

ALTERNATIVE FEE ARRANGEMENTS AND CLIENT EXPERIENCE IN THE UNITED STATES

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Outline – Alternative Fees

- IP Prosecution and Transactional Work
- Litigation
- Ethical Considerations
- Delighting the Client – What works, what does not.

Transactional Work - US

- Hourly Rate

Professional	Rate
All	\$438 - \$453*
Partners	\$503 - \$521*
Of Counsel	\$495 - \$485*
Associates	\$386 - \$387*
Patent Agents	\$284 - \$279*

2017 REPORT ON THE ECONOMIC SURVEY, I-7,
AIPLA (2017).

* 2019 REPORT ON THE ECONOMIC SURVEY, I-9,
AIPLA (2019).

Transactional Work - US

- Flat Fees

Task	Average Fee
Patent Application	\$8,523 - \$11,469
Amendment	\$2,724 - \$4,654
TM Clearance Search	\$1,501
TM Application	\$1,173

2017 REPORT ON THE ECONOMIC SURVEY,
AIPLA (2017).

Cash, Differently

- Fixed fee, subscription, “retainer.”
- Success fee.
- Partial contingency.
- Caps and collars.
- Hold backs.

Alternatives to Cash

- **Stock**
 - Right to vote or govern company?
- **Options**
 - Cashless exercise?
 - Expire.
 - Exercise price cannot be discounted. 26 U.S.C. § 409A
(120% immediate tax penalty!)
- **S.A.F.E. Agreements**
- **Debentures**
 - Convertible to stock?

Taxes!

Problem: \$10,000 of stock for \$10,000 of legal work means you owe taxes as if you received \$10,000 cash.

- Bite-sized project with flat fee for stock.
- Signed writing waiving independent valuation of company.
- Discounted hourly rate or flat fees for all other work.

Litigation Costs - US

Scope	Average Cost
<\$1M Damages, through Discovery	\$306,000
<\$1M Damages, through Appeal	\$627,000
>\$25M Damages, through Discovery	\$2,000,000
>\$25M Damages, through Appeal	\$3,831,000

2017 REPORT ON THE ECONOMIC SURVEY, AIPLA
(2017).

Insurance Coverage for Defense

Product liability insurance policies, general business insurance policies cover “advertising injury.”

Insurance companies limit exposure by funding defense of litigation.

- Negotiated fees with attorneys
- Goal is lowest overall cost, full stop.

Trend: Companies insure against business risks.



Insurance companies fund defense.



Litigation insurance for everyone! (?)

Enter Litigation Financing

Opportunity: If it costs \$3.8M for the chance to win >\$25M in damages, investors want in!

Historically: Champerty and maintenance laws prevented disinterested parties from funding litigation.
(Still unlawful in several states!)

Trend: Contingent fee litigation

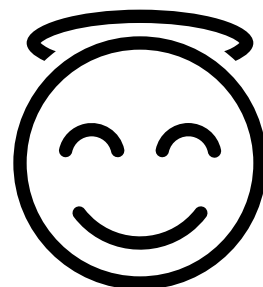


Lender-financed support for attorneys



Litigation as an investment!

ETHICS!



Taking Equity – Is It Allowed?

(i) A practitioner shall not acquire a proprietary interest in the cause of action, subject matter of litigation, or a proceeding before the Office which the practitioner is conducting for a client, except that the practitioner may, subject to the other provisions in this section:

* * *

(3) In a patent case or a proceeding before the Office, take an interest in the patent or patent application as part or all of his or her fee.

37 C.F.R. § 11.108(i) (2019) (emphasis added).

Business Arrangements with Clients

(a) A [practitioner, lawyer] shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- [Terms are fair, reasonable, written, reasonably understood];
- [Advise in writing: seek independent counsel];
- [Client gives informed consent in signed writing to essential terms].

37 C.F.R. § 11.108(a) (2019)

MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2018).

Privileged Information and Third-Party Funders

- Problem: Disclosures to insurance companies and litigation financiers can waive attorney-client privilege and damage case.
- Solution: Limit such disclosures. Third party funders receive public/produced information only.
- Ethical dilemma: When does attorney tell third party funder of fatal flaw in case?

Delighting the Client

- Payment in advance
 - Predictability – for attorney and for client.
 - Favors flat fee arrangements – clients hate additional charges.
- Interest, Late Fees, Payment Plans
 - Source for later discounts.
 - Watch local rules!
- Extras that add to the client experience
 - No-charge simple tasks, routine status reports.
 - TELL client all discounts and freebies!
 - Undercharge. Overdeliver.
 - Cultivate personal relationships with clients!

Questions or Comments?



(The Fine Print)

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Thank You!

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Full Text of Model Rule 1.8

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2018).