GROWING DEMAND FOR UPFRONT FEES

ALTERNATIVE PRICING ARRANGEMENTS SUCH AS FIXED FEES AND VALUE PRICING ARE STEADILY MAKING GROUND AS A WAY TO BENEFIT BOTH CLIENTS AND PRACTITIONERS. **BY KARIN DERKLEY**

When David Kelly set up his commercial law firm KHQ in 2006, a key part of his offering was giving his clients the option of agreed upfront fees. "It was an entrepreneurial thing," he says. "For a new firm servicing large corporates, our ability to be innovative with fees was a unique selling point."

One of the firm's main clients in those early days was Toyota Australia when it was still making cars in the Altona plant. "They had the budget to spend top dollar on top lawyers, but cost certainty was very important to them and the fact we could quote a figure for a contract review and stick to it was a significant point of difference between our firm and others."

TBA Law principal solicitor Jacqueline Brauman says she started charging fixed fees at her Nagambie firm after years of having the same pricing conversation with every new client. "Before we had (upfront) pricing, people were constantly wanting to know: 'how much is this going to cost me?' So I decided it would be better to quote a fixed fee when people ring rather than having to work out each time how much it was going to cost."

Five years down the track she says she would never go back to time-based billing. "Upfront pricing is just so much easier, for clients and for us. For clients it sets expectations. And for solicitors it saves such a lot of time not having to deal with lengthy cost discussions. They can just focus on the work they're doing rather than filling out time sheets."

Non time-based pricing models have been debated since hourly billing became widespread in Australia in the legal profession in the 1940s. A system that relies on billing by six minute time periods rewards inefficiency and sets up clients for dissatisfaction, critics say.

Of complaints to legal services commissioners, 80 per cent are about legal fees. While lawyers have to provide cost estimates of their legal services under Uniform Law, the guideline makes clear that this does not have to be a fixed fee quotation. But recent surveys have shown that clients are increasingly demanding pricing certainty.

TBA Law principal solicitor Jacqueline Brauman

Fixed fees

The 2020 Macquarie Business Banking Legal Services Industry Pulse found that 70 per cent of firms said they were under pressure from clients to deliver value and solve problems, not bill time. The CommBank Legal Market Pulse 2020 found that 63 per cent were experiencing demand from clients for alternative fee arrangements and that this had accelerated as a result of COVID-19.

Even before the pandemic, the 2019 NAB Australian Legal Services Industry Survey found that 40 per cent of small to medium enterprises preferred to pay fixed fees for their legal services, and another 17 per cent wanted value-based billing. Just 25 per cent were happy with hourly billing.

That's also the story with small law firms and conveyancers, with 43 per cent reporting an increase in requests for fixed-fee pricing in the last 12 months across most practice areas to the Smokeball State of Small Law Australia Survey. Smokeball found that more than half of all firms (53 per cent) expected this trend to continue in the next 12 months.

Smokeball chief revenue officer Jane Oxley says the move to upfront billing is also being driven by pressure from competitors. "You've got New Law firms who have worked out how to leverage technology and offer competitive fixed prices and that is putting pressure on other firms to do the same."

But law firms are taking some time to respond to these demands. A survey by accounting company Pitcher Partners found that time-based billing still makes up more than half of pricing arrangements. That's despite the fact clients are clearly interested in price certainty, Pitcher Partners partner Ben Lethborg says. "From a client point of view certainty of pricing and fixed price billing is very appealing."

Alternative fee arrangements can take a number of forms, from simple fixed fees for particular services or bundles, to contingency fees, retainers and value pricing, where the law firm and the client agree on an upfront price according to the complexity of the work, its urgency and other criteria.

As former managing principal of Moores, David Wells took the mid-tier firm into a value pricing model in 2010. "Clients were becoming more demanding, and there wasn't much future in trying to be the same as every other legal practice in Melbourne." After piloting a pricing for value approach with one of its teams and then across the whole practice, in 2013 Moores turned off timesheets completely "and we've never looked back".

With upfront pricing, the focus for lawyers and the client is on the outcome not the time taken to achieve it, says Mr Wells, who is now a director with Innovim Group. "If we can create significant value for our clients because of our intellectual capital and our expertise, that's just a wonderful model."

Upfront pricing in whatever form it takes is simply about "front-loading" the work, says Ovid Consulting director Liz Harris, who advises law firms on pricing, process improvement and client experience. "If you agree a price with the client upfront then that determines the scope of what you're going to do and how you're going to do it."

"In having that conversation, the client has to think about what they are wanting to achieve and how, what their expectations are, and how they're going to work with the lawyer."

Pricing consultant John Chisholm says that certainty and transparency not only benefits clients but firms too. "Firms that are upfront in their pricing get paid quicker and have substantially reduced or eliminated cost disputes with their clients. When you add better and more trusting relationships, everyone can be a winner."

Value pricing has meant being freed from the tyranny of time-recording, Mr Wells says. "It's a bad thing for professionals when the only thing that is really valued is how many six-minute units they have on their timesheet at the end of the day."

With hourly billing there is no incentive to do things more quickly, says Ms Harris. "If I come up with a brilliant idea that resolves a piece of litigation very quickly, I don't get any benefit out of that. I don't get remunerated for that brilliance."

There's nothing particularly complicated about value pricing, says Mr Kelly. "It is just a way to set a fee in consultation with your client, which is something lawyers have been doing for years. You have a conversation with the client: how urgent is it, how important is it, what risk does this pose for your business, what budget do you have for this?"

"Sometimes you tell the client sorry I can't do it for that fee, your budget's too low. But most of the time you can work out a way to bring it in for the fee they're willing to spend."

Firms that have been early adopters of upfront pricing tend to be specialist boutique firms, Mr Chisholm says. "The courageous lawyers who lead these firms tend to have a more entrepreneurial approach, are curious, innovative, more tech savvy and prepared to share risk with their clients. Their clients love the predictability and certainty those firms offer."

Nigel Evans set up his commercial litigation firm Aptum after 11 years as a commercial barrister, with a focus on value pricing. He says the process is similar to an architect scoping a renovation or house-build. "For us, value-based pricing is about aligning our success with the client success. It also creates a better experience for lawyers because they're not obsessed with activity, they're obsessed with effectiveness."

Value pricing does require a lawyer to share risk with clients, Mr Evans says. "But given we're the ones managing much of the risk, it makes sense we should shoulder some of it. The lawyer can then benefit by delivering (the matter) more effectively."

Some larger law firms have also been going outside the hourly billing box in recent years. Clayton Utz offers fee arrangements that include fixed fees for specific projects or a hybrid of hourly rates and fixed fees.

At Herbert Smith Freehills, executive partner Andrew Pike says the firm is seeing an increase in clients asking it to be "proactive in pricing solutions. As a result, we offer numerous alternative fee arrangements," he says. "The majority of our clients still opt for traditional fee arrangements, but many clients tell us that they appreciate the range of flexible options available to them."

MinterEllison too says it is catering to demand from clients seeking fixed fees on high volume, standardised work like leasing, conveyancing and litigation. The firm also has performance-based pricing arrangements with a number of clients where the fee varies according to the value it delivers.

DLA Piper has been offering clients agreed prices on commoditised and transactional work for some time, but head of operations and pricing Stephen Spencer says it has become more popular for large scale projects and big-ticket projects as well. "We use it as a differentiator and for a competitive advantage in

KHQ director David Kelly

Aptum managing director Nigel Evans

that we're willing to fix a fee where others don't."

If managed properly, upfront pricing can eliminate bill shock and disputes over fees, he says. "You remove the administrative burden of putting together bills that can run to 40 to 50 pages, and the need for a client to review the bill line by line. You just have one line that says, 'price as agreed'."

Many lawyers assume that upfront pricing works best with transactional or commoditised matters such as conveyancing, wills and estates, or business transactions, and less so for disputes and litigation.

But Mr Evans doesn't believe there are any particular obstacles to using value pricing in litigation. "Litigation is nowhere near as uncertain as people make out. What the uncertainty comes from is the lack of proper assessment in the early stages of a dispute. You can iron out a lot of the uncertainty if you take the time at the beginning of a dispute to find out what a client needs to achieve."

Many of his clients are people who have had bad experiences with litigation in the form of cost blowouts, or being trapped in "interminable disputes where the client feels like they're a passenger rather than an active participant."

Having no control over the behaviour of the other party's lawyer in a dispute can make things trickier, Mr Kelly acknowledges. "But there are elements of a dispute where you know what's going to happen within a fairly accurate degree of knowledge."

You can set a "what if?" fee that allows for different possibilities, he says. "The client can see that you can't control which way it goes and if it goes one way, it'll be one amount, and if it goes the other way it'll be another amount."

Family law is one example of a traditionally time-billed area of law that is seeing a change to fixed free pricing, says Ms Oxley. "It's an emotional area of law that is also very cost sensitive. Clients are demanding bill certainty and are more aware of the potential for cost blow outs." But matters that continue on to court can be difficult to price because of the unpredictability of the other party.

Ms Brauman says TBA Law gives fixed fee quotes on stages – "so it might be a price for negotiations, and if it goes beyond that, we'll think about the next step. And then another price to the first directions hearing. And another price to take it to mediation."

Mr Wells says providing a client with different pricing options demonstrates that the lawyer is able to take a creative approach to the client that empowers them to make choices. "It's an outcome that builds trust and rapport."

Ms Harris encourages lawyers to think about pricing the "diagnosis phase" in litigation. "Just as a doctor is entitled to spend some time running tests and working out what the problem is so that they can then provide you with advice about what the right treatment is going to be for that particular problem.

"I encourage lawyers to price the diagnosis, and then you can have a discussion about the outcome clients want to achieve and work out the best strategy to actually achieve that outcome and price that particular strategy." ■