

# Client Alert

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## A Business Person's Guide to Attorneys' Fees in Transactions, Research, and Litigation

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The thought of attorney's fees can strike fear in even the most brave and confident business person. This is because the law is one of the few fields where you may ask for services and agree to pay for them while not knowing the outcome of those services or the total cost. Attorneys can be asked to do complex and emergent work where there is no accurate way to create an estimate or price tag. Attorneys also may be asked to handle matters or issues that have never been addressed before. More often than not, even if the same law is being applied, each case has its unique facts that require a bespoke approach.

That being said, a business person should cultivate an open and continuing conversation about attorneys' fees that can be good for both parties and for a healthy working relationship. Typically, business lawyers enter into a written fee arrangement with clients with hourly rates that may vary depending upon that attorney's level of experience. However, depending upon the circumstances, attorneys may be willing to provide estimates, or engage in flat fee arrangements for certain types of legal services. Additionally, a business person can take proactive steps that can facilitate their attorney's ability to work more efficiently, thus reducing the amount of billable hours incurred. Usually, in this competitive legal environment, conversations about attorneys' fees are welcome. While each situation is unique, the authors can each speak from more than 20 years of legal services to business owners on some practical advice for managing attorney's fees with certain types of frequently requested legal services. We will discuss some pointers below for transactions, legal research, and litigation.

### Transactions

There are many different types of transactions and the advice of experienced legal counsel can be invaluable in considering a transaction and the terms. For less complicated, routine transactions there may be documents that are commonly used so that the attorney may be able to prepare the necessary documents pursuant to a flat

fee for services or reasonably estimate the time that could be required to produce the services. In more complex transactions, the attorney may need to prepare a one-of-a-kind agreement from scratch, and the deal will likely involve substantial negotiation of terms, all of which make it more difficult to estimate fees and impact the use of a flat fee for the transaction without adjustments for pre-determined contingencies that could occur. Also, your bill could be lower if reasonable steps are taken to clarify the specific areas of focus which helps the attorney to work more efficiently. Preparing a term sheet in your own words of transaction terms including identifying those of most importance to you can provide a helpful starting point for meaningful discussions on the transaction. In the context of the sale of a business, the buyers traditionally (but not always) prepare the first draft of the purchase agreement. If the other party to the transaction is drafting the initial documents, you can ask your attorney for a fee to review and discuss the first draft with written comments to follow and discuss the fees for each step in the process.

Prolonged negotiations involving difficult parties and their counsel can increase the fees incurred in transactions, notwithstanding the efforts to manage legal fees and keep them from exceeding initial estimate provided. Important transactions that involve risk can be difficult to migrate through and an attorney can be invaluable in explaining typical market-driven terms for a party in your position as well as help shape reasonable expectations, and identify and rank in priority the must-have terms of your transaction agreement. Early communication on which terms you must have in connection with a transaction and those on which you can be more flexible can assist an attorney in the representation. An attorney may not agree to a flat fee for a transaction due to there being too many contingencies or may agree to a flat fee only with understood contingencies that will alter the agreed upon flat fee. An attorney may also be willing to provide a range of fees for various stages of a transaction, or at least an estimate for such stages

### **Research**

It is not unusual to pay attorneys for legal research, and in unique or novel situations those costs can be high. While attorneys are familiar with the law in the area they practice, special situations may require them to look up special provisions of the law, interpretive cases, and regulations to develop the arguments and defenses in your case. Also, each matter has different facts that will require new applications of the law in that matter. Nonetheless, retaining an attorney who specializes in your particular industry or type of matter will help minimize costs. For example, an attorney who regularly advises on technical federal laws like E.R.I.S.A or H.I.P.A.A. may not cost you as much in legal research on that issue since they are already familiar with the law, even though their hourly rate is higher due to their degree of specialization. Also, the specialized lawyers may supervise lawyers who conduct research at a lower rate to save you money.

It is helpful to have a clearly defined scope of research and a well-defined question so the time of the attorney can be focused on the issue. Also, discuss in advance the format in which you want your answer. A formal memorandum usually costs more because of the time involved in drafting, editing, and reviewing. In many instances, you may simply want an answer to your legal question provided by email. Consider requesting an estimate of the time involved for the research and/or call to go over the results and ask for a quote for the cost of putting the answer into a formal memorandum. You may not want the results to be in a formal memorandum if you decide to go in a different direction based on the research. For multistate research on the same issue, you could possibly request a flat fee per state and have the research placed into a useable format, such as a chart.

### **Litigation**

Some of the highest amounts of attorneys' fees can come from litigation. Business owners should have up front conversations with their attorneys as to possible outcomes based on known facts, as well as the potential fees involved. One of the best strategies for minimizing your attorney's fees in litigation is to appoint a well-organized member of your management team to be the point person for the litigation. Initially, that person should prepare a statement of the facts surrounding the dispute and assemble all documents relevant to the dispute. Notably, it is important to provide your attorney with records that support your position and that undermine your position. Without that information, your attorney cannot provide you with their advice as to your prospects of prevailing on the claim. Providing all of this information in an organized fashion to your attorney at the outset of the litigation will help to minimize the amount of time the attorney spends getting a

full understanding of the dispute, and this could save you attorney's fees. It may help ensure that important information relevant to your case can be addressed early.

Most business litigation is handled on an hourly basis. Some cases may be appropriate for a contingency fee arrangement when representing your company as plaintiff, but in such cases law firms will likely need to understand other factors to represent your company.

Estimating litigation costs is very difficult because fees for the same kind of claim can vary considerably based on a variety of factors including the attorney representing the opposing party. Certainly attorney's fees can be minimized when both parties have experienced, capable attorneys who explain to their clients early in the case both the strengths and weaknesses of their positions, and who reasonably and professionally handle the matter including with respect to discovery issues that often arise.

Litigation costs today are higher than they were twenty years ago because of the prevalence of electronic discovery. At the beginning of your case, you will need to consider the retention of records (paper and electronic) relating in any way to the litigation and for the duration of the case including any potentially lengthy appeals processes. In many cases, law firms retain third party IT vendors to assist with the capture and preservation of electronic files to avoid claims by the opposing party that relevant evidence has been destroyed. Depending on the type of litigation, the costs associated with such vendors can be in the tens of thousands of dollars and in complex litigation those costs can run well into six figures. Similarly, your case may require the use of expert witnesses, whose costs will run from a few thousand dollars on the low end to tens of thousands of dollars or more. These vendors and experts typically require up front initial payments to be engaged.

We trust this article is useful in providing you with some tools and ideas to engage in an open and thorough conversation with your attorney on how the legal services you are requesting will be priced, billed, and collected. Attorneys are generally willing to discuss pricing and fees with you up front. A one-size-fits-all solution to managing legal fees does not exist because legal representation is so personalized. However, an open and honest conversation about your attorney's fees and costs will put you and your attorney on the right path to success.

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