

AAALA Roundtable: “Getting Paid – Billing and Collection Strategies for the Food and Agriculture Lawyer”

October 21 at 1:15pm to 2:30pm

This interactive round-table will help spur on a business discussion on the age-old question: how do I do what I love and get paid? The panel will begin the conversation with retainer agreements and the selection process from the onset of representation. It will then move into a topic of 4 major billing types: (1) the billable hour, (2) flat fee, (3) contingency, (4) subscription services, and (5) to a lesser extent, the exchange of goods and services. Next, the roundtable will address good billing strategies and conclude with collection issues such as liens, Alternative Dispute Resolution (“ADR”), litigation, and firing clients. Cari will also discuss her survey results.

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Background Materials & Discussion Outline

By Cari Rincker, Esq.

I. GETTING PAID: TYPES OF BILLING

A. Traditional Billing

1. Background

- a. Historically, lawyers would analyze a client's file at the end of representation and set a fee according to the perceived value to the client. However, over time, minimum fee schedules were established.
- b. In 1975 with the Supreme Court decision in Goldfarb v. Virginia State Bar, lawyers stopped using minimum fee schedules due to antitrust violations. See See MARK A. ROBERTSON, ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS (2014) at 9.

2. The Billable Hour

- a. Advantages vs. Disadvantages
- b. Picking the Right Number
- c. Value
- d. Ethical Concerns
- e. Retainer Agreement Pointers

B. Alternative Fee Arrangements (“AFAs”) (a/k/a “Special Fee Arrangements” (“SFAs”))

1. Advantages

- a. Why Clients Seek AFAs
 - i. Aligns the law firm's incentives with the client's incentives.
 - ii. Reduces the risks on the client.

- iii. Reduces litigation expenses for the client.
 - a) It encourages litigation on matters that the client may not have pursued
- iv. Produces more predictable cash flow for clients (e.g., predictable cash flow & budgeting).
- v. It creates greater transparency.
- vi. It produces more competitive pricing.
- vii. It encourages efficiency.
 - a) It encourages the use of technology.
 - b) It encourages process thinking for lawyers.
- viii. Encourages communication between the lawyer the client without concern for billable times

See e.g., Kirkland & Ellis, “Alternative Fee Arrangements and Litigation Finance”, available at http://www.kirkland.com/files/afa_brochure.pdf (last visited September 2, 2014); Vincent J. Cordo Jr., “Alternative Fee Arrangements: New Ways to Get Paid,” Law Practice (Vol. 39. No. 2) available at http://www.americanbar.org/publications/law_practice_magazine/2013/march-april/alternative-fee-arrangements.html (last visited September 2, 2014); Carrie Nixon, “Alternative Fee Arrangements: More Than Just Cutting Costs,” September 6, 2011, available at <http://www.nixonlawgroup.com/articles/alternative-fee-arrangements-more-than-just-cutting-costs/> (last visited September 2, 2014); Frederick J. Esposito, Jr., “The New Normal – Alternative Fee Arrangements and Project Management for Lawyers,” Law Practice Magazine, Vol. 37 No. 6, available at http://www.americanbar.org/publications/law_practice_magazine/2011/november_december/the_new_normal.html (last visited August 21, 2014).

b. Why Lawyers Seek AFAs

“A gunfighter doesn’t charge by the bullet.” – Poster in well-known criminal defense lawyer’s office.

See Mark A. Robertson, “Alternative Fees for Business Lawyers and their Clients” at xiii.

- i. Can be compensated for taking advantage of technology.
- ii. Can be compensated for repeated work.
- iii. Can make decisions based on what is good for the client, not the bill.
- iv. Example – having three partners sit in on a meeting and not worry about writing off the time for one of them. Rachel M. Zahorsky, “Facing the Alternative: How Does a Flat Fee System Really Work?” ABAJournal (March 2012), available at http://www.abajournal.com/magazine/article/facing_the_alternative_how_does_a_flat_fee_system_really_work/ (last visited August 21, 2014).

c. What is the applicability in the food and agriculture industry?

- i. Per survey results, food and agriculture prefer the predictable nature of flat fee arrangements.
- ii. Culturally, there seems to be a distrust in lawyers (generally). Flat fee arrangements may build trust between lawyers and food/agriculture clients.

2. **Types of AFAs**

a. Pure Contingency

- i. Percentage plus disbursements (subject to ethical rules)

b. Partial Contingency

- i. Percentage of hourly rate plus smaller percentage of recoveries
- ii. This is more typically used when the Plaintiff is seeking monetary damages. See Kirkland & Ellis, “Alternative Fee Arrangements and Litigation Finance,” available at http://www.kirkland.com/files/afa_brochure.pdf (last visited September 2, 2014).

c. Flat Fee/ Fixed Rate

- i. Many lawyers believe that flat fees are impossible with litigation; however, litigation should be broken down by “phase”.
- ii. There can be a flat fee estimate per phase of litigation for the client. See LexisNexis, “Business of Law Blog,” available at <http://businessoflawblog.com/2014/05/alternative-fee-arrangement/> (last visited September 2, 2014).

d. Value or Success-Based Fees (“Holdback” or “Success Fee”)

- i. Pay a portion of the fee up front with the remainder contingent on a success in a matter.
- ii. Used more often when law firm is representing the defendant or upon a completion of a particular transaction (e.g., acquisition of a sale or other transaction). See Kirkland & Ellis, “Alternative Fee Arrangements and Litigation Finance,” available at http://www.kirkland.com/files/afa_brochure.pdf (last visited September 2, 2014).

e. Blended Rate

- i. 100% hourly arrangements in which a single middle rate is charged for both senior and junior lawyers. See LegalBizDel, “Are blended rates alternative fee arrangements?” (April 24, 2013) available at http://adverselling.typepad.com/how_law_firms_sell/2013/04/are-blended-rates-alternative-fee-arrangements.html (last visited September 2, 2014).

f. Hybrids

- i. Examples:
 - a) Hourly and Flat Fee
 - b) Hourly within a Range

g. Subscription

i. Examples:

- a) Client pays \$____ a year for unlimited email and telephone consultations
- b) Client pays \$_____ a year for 1 hour of email and telephone calls per month regarding estate plan, quarterly lunch with attorney to ask attorney questions and annual review of estate plans
- c) Client pays \$____ per year for a maximum of ____ hours per month or year
- d) Client pays \$____ for access to the firm's form bank

h. Multiple Matters

i. Examples:

- a) Bulk rate/ Volume discounts offered for multiple matters. See Paul Bonner & Deborah McMurray, "Alternative Fee Arrangements That Work for Clients," Law Practice, Vol. 40, No. 3, available at http://www.americanbar.org/publications/law_practice_magazine/2014/may-june/alternative-fee-arrangements-that-work-for-clients-and-lawyers.html (last visited September 2, 2014).
- b) Reduced rate for the right of first refusal to handle all contingency cases for a specific period of time. See Kirkland & Ellis, "Alternative Fee Arrangements and Litigation Finance", available at http://www.kirkland.com/files/afa_brochure.pdf (last visited September 2, 2014).

3. **Running the Business**

a. Billing

- i. Bills with flat fees do not usually include detailed time entries. Law firms may keep this in their records but it is not provided to client unless specifically requested.

ii. AFAs can still be billed monthly. See LexisNexis, “Business of Law Blog,” available at <http://businessoflawblog.com/2014/05/alternative-fee-arrangement/> (last visited September 2, 2014).

iii. Should lawyers bill flat fees on a *quantum meruit* basis as the work continues?

b. Business Questions to Think About

i. How much money will I make/lose if I take on this matter?

ii. Are the fees established by my competition too high or too low for my particular practice?

iii. Can I be more effective in choosing the tasks to be performed and delegating work to less expensive lawyers and staff?

iv. Can I be more efficient, provide the same quality of service, and still make money?

v. Should I stop handling this type of transaction completely?

vi. If I decide to take this matter on as a loss leader, then what must I do to leverage the credibility gained into higher profits on future matters?

vii. What kinds of transactions, clients or work produce the most/least profit?

See MARK A. ROBERTSON, ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS (2014) at 11.

c. Picking the Right Fee

i. Examine closed files and bills to determine how much time a matter took and what the cost was to the firm for the work involved. See MARK A. ROBERTSON, ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS (2014) at 32.

ii. *Law firm is forced to make an assessment of the following factors in deciding about AFAs:*

a) likelihood of success on the engagement;

- b) the amount of personnel, both professional and support staff likely to be required;
- c) the level of professional staff required, from junior to senior associate;
- d) the length of the engagement; and
- e) any unique or novel reasonable foreseeable issues that may arise.

See Jerome Kowalski, “Alternative Fee and Billing Arrangements: A Primer” available at <http://www.jdsupra.com/legalnews/alternative-fee-arrangements-a-guide-fo-57401/> (last visited September 2, 2014).

iii. *Think about the “value” to the client*

- a) How do you distinguish your perception of value from the client’s perception of value?

See MARK A. ROBERTSON, ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS (2014) at xiii.

- b) Examples of how clients perceive value:

1. Avoiding exposure to risk
2. A brilliant idea
3. Routine handling of client’s needs give client peace of mind
4. Counseling against unsound courses of action
5. Acceptance of responsibility
6. Lawyer’s ability to communicate clearly to help clients understand
7. Timely performance
8. High-level expertise and skill
9. Exclusivity or unavailability to others
10. Timely follow-up

11. Straight-forward approach

See MARK A. ROBERTSON, *ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS* (2014) at 3-5.

iv. *What is your cost to providing the legal service?*

a) Look at Overhead. In order to decide on the right billing structure for your law practice, you must first take a long hard look at your own overhead expenses including:

1. Office space
2. Office supplies
3. Professional expenses
4. Hardware
5. Taxes
6. Professional Dues
7. Personnel

See Sam Glover, “How Much it Really Costs to Start a Solo Practice” June 22, 2012 available at <http://lawyerist.com/44691/how-much-it-really-costs-to-start-a-law-firm/> (last visited September 2, 2014); FindLaw, “How Much Does it Cost to Start Your Own Law Firm?” available at <http://practice.findlaw.com/how-to-start-a-law-firm/how-much-does-it-cost-to-start-your-own-law-firm.html> (last visited September 2, 2014).

b) Variables /Uncertainties

Under Control of the Lawyer	Not Under Control of the Lawyer
Effectiveness of negotiating fee and payment arrangements	Client’s view of desired solution
Methods used to define the “problem”	Client’s reactions
View as to necessity for a “Cadillac” solution or a commercially acceptable solution	Actions of opposing counsel

Type of resources required to develop a solution	Court or administrative actions
Resources previously developed in similar matters	Resource availability and performance
Priority placed on matter solution	New, conflicting demands affecting priorities
Effectiveness of resource supervision	New facts and circumstances
Quality of resources used	Acts of God
Diligence in timely billing and collection follow-up	

See MARK A. ROBERTSON, ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS (2014) at 34.

v. *Flat Fees with Litigation*

- a) With litigation, flat fees may be charged for the different stages of litigation – the retainer agreement should clearly identify these stages. See generally PATRICK J. LAMB, ALTERNATIVE FEES FOR LITIGATORS AND THEIR CLIENTS (2014).

4. Making the Process More Streamlined and Efficient

a. Use of Checklists

- i. Lawyers have long used checklists, forms, brief banks and other methods to reuse work produce and enhance and develop improved documents. See MARK A. ROBERTSON, ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS (2014) at 51.
- ii. The book E-Myth Attorney and E-Myth Revisited does a nice job talking about the need for checklists in a business to make the processes fool-proof. See MICHAEL E. GERBER, ROBERT ARMSTRONG AND SANFORD FISH, “THE E-MYTH ATTORNEY: WHY MOST LEGAL PRACTICES DON’T WORK AND WHAT TO DO ABOUT IT” (2010).

b. Learn to Breakdown Common Transactions

- i. Pick a few simple transactions that you have done at your law practice. Let's think about forming a corporation:
 - a) Identify common documents
 1. Certificate of Incorporation
 2. Bylaws
 3. Initial Meetings Minutes for Incorporators , Shareholders and Directors
 4. Stock Certificates
 5. A tax ID application
 6. A State Initial Tax filing
 7. Corporate minute book and seal and
 8. Transmittal letters
 - b) Prepare standard forms with each variable
 - c) Review the common charges for preparing those documents
 - d) Determine what can be streamlined
 - e) Prepare a transaction plan for the incorporation
 - f) Establish your fixed fee

See Mark A. Robertson, *Alternative Fees for Business Lawyers and Their Clients* (2014) at 90.

- c. Use of Form Banks. There are various form bank that can be used to help the lawyer be more efficient. Examples:
 - i. HotDocs
 - ii. Blumberg Legal Forms
 - iii. MatMaster
 - iv. Blankrupter
 - v. Easy Trust
 - vi. Wealth-Docx
 - vii. Corporate Representation Service (prepares annual minutes and special meetings minutes, executes a corporate compliance check for clients for \$200 per years.

See MARK A. ROBERTSON, *ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS* (2014) at 51.

d. Use of Technology

- i. Think about where technology should or shouldn't be used.
- ii. Select what to automate
 - a) Identify discrete items to automate
- iii. Develop specific system
- iv. Determine pricing for services

See MARK A. ROBERTSON, ALTERNATIVE FEES FOR BUSINESS LAWYERS AND THEIR CLIENTS (2014) at 71.

5. **Ethical Considerations with AFAs**

6. **Trends with AFAs**

- a. Survey results in 2009 by *The American Lawyer*:
 - i. “Only 24% of the GCs and CLOs responding to the survey indicated that they paid all of their law firms by the billable hour. By comparison, 48% paid a flat fee for an entire matter, and 36% paid a flat fee for at least some stages of a matter.”
 - ii. “Among companies with annual revenues of \$1 billion or more, 60% said they used a flat fee for an entire matter, and 46% paid a flat fee for some stages of a matter. Only 12% paid firms solely under the traditional billable hour arrangement.”
 - iii. “Of the GCs and CLOs surveyed, 39% paid their outside firms more money under AFAs in 2009 than in 2008.”
 - iv. “Fifty-four percent GCs and CLOs said they initiated their AFAs, 18% said that they were initiated jointly, and only 3% said their law firms kicked off the conversation.”
 - v. “Half of those polled advised that they dropped at least one firm from their outside counsel lists in 2009, while 14% dropped four or more firms.”

See Jaffe PR, “Marketing Law Firm Value: Alternative Fee Arrangements,” available at <http://www.jaffepr.com/about-us/industry-insight/white-papers/marketing-law-firm-value-alternative-fee-arrangements> (last visited September 2, 2014).

II. ADDITIONAL ISSUES ON GETTING PAID

A. Picking the Right Clients

1. Spend time looking at your law practice.

- a. Who is your ideal client? Who is your client base?
- b. Who can afford your services and pay you?
- c. What segments (and sub-segments) in the food and agriculture industry are you serving (primarily)?
 - i. Farmers and ranchers
 - a) Cattle producers
 - b) Vegetable growers
 - c) Farmers that sell via direct marketing
 - d) Large-scale farms
 - ii. Agri-businesses
 - a) Small to mid-size agri-businesses
 - b) Agriculture technology businesses
 - iii. Food entrepreneurs
 - a) Cottage food operators
 - b) Food companies
 - iv. Food retail
 - a) Farm-to-table industry
 - b) Food trucks
 - c) Restaurants
- d. What do you offer those clients?

2. Describe your “ideal client” – what does this person read or do in his/her free time? What is his/her personality traits? See MICHAEL PORT, BOOK YOURSELF SOLID.
3. What legal services do you believe your ideal client wants?
4. Everything that you do from a marketing standpoint should be geared towards your ideal client. Think about the desired frequency, diversification of media platforms, and quality of content. See David Lorenzo, “Can Lawyers Really Choose Their Clients?” available at http://www.rainmakerlawyer.com/site/permalink/can_lawyers_really_choose_their_clients (last visited).
5. Some “red flags”
 - a. Client fired last attorney (or has fired several attorneys)
 - b. Litigious
 - c. Evasiveness
 - d. Desire to educate the lawyer on the law
 - e. Promise of additional work or contact
 - f. Client downplays their matter
 - g. Too much focus on fees
 - h. Unrealistic expectations
 - i. Rush jobs
 - j. Unreliable

See Allison C. Shields, “How to Avoid Bad Clients Before They Enter Your Practice” October 3, 2014 available at http://legalease.blogs.com/legal_ease_blog/2014/10/how-to-avoid-bad-clients-before-they-enter-your-practice.html (last visited October 5, 2014).

B. Client Interview

1. Spend some time getting to know the person or company before agreeing to represent them. See e.g., Kathy Cripps, “Choosing the Right Clients: Some Do’s and Don’ts,” available at <http://prfirms.org/voice/2011/%E2%80%9Cchoosing-the-right-clients-some-dos-and-donts%E2%80%9D> (last visited September 2, 2014).
2. Should you find out whether your client is litigious? Some suggest asking the following questions:
 - a. Ask if the potential client (“PC”) has worked with another law firm before contacting you.

- b. Ask if they have ever sued a law firm or lawyer before.
- c. Ask about his/her litigation history.
- d. Ask if the PC was turned away from other lawyers.

See Rob Diziki, “Choosing the Right Client” March 29, 2013 available at <http://www.prosightspecialty.com/solutions/lawyers-professional-liability/lawyers-pl-blog/choosing-the-right-client/#.VAYL-vldVIV> (last visited September 2, 2014).

3. Running credit checks on clients?

C. Client Expectations

1. **Some Pointers:**

- a. Under promise and over deliver
- b. Fire high maintenance clients that can never be satisfied
- c. Communicate clearly to clients regarding workload, timelines and fees
- d. Bill clearly
- e. Recognize recurring revenue
- f. Call clients just to “check in” without expecting anything
- g. Don’t bait and switch. Give clients the attorney time they expect

See Micah Buchdahl, “Managing Client Expectations,” LawPractice TODAY August 2011 available at http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/august11/managing_client_expectations.html (last visited October 5, 2014).

- h. Outline the process (stages beginning to end) so they clearly understand the direction

See Allison Shields, “Managing Clients’ Expectations,” Lawyerist July 19, 2012 available at <http://lawyerist.com/45544/managing-clients-expectations/> (last visited October 5, 2014).

- i. Don’t delay bad news
- j. Offer choices
- k. Finish strong on the case
- l. Be consistent

See Martha Newman, “4 Ways to Manage Client Expectations” Top Lawyer Coach, available

<http://toplawyercoach.com/2011/03/managing-client-expectations-legal-marketing/> (last visited October 5, 2014).

D. Retainer Agreement

1. *Interest*
2. *Payment security*

E. Client Communications

F. Billing

1. *Your Bills = Your Brand*
2. *Timing*
3. *Payment Methods*
4. *Method that Bills are Sent*

G. Collections

1. *Telephone Calls*
 - a. When should a lawyer call a client to discuss the bill to see if the client has a problem with the bill? Some suggest that this should be done if a bill is unpaid for 45 to 60 days. See Lawyers Mutual, “Attorney-Client Relationship Toolkit” available at http://files.lm2014.gethifi.com/risk-management-resources/risk-management-handouts/attorney-client-relationships/Attorney-Client_Relationships.pdf (last visited October 5, 2014).
2. *Liens*
3. *Alternative Dispute Resolution*
4. *Litigation*
5. *Firing Clients*

III. SURVEY RESULTS

A. June 2013 Survey

Rincker Law, PLLC conducted an online survey titled “**Use of Lawyers for Agriculture Producers and Agri-Businesses**” via Constant on June 8, 2013. There were 70 participants in the short survey over a four-day period advertised via social media platforms (e.g., Facebook, Twitter, Rincker Law, PLLC’s blog) and via email to New York Agri-Women, National Cattlemen’s Beef Association’s Young Producers’ Counsel, and selected agriculture clients. The results are interesting and tell a lot about what farmers and agri-businesses desire from agriculture law professionals.

The survey was completely anonymous. Rincker Law, PLLC asked the participants eight simple questions. On each question, there was about one nonresponse. The participants were able to leave comments after each question. This article describes the data and lessons from the survey so that agriculture lawyers can better serve the community.

Like any good survey, it is important to know the **demographic**. Of the 70 participants, 45 (64.2%) were involved in agriculture production (including a dairy farm in Canada and a vineyard). Twelve (17.1%) participants identified themselves as an agri-business. Two (2.8%) participants identified themselves as the food and beverage industry. Ten (14.2%) participants identified themselves as “other.” From reading the comments, the majority of the “other” participants were involved in extension education, state government and agricultural not-for-profit organizations.

When asked “[h]ow many lawyers have you worked with over the last 2 years?” data are:

- 18 participants (25.7%) had not worked with a lawyer;
- 23 survey takers (32.8%) had worked with one lawyer;
- 22 respondents (31.4%) had worked with two to three lawyers; and
- Six people (8.5%) had worked with 4 or more lawyers.

The respondents who left comments after this question shared the instances when attorneys were hired such as performing succession/estate planning, drafting a gas lease, solar farm development, working on a farm/ranch lease, doing a real estate transaction, and a debt consultation.

In response to this question, one survey taker noted that out of the “5 [lawyers] only 2 knew the law better than myself.” This highlights the fact that the lawyers should better educate the agriculture community on the complexity of the legal system and the requisite learning curve with certain legal questions that a farmer or agri-business person has. Furthermore, this also demonstrates the frustration that many in the agriculture community have with their specific

legal issues. For example, few employment attorneys understand the nuances affecting farm labor. Another example: few agriculture attorneys have a strong grasp of federal farm programs and how a farm can structure its business to maximize payments (i.e., federal farm payment planning). Because agriculture law touches upon nearly every area of law, it is challenging for any attorney to have an in-depth understanding in each area; yet, that is what the agriculture community sometimes expects.

In the next question, survey participants were asked “**[if you needed a lawyer, which of the following search mechanisms would you most likely utilize?]”** The statistics are as follows:

- 31 people (44.2%) said they would ask someone they trust for a referral;
- 29 participants (41.4%) said they would use an attorney they already know;
- Only four survey takers (5.7%) said they would ask a food or agriculture organization for a referral;
- Two participants (2.8%) said they would do a Google search; and
- Only one person said that he/she would use an attorney search website such as Avvo, Lawyer.com, Justia, etc.

No participants said they would use social media to locate an agriculture lawyer, which is interesting since this survey was primarily advertised via social media. In other words, even though farmers, agri-businesses and food entrepreneurs use social media, it is not the desired search device when looking for a trusted professional. Finally, two participants said they would use another mechanism not listed in the answer choices.

Here were some of the selected comments:

- “I met one of the lawyers that I have worked with this year because he made his passion for food evident to me while shopping in my farm stand store and the other because he and I share the same graphic designer who is also passionate about good, clean food.”
- I “[u]se a firm that I have personally met or have heard speak.”
- “Combination. i.e., asking someone I trust for a referral, ask a food or ag organization for a referral & search Google.”
- “Find a lawyer that’s a specialist in the matter in question.”
- “Asked a professional business person who has reason to refer their clients to legal advisors.”

In sum, approximately 90% of the participants would choose an attorney they know or were referred by someone they trust. These referral sources are likely other members of the agriculture community, accountants, financial advisors, extension agents, and other attorneys. Like the client base, the best agriculture law practices are farmed with patience by cultivating relationships with the agriculture community and their trusted advisors.

When asked “[w]hat is the most important factor when deciding on a lawyer?”, 44 participants (62.8%) said the “it is someone I trust to properly deal with my legal issues.” In second place, 19 participants (27.1%) said that “it is someone that understands my food and agricultural business.” Tied for third place with only two votes (2.8% each) were (1) “it is someone I like and want to work with, (2) and “other.” Only one participant each picked “that it is someone near where I live” and “that it is someone who is affordable.” No survey participants selected for “someone who is available to help me after business hours (nights and/or weekends).”

Here were some of the responses:

- “All of these are very important factors. 5 years ago I would have said "someone I trust" as the most important factor. But, how would I know if I really would "trust" someone when initially selecting my lawyer? After working with 2 different lawyers pretty frequently over the past few years, I feel like someone you like AND trust is the most important factor.”
- “I needed to be understood, treated fairly, treated respectfully. Needed someone locally and affordable. Needed someone I could trust and respect. Needed someone to discuss my circumstances and issues.”
- “Trust would include at least a basic understanding of animal agriculture.”
- “Reputation.”
- “Ability and competence are critical, as is knowledge of the applicable statutes.”
- “Combination. i.e. 1. Trust 2. Someone who understands ag 3. Someone who is affordable (this point is overarching).”
- “We must be able to communicate our thoughts to each other with efficiency.”

In a future survey, it would be helpful to ascertain what makes a client “trust” an attorney with their legal problem.

The next question in the online survey was “[w]hat is your primary legal need?” Interestingly, 33 respondents (47.1%) reported that general business law (e.g., business entities, contracts, leases, trademarks) was their primary need. In second place, ten participants (14.2%) indicated that their No. 1 legal need was succession and estate planning (“The next generation has taken over the farming operation”). There were six votes (8.5%) for litigation and three

responses (4.2%) for “permits & licenses with government authorities.” Only two participants (2.8%) stated their primary legal need was land use and zoning while one respondent each selected for environmental compliance, debt collections and insurance disputes. No survey participants opted for “food labeling” as their primary legal need.

Ten participants selected “Other”, which included some of the following comments:

- “Legislation”
- “Pipeline right-of-way issues.”
- “Non-profit management advice.”
- “Water issues.”
- “1031 exchanges, fence problems with neighbors. Making them aware of the ‘right hand’ rule.”

The following two comments demonstrate the broad spectrum of legal problems affecting the agriculture community:

- “It could be all of the above.”
- “Nearly all options listed here. I prefer working with someone that is familiar with all my legal needs or at least has an associate in house that is more focused on particular areas.”

It is impracticable for most small law firms to have “an associate in house” to serve the needs of every practice area affecting agriculture production and business; however, the food and agriculture law community should strive to build stronger coalitions with agriculture attorneys who concentrate in other practice areas other than their own.

Importantly, I asked the survey takers “[w]hich of the following payment methods would you prefer to use with your lawyer?” There was an overwhelming desire for flat fees (41 votes representing 58.5% of the poll). There were only seventeen responses (24.2%) for the traditional billable hour. Four participants (5.7%) selected for a “subscription service (monthly payment for X amount of monthly or annual service).” Six voters selected other/contingency.

Some comments were as follows:

- “We often have to work with lawyers who can offer *pro bono* support.”
- “I need to have billing on a sliding scale, monthly payment arrangement on an as needed basis.”

- “In my husband’s estate, [the lawyers] bill by the hour and [the] extensions of tax filings are killing me. [I]t has been two years and I am still getting \$500 bills every month for one thing or another.”
- “. . . [I]t’s pretty hard to even find someone, much less afford the \$1500 retainer he asked for.”

It would behoove agriculture lawyers to implement more predictable alternative billing structures for the agriculture community such as flat fees, range/maximum fees, subscription services, and unbundled legal services for those Do-It-Yourselfers. Retainers for subscription services should be narrowly tailored to clearly explain what is and what is not included on a monthly or annual basis. Retainers for flat fee services to allow additional billing if the transaction becomes significantly more complicated than originally anticipated.

Packages for flat fee services can be utilized cooperatively with other attorneys with complementary practice areas on a matter-by-matter basis or an of counsel relationship. Think outside the box: flat fee packages offered to agriculture clients can reach outside the attorneys normal practice areas. To illustrate, if you are an agriculture lawyer helping setup a farm, a flat fee package could include setting up the business structure(s), applying for a trademark, drafting a farm lease, setting up an employee handbook, and drafting the Terms of Use for the farm’s website. Perhaps this lawyer will work with an employment lawyer on the employee handbook portion and an Internet/technology lawyer for the Terms of Use element of the flat fee farm set-up package. There are limitless possibilities for flat fee structures by developing thoughtful coalitions with other attorneys.

Solo practitioners and small firms typically have less overhead and can offer reduced or “low bono” fees for indigent farmers or ranchers. However, these lawyers oftentimes have less secretarial and paralegal support to help reduce the attorney time required to manage these cases. The agriculture law community needs to develop more “virtual legal assistants” and “virtual paralegals” that have a proficiency in agriculture law matters to better assist agriculture lawyers in solo and small firm settings.

The next question posed to survey participants was “[w]hat is your biggest concern with using an attorney?” The responses here were pretty evenly distributed among the top three choices. Coming in first place with 19 votes (27.1%) was “[t]hat an attorney won’t add value- he/she will overcomplicate things.” In second place with 16 selections (22.8%) was “[t]hat my attorney won’t fully understand my food and agriculture business.” Not far behind with 15 responses (21.4%) was “[t]hat my attorney won’t be worth the legal fees.” Ten people (14.2%) said “[t]hat a good lawyer will be too busy to give my business the time and attention that I need.” Five participants (7.1%) choose “other” while two survey takers selected “[t]hat a lawyer will just try to sell me more legal products that my business doesn’t need.”

Survey respondents left the following comments:

- “It has been my experience in practice that the lawyer charges me for every minute they talk to me, even when they are returning my call to tell me they haven’t done the work, or

made a mistake and need to file additional papers, or that government has not gotten back to them which is why they have not returned my calls. And it turned out once that after \$3K in legal fees and a year of waiting I got the job done quicker and for free after I fired the attorney and took all my files home.”

- “That the attorney be understanding, provide fair treatment, be unbiased as far as political preference. That the lawyer be competent, knowledgeable about the difference in state and Federal law and know that Federal supersedes state laws. That the lawyer have time to discuss my circumstances and issues. That the lawyer not complicate my case and not take advantage of my circumstances. That he choose judges that use the law fairly and not by his/her own interpretations.”
- “I seem to never be 100% sure we got the issue at hand resolved properly, so it won't be challenged in the future. It seems very difficult to get a straight answer from a lawyer. . . many times after asking a question, I am more confused than before I asked the question.”
- “That my case will not be properly managed and/or the services provided will be inadequate.”
- “It takes a special type of attorney to truly understand what a farmer deals with on a daily basis. It is too easy to forget or overlook the fact that the farm often times also is the farmer’s home. This is a bit of an issue sometimes. They also need to realize that most farmers can't always just adjust their price to recover the cost of a good attorney.”
- “Lawyers are "untrustworthy" - which is a typical view of most farmers & ranchers.”
- The final respondent complained that her lawyer was not listening to her estate planning concerns and stated that her “husband would have wanted it this way.”

Put simply, the agriculture community does not believe that lawyers are worth the legal fees. Agriculture attorneys need to do a better job educating clients and the community about potential harm to the food and ag business if legal issues are not properly dealt with.

The final survey question was open-ended. It was “**[h]ow can the legal community better serve you?**” Twenty-three of the respondents answered this question. Some of the responses were as follows:

- “Be more open to answering my questions.”
- “Have a more reasonable fee structure for farmers.”
- “Realize the long term ramifications.”
- “Be more familiar with the agriculture business.”

- “Be available when I need a lawyer.”
- “Keep up to date on agriculture/food issues.”
- “Help me to learn local and state law.”
- “Get out in the field and get their hands dirty.”
- “Keep it simple.”
- “Listen and understand; if you don’t [understand then] ask questions.”
- “Unwarranted motion practice should be eliminated.”
- “Have attorneys that specialize in specific aspects.”
- “Realize that a lot of farmers find the fees too hi [sic].”
- “To better understand agricultural issues in an ag [operation].”
- “Give value. And knowledge.”
- “Stay current/reasonable pricing.”
- “Try to keep everything more cooperative.”
- “Quit filing frivolous law suits just to get rich.”
- “General assistance to help me do it myself.”

To summarize, there are a few take home points from this survey:

- When searching for an attorney, farmers, ranchers, agri-business owners, and food entrepreneurs will talk to someone they know or will be referred by someone they trust.
- Agriculture clients primarily seek sold business law counsel for their farm, ranch or agri-business; however, they also have a myriad of other potential legal issues that affect their operation that they need counsel on from time to time.
- Agriculture clients seek attorneys/law firms that can handle the full breadth of their needs. Agriculture attorneys in solo and small firm settings can serve these diverse needs through cooperative arrangements with other food and agriculture attorneys that have concentrations in specific areas.

- Agriculture clients want reasonable, predictable fee structures. When possible, agriculture lawyers should consider alternative billing methods such as flat fees, capped ranges for billable hours, sliding scale fees for financial hardships, subscription services, or hybrid arrangements.
- Agriculture clients do not want to be oversold on legal products. They need to be educated on the value of the legal service.
- Although agriculture clients hope to work with a lawyer who understands the food and agriculture industry with reasonable fees, ultimately they will select a lawyer who they trust to handle their legal issue.
- The agriculture law community should focus more on concerted marketing in the industry.

This was a short survey taken over a long weekend advertised primarily through social media. A more sophisticated survey might be a valuable learning tool for the agriculture law community in the future.

B. August 2014 Survey

Rincker Law, PLLC conducted an online survey titled “Use of Food and Agriculture Lawyers” via Constant in July – August 2014. There were 13 participants in the short survey advertised via social media platforms (e.g., Facebook, Twitter, Rincker Law, PLLC’s blog). The survey was completely anonymous. After each question, survey takers were allowed to post a comment. The answers to the survey were as follows:

1. Q1: Which of the following best describes you?

a. Results

- Agriculture producer (farmer/rancher) – 10 (almost 80%)
- Agri-business – 2
- Government employee – 1

b. Comments

- Direct sale to public so could be considered food entrepreneur
- Full time ag business consultant, part time farmer.

2. Q2: In the last five years, how many attorneys have you worked with?

a. Results

- i. Zero - 1
- ii. One - 4
- iii. Two - 6
- iv. Three to Four - 1
- v. Five to Seven - 1

b. Comments

- i. My wife is an ag attorney.
- ii. Asked for info on finding someone closer

3. **Q3: In the last five years, what types of matters have you hired an attorney for? (Pick all that apply)**

a. Results

- i. Business formations and compliance (including partnership agreements) - 3
- ii. Contracts (including leases and confidentiality agreements) - 5
- iii. Estate and succession planning - 6
- iv. Intellectual property (e.g., trademarks, copyrights, patents) - 2
- v. Debt collections - 0
- vi. Direct farm marketing issues (i.e., selling food products direct to the consumer) - 0
- vii. Land use and zoning -3
- viii. Tax law (including 1031 exchanges) - 2
- ix. Insurance – 0
- x. Real estate transactions/ easements/ property law – 7
- xi. Environmental law/ water law – 0
- xii. Employment and labor law – 2
- xiii. Tort Law (including Right-to-Farm law/ nuisance suits) – 2
- xiv. Bankruptcy (including Farm Bankruptcy) – 0
- xv. Foreclosure- 0
- xvi. Animal law/ animal welfare law/ slaughter law – 0
- xvii. Food labeling/ food safety- 0
- xviii. Government permits- 0
- xix. Litigation- 3
- xx. Other – 1

b. Comments

i. Would have hired but couldn't get an attorney to call me back!

ii. Problem finding lawyers with agriculture experience

4. **Q4: As your food and agriculture business changes, which of the following do you foresee hiring an attorney for assistance? (Pick all that apply.)**

a. Results

- i. Business formations and compliance (including partnership agreements) – 7
- ii. Contracts (including leases and confidentiality agreements) - 6
- iii. Estate and succession planning - 7
- iv. Intellectual property (e.g., trademarks, copyrights, patents) - 2
- v. Debt collections - 0
- vi. Direct farm marketing issues (i.e., selling food products direct to the consumer) - 2
- vii. Land use and zoning - 5
- viii. Tax law (including 1031 exchanges) - 3
- ix. Insurance – 0
- x. Real estate transactions/ easements/ property law – 6
- xi. Environmental law/ Water Law – 3
- xii. Employment and labor law – 4
- xiii. Tort Law (including Right-to-Farm law/ nuisance suits) – 3
- xiv. Bankruptcy (including Farm Bankruptcy) – 0
- xv. Foreclosure - 0
- xvi. Animal law/ animal welfare law/ slaughter law – 2
- xvii. Food labeling/ food safety - 1
- xviii. Government permits - 5
- xix. Litigation - 1
- xx. Other – 0

5. **Q5: Do you budget for legal fees in your food and agriculture business?**

a. Results

- i. Yes - 2
- ii. Sometimes - 5

- iii. No - 5
- iv. Other - 1

b. Comments

- i. Need to do more so – affording is the big setback.

6. **Q6: When choosing an attorney, what are the most important factors?**

a. Results (from most important to least important)

- i. Expertise in subject matter
- ii. Trust
- iii. Reputation
- iv. Customer Service
- v. Knowledge of the food/agriculture industry
- vi. Cost/price
- vii. Geographic location
- viii. Other factors
- ix. How many attorneys are in the firm

b. Comments

- i. Have used the same law firm for the past 45 years
- ii. Past success

7. **Q7: For the type of legal services needed, what type of billing do you prefer?**

a. Results

- i. Billable Hour – 4
- ii. Flat Fee – 5
- iii. Hybrid (billable hour within range, lower billable hours plus contingency) – 4
- iv. Contingency – 0
- v. Subscription – 0

8. **Q8: What questions do you have when a lawyer quotes you an hourly rate?**

- a. “What does it cover? Is it higher to go to court? How much are filing fees?”

- b. “I rarely ever discuss the hourly rate. I am making my selection based on who I think will do the best job for me. I feel if the job is done right the first time then it will be the most economical.”
- c. “Hours needed to complete, especially for items where they can use previously written contracts, bylaws, etc. that can easily be cut and pasted into. I don't mind paying for a reasonable amount of time, but billing several hours for something I know you've used before and just "tweaked" [sic] irritates me. My attorney passed away and the new attorney from the same firm did just that, however he did later adjust the hours he billed.”
- d. “How will their time be accounted for.”
- e. “I never haggle price.”
- f. “My attorney likes to duck hunt so when he calls I try to find him some ducks on our land to hunt.”
- g. “How many hours does what I'm asking typically take?”

9. Q9: What does an attorney's hourly rate tell you about that lawyer?

- a. “Experience, value of their time.”
- b. “Hopefully that they can make a profit, know what they're doing and representing themselves honestly.”
- c. “I would say it conveys experience and demand. The higher the rate I feel that attorney is more in demand.”
- d. “Their billing rate. I hope they type and talk quick. :)”
- e. “How highly they think of themselves, what their fee is worth to them...may not be worth that to me?”
- f. “Anymore, not much. It used to be how good they were. Now it's how good they think they are.”

10. Q10: What concerns do you have about flat-fee billing?

- a. “Are they over-charging me for the time my case is actually requiring? Are they going to avoid my phone calls because they don't have time/don't want to talk to me and answer my questions? Am I getting my attorney's full attention on my case?”

- b. "Understanding what it covers."
 - c. "My concern with flat fee would be that both parties fully understand the scope of the work needed."
 - d. "I feel more comfortable with flat rate for items that are routine, such as corporation formation, real estate contract, collections letter. Then I know exact cost and not concerned over a little billing, such as to read or respond to email, or to setup an appointment. I understand things, such as litigation cannot be flat rate, as they are each different."
 - e. "Services may not be provided as diligently as they might be if billed hourly."
11. **Q11: How interested would you be in a "subscription service" that you can budget for and receive a certain amount of monthly, quarterly or annual services?**
- a. Scores ranged from 1 ("no interest") to 3 ("indifferent").
 - b. Comment: This would really help if it went towards "if needed" billing. Seldom need attorney but would like to have an ag familiar one if needed.
12. **Q12: What are the most important things to you with an attorney's retainer agreement?**
- a. "That he/she is not going to have a conflict of interest with my matters."
 - b. "Honestly represented. Used effectively."
 - c. "My concern is that it be easy to read and I understand the terms of our engagement..."
 - d. "Knowing they stand behind me ready to work if the need arises."
 - e. "Services and actions covered in detail."
 - f. "Definitive beginning, end, expectations."
13. **Q13: How do you prefer receiving bills from your attorney?**
- a. Results:

- i. Email only – 0
- ii. Mail only – 9
- iii. Email and Mail – 3

14. **Q14: What methods do you use to pay your attorney?**

a. Results:

- i. Cash – 2
- ii. Check/Money Order – 11
- iii. Credit Card – 0
- iv. Exchange for service or food/farm products – 0
- v. PayPal, Google Checkout, etc. – 1

15. **Q15: What are your biggest frustrations with the way food and agriculture attorneys bill?**

- a. “It hasn't gotten that far - finding an agriculture friendly attorney is #1 step. If I don't see/read ag experience I keep looking.”
- b. “Small 5 minute billing to read emails, respond, schedule or reschedule appts [sic], open snail mail, etc.”
- c. “Slow to bill. Sometimes more retainer than what is needed and too much time elapses ‘til I get the difference back.”

16. **Q16: How can the legal community better serve the food and agriculture industry?**

- a. “Be visible! May be 'small jobs' but are important and will be paid. It might be a small \$100 job to an attorney but it's a couple days' work to get that \$100 - would like it done right, fairly. Looked for an attorney to handle drawing up a transfer paper - I can do it but want to insure it's all legal. Cannot get an attorney to return my call... so will muddle through on my own. If they're not there when needed what good is it? We all need to make a living but don't be so focused on money that y'all become oblivious to how much time it takes me the customer to get that money that's so casual to you.”
- b. “Newsletters with examples, perhaps?”
- c. “Communicate more effectively through mediums utilized by the Ag/farming/ranching community.”
- d. “Understand farming, cows, water rights. A background in it is a HUGE bonus. There are very few that have hands on knowledge of

our industry. Instead of the usual CLE cocktail parties, swap some of those hours with farm, ranch, packing house tours or even a beef short course at an Ag school, or a leading beef, cotton, breeders, rice, commodity, etc. association convention attendance.”