 for the paralegal. Their combined hourly rates are \$510.00. When this is divided by the number of timekeepers, a blended rate of \$127.50 per hour is reached. No matter who works on the file, whether it is the most senior partner or the most junior paralegal, the blended rate is charged. This has an advantage where most of the work will be done by a senior attorney who is billing at a significantly reduced hourly rate. However, paralegal time may be charged at a higher rate unless an agreement is reached that the paralegal's time would be billed at the lowest possible rate.

### Flat Fee

Certain tasks may also be billed on a *flat rate* or *project basis*. This is most used where a particular project has been done many times before by the particular attorney. For example, an experienced transaction lawyer who has incorporated many corporations or drafted many partnership agreements should be able to produce the work on a flat-fee basis, meaning that the attorney will charge no more than a certain amount for work on the project (e.g., \$1,500.00 to prepare all the documents related to a corporation, etc.).

### Task-Based Fee

Similar billing practices include the *task-based* or *project billing* in which the attorney is requested to provide a budget in advance of performing the particular task and may not (without prior agreement) exceed the budget. In many instances, the standard or discounted hourly rate will be used in conjunction with the task-based or project billing to arrive at the budgeted amount. For example, let's say that you are a defendant in a lawsuit. The attorney recommends the filing of an answer as well as initial discovery, including interrogatories, request for admissions, and request to produce documents. The attorney may have previously defended similar actions. The attorney should thus be able to provide you with a budget where the work would be performed on either an hourly or discounted hourly rate, but not to exceed a certain rate. If the attorney takes more time than is allowed by the budget, the client is charged nothing more. Similarly, if the attorney takes less time, no more than the actual time is billed. Each stage of litigation can therefore be budgeted to determine whether or not to proceed with a particular task.

We recommend that when hourly work is performed, the client obtain a clear indication of the hourly rates to be charged for certain litigation matters, it may be possible to negotiate a *not-to-exceed* budget be provided for any significant task to be performed. Such a not-to-exceed budget could also be established for each stage

of the proceeding rather than for each particular task, so that the client is aware, in advance, of how much each stage of the litigation will cost.

Unfortunately, in litigation, it is often difficult for an attorney to estimate all work to be performed at a particular stage because of uncertainties as to what an opposing party may do. For example, an opposing party may refuse to respond to discovery, requiring a motion to be filed. Similarly, an opposing party may file an unwarranted motion which requires a response that was not anticipated. Thus, in most cases, an attorney can only give an estimate of what work may be necessary.

### Contingent Fee

Other billing rates include a *contingent fee* in which the attorney agrees to accept a percentage of any settlement, award, or judgment that is ultimately rendered; and if there is no settlement, award, or judgment, no attorneys' fees will be paid.<sup>1</sup> This fee arrangement is most often used in personal injury matters because of lack of resources by the injured party to pay an hourly fee. The contingent fee spreads the risk between the client and the attorney which often justifies the seemingly high percentages that are charged (e.g., 33a% to 50% depending on the stage of the proceeding).

The contingent fee is not, however, limited to personal injury matters. It can also be used effectively in commercial collection cases, especially where recovery is doubtful. In such instances, many companies are willing to pay a percentage of what is recovered--generally between 25% and 40%, depending on the stage of the proceeding--because they do not want to "throw good money after bad."

Some clients use what is known as a

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<sup>1</sup>Although attorneys' fees are generally contingent, most attorneys will require that costs be reimbursed by the client, even if they are initially advanced by the attorney. Reimbursement of costs may, however, in some circumstances be contingent upon recovery. See California Rules of Professional Conduct, Rule 4-210(A)(3).

*reverse contingent fee* in which the attorneys are paid based on a percentage of the amount they save a company in defending a lawsuit. Thus, if the potential exposure is \$400,000.00 and the attorney is able to save \$300,000.00, the attorney is paid a percentage of the amount saved rather than the hourly rate.

In some instances, a client may wish to negotiate a reduced hourly fee (generally enough to cover the attorney's overhead) and a reduced contingent fee as well (often 5% to 10% less than the general contingent fee). This fee arrangement is best used where protracted litigation is likely, the amount to be recovered is large (in excess of \$100,000.00), but recovery is somewhat doubtful. It provides a level of commitment by both parties; the attorney is committed because he or she is receiving reimbursement of overhead plus a contingent fee, while the client is showing his commitment by the payment of the reduced hourly fee while saving money on the overall legal expenses by paying the remainder of the fees as a contingent fee.

### Conclusion

Coleman & Horowitz, LLP provides legal counsel to the business community in the areas of commercial and corporate law, real estate litigation and transactions, personal injury litigation, environmental regulations, casualty insurance defense, insurance coverage, tax, probate and estate planning. This Legal Brief is intended to provide the reader with general information regarding current legal issues. It is not to be construed as specific legal advice or as a substitute for the need to seek competent legal advice on specific legal matters. This publication is not meant to serve as a solicitation of business. To the extent that this may be considered as advertising, then it is herewith identified as such.

As can be seen, there is wide variety of billing rates available. Before selecting one over another, you should discuss the alternatives with your attorney, who should recommend the most cost-effective billing rate. In doing so, you can have all your legal needs met at a reasonable cost.

*This article was prepared by Darryl J. Horowitz, a litigation partner at Coleman & Horowitz, LLP, emphasizing business, construction, real estate, environmental and personal injury litigation, commercial collections, casualty insurance defense, insurance coverage, and alternative dispute resolution. He is a member of the Fresno County Bar Association, the American Bar Association, the Consumer Attorneys of California, Association of Business Trial Lawyers and the Federal Bar Association. If you have any questions regarding the subject of this article, please contact Mr. Horowitz at (559) 248-4820, or by E-mail at "dhorowitz@ch-law."*