

State Bar of Michigan
The Elder Law and Advocacy Section

Value-Billing Will Improve Your Bottom Line

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About the Presenter

Timothy L. Takacs is in private practice in Hendersonville, Tennessee, limiting his practice exclusively to elder law. He is a member of the National Academy of Elder Law Attorneys (NAELA) and has been certified by the National Elder Law Foundation as a Certified Elder Law Attorney and by the State of Tennessee as an Elder Law Specialist. Tim was the first chairperson of the Tennessee Bar Association’s Elder Law section.

Tim Takacs is a charter member of the Special Needs Alliance, LLC, a network of the country’s leading disability lawyers. In 2000 he founded The First State of Tennessee Pooled Trust, which is Tennessee’s first “pooled trust.” He is a member of or serves on the board of a number of senior services organizations.

Tim Takacs is the author of *Elder Law Practice in Tennessee* (LEXIS Law Publishing, 1998), a treatise on elder law written for Tennessee attorneys. He is also the founding editor and now co-authors, with his colleagues Robert B. Fleming, CELA, and Prof. Rebecca C. Morgan, *The NAELA E-Bulletin*, a weekly e-mail newsletter published by NAELA.

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Billing Methods

Some time ago I began collecting email messages (from the NAELA listserv and elsewhere) about how, and how much, elder law attorneys charge for their work. Several experienced elder law attorneys shared their information, and I reproduce three messages below, removing the names (and edited slightly for clarity and minimizing redundancy).

Attorney A: We charge a \$250 consultation fee for a 1 hour consultation (actual time with the family has been averaging 1 1/2 hours) to determine whether we can help the family. We provide the family with a 13-point list of items to bring to the meeting and a 4-page questionnaire to be completed before the meeting. We make some calculations to determine how much we can save the family and then quote (generally) a flat fee of \$2,500 for a report/plan detailing how to achieve the savings. Appointments - are generally scheduled 2 to 3 weeks out (earliest times available). Almost all of the clients are referrals from prior clients who have protected significant dollar amounts. Less than 5% do not schedule an initial consultation because of the \$250 fee. We also charge flat fees for additional work (powers of attorney, wills, etc) in addition to the plan.

Attorney B: This has been an evolutionary process for me. I believe in flat fee billing for several reasons, but usually with estate planning I am able to meet with a client and have a no-fee consultation. This is not true in Medicaid planning, because ideas are often executable by the client, and the half a loaf theory, for example, could be revealed in the initial meeting for sales purposes, for example, and used by the client for free.

I split my Medicaid billing into three phases.

First is the initial consultation which is hourly, and I include a planning memorandum which outlines the law and my recommendations based on the particular facts of the case.

In the planning letter I give two flat fee quotes. The first is for implementation of the plan (estate planning docs, deeds, trusts, dealing with brokers, dealing with doctors if the child caretaker exception is being used, etc. etc.). The second is for the Medicaid application process itself, including a separate quote for an appeal if we are attempting to increase the spousal resource allowance.

I find that this is helpful because many times a plan can be implemented, and no Medicaid application ever needs to be filed because of an intervening death, and therefore the client does not have to pay for it.

I do not like the idea of charging based on the amount of money "saved" or the size of the estate. If I do transfers with three year lookback planning, it does not really matter whether I have a client with \$1 million or \$400,000, (other than maybe some gift/estate tax advice). I think that there are also questions as to how much you actually "saved" a person by planning. What if they die the week after you finish? How much did you "save" them?

I don't have too many people balk at Medicaid planning fees. Some may squirm a little, but I usually can put it in perspective for them with the anticipated results. It is a very rare occasion when a client says that they will not meet with me because I charge for the initial consultation, either. I have only had one client not agree to have me prepare a planning memorandum, so that is rare too.

I used my experience to set the value of my services based on experience and time it takes to work through the process. I review them occasionally to make sure I am not losing money.

Attorney C: I do my representation in phases.

I do a first meeting except I give it away - no charge. But I try to limit my personal time to about 45 minutes to 60 minutes. The client is told 30 minutes so they realize I give more than

they expect.

At the meeting I have the basic facts and tell them the problems and how I can help them save \$\$\$ and how I can help with the Medicaid problems. I tell them I do matters in phases because I cannot tell at this time what all the problems and solutions will be. I tell them I am not their attorney. I give them the letter with intake forms and tell them if they want to hire me, fill out the forms and make copies for me of all the documents. Bring to the office with the check and I know I am hired.

Phase I is the minimum of \$2,850 which I described earlier. It is a minimum because I charge an additional \$250 for each piece of real estate. If it is a 2nd marriage with children by prior marriages, the minimum fee is \$3,750.

Phase I is through the planning stage. I tell them that at Phase One I will be advising them what to do and what they need whether or not they hire me for anything else. At the end of Phase One, I then quote fees for additional work. I do not break out each item or fee, but as an example:

A set of power of attorney documents.

A will which will preserve the Medicaid benefits of the Institutionalized spouse if the CS dies first.

Helping to gross up.

Preparing and going with them to file Medicaid application and face to face interview, which I never let my clients do alone if anything can go wrong. If a married couple, the first application is for the resource assessment.

If married couple, then help with spend down to or spend the institutionalized spouse's share.

If married couple, then after qualified prepare 2nd Medicaid application to show now qualified and go back to DHS with the "now he is qualified" application. Monitor the Department of Human Services and the patient copayment, supply additional information, etc.

This does not include fair hearing.

For a married couple, the additional fee after Phase One: usually \$6,000 to \$12,500, average about \$7,500 to \$10,000.

If a single person, then total fees are usually \$2,850 for Phase One; for Phases Two and Three about \$6,000.

I base my flat fee quotes on:

Set of powers of attorney \$800. This includes counseling, preparation, execution of 4 sets of documents, with usually 4 originals of each document.

Will with special needs trust for spouse and grandchildren's trust for contingent beneficiaries \$1,500.

Deeds: About \$300 each.

Medicaid applications \$2,500 each (Up from \$2,000 each last year. Our time records showed we were losing money on applications). Most of this work is by legal assistants and associate attorney. I usually go to DHS with the client.

Helping with gross up \$500 to \$1,000.

Helping with spend down \$500 to \$1,000.

Helping with nursing home issues and/or care plan meetings \$500 to \$1,000.

Another \$1,000 to \$2,000 for problems/situations not planned for, which nearly always happens.

I always emphasize the problems and the benefits I am providing. I counsel extensively about everything. A few weeks ago I had 90 different things on my checklist to talk with clients about

at the first Phase One meeting. Make a list, you will be surprised at all the matters to fully counsel the clients.

I usually get Phases 2 & 3 up front, but if grossing up with a mortgage, sometimes from the mortgage. I tell my clients I do not like to send bills and I know they do not want to receive bills. Client wants to know what it costs, flat fee. This is more important than the amount. They know if I am saving them \$50,000, then the fee is a good investment, not an expense or a cost.

Unit- or Task-Based Billing

Each of these attorneys uses a form of what we might call “unit billing” or “task-based” billing. Attorneys B and C essentially breaks down their tasks into “phases,” and, for Attorney C, the tasks associated with each phase are broken down in greater detail. The Uniform Task Based Management System (UTBMS) was co-developed in 1995 by the American Bar Association, American Corporate Counsel Association, and PriceWaterhouseCooper in an effort to standardize billing procedures and practices by America's top law firms. In practice, the UTBMS is a budgeting and billing system that provides clients and law firms with meaningful cost information on legal services. The system enables lawyers to budget and bill by task, helping both the client and his lawyers to understand, manage and conduct matters. This system is particularly helpful to clients wishing to build a clear picture of their use of legal services. Used extensively by the insurance claims industry, uniform task-based billing streamlines the billing process for litigation. Insurance claim auditors can review how much time and expertise has been spent on a litigated matter for each billing period by phase of litigation and task. These figures can then be compared to the pre-established budget to help ensure the budget for the litigation is on track.

For example, Stephen M. Voltz has published a sample flat-fee, task-based schedule for litigation. He breaks down litigation into component tasks and assigns a set fee to each task. I've included Voltz's table of tasks and fees at the end of this paper.

For an elder law or Medicaid planning practice, a similarly detailed table could be created; however, breaking down the components of a Medicaid planning case in such extraordinary detail is not likely to be helpful to lawyers or their clients. Unlike litigation, many if not most Medicaid planning cases follow the same path, which we will break down as follows:

1. Initial case assessment
2. Development of the Plan
3. Implementation of the Plan
4. Application for Medicaid

A fee agreement based on a task-based system in a Medicaid case might therefore look something like this:

Sample Task-Based Fee Agreement in Medicaid Case

1. Scope of Engagement

Institutionalized Person presently resides at Nursing Home in City/State. Institutionalized Person is not now receiving Medicaid nursing home benefits. Institutionalized Person is not married/is married to Community Spouse.

The purpose of the representation is to enable Institutionalized Person to qualify for Medicaid nursing home benefits.

Legal services to be provided:

- Assess client's needs for Medicaid planning and other legal services
- Draft client documents

- Develop Plan for qualifying for Medicaid nursing home benefits
- Assist client in implementation of Medicaid Plan
- Assist client in making application of Medicaid nursing home benefits

2. Excluded from the Engagement

Legal services not to be provided:

- Seek guardianship for Institutionalized Person
- Probate and estate administration
- Advice and litigation involving nursing home care issues and Medicare benefits
- Preparation and filing of tax returns
- Appeals or litigation beyond the initial Medicaid application
- Estate tax planning

3. Attorney’s Fee, Costs and Expenses

The fee for our services is payable as follows:

Initial Case Assessment

- Review client documents
- Review client workbook information
- Advise concerning additional information needed to make initial case assessment
- Initial conference with client/family members
- Advise on what legal documents are necessary and whether Medicaid asset protection planning is necessary or advisable

Total fee for above services: \$_____

Basic Documents

- Community spouse’s will with special needs trust for institutionalized spouse
- Durable Power of Attorney
- Durable Power of Attorney for Health Care
- Title Transfers from institutionalized spouse to community spouse

Total fee for above services: \$_____

Develop Medicaid Plan

- Research applicable law and rules
- Subsequent conferences with client/family members as needed
- Develop additional information as needed
- Draft Medicaid Plan

Total fee for above services: \$_____

Implement Medicaid Plan

- Advise on strategies in multiple conferences with client/family members
- Draft asset transfer documents and any other documents necessary to implement Plan
- Monitor “spend-down”
- Assist in implementation of Plan selected
- Advise as to “when to apply for Medicaid”

Total fee for above services: \$_____

Application for Medicaid Nursing Home Benefits

- Prepare and attend Medicaid spousal resource assessment at Department of Human Services
- Prepare and file written Medicaid application
- Prepare client or client representative for Medicaid intake interview

- Accompany client or client representative to Medicaid intake interview
- Follow up on Medicaid application interview, supplying additional information, advising client on copayment amount and spousal income allocations

Total fee for above services: \$_____

Other Services

For services not directly related to the unit-fee services described above, you agree to pay \$_____/hour, toward which you agree to deposit in our escrow account \$_____. In addition, you agree to pay all reasonable and necessary expenses incurred.

[signature lines, etc.]

Value-Based Billing

We now need to add a value-based billing aspect to the unit- or task-based billing model that we have been describing.

The task-based billing methods described by the three attorneys above all contain at least one flaw: they do not account for the value of the firm's services to the client. (I'll explain the second flaw later in this paper.) For Attorney C above, the most detailed billing method, the fee structure seems to be too inflexible to account for the value of the firm's services to the client. Will the client really spend \$12,000 to save \$50,000? If the client balks, will Attorney C reduce the firm's fee? If so, by how much? And using what criteria? Would the client and attorney negotiations result in cutting or reducing services? For example, Attorney C might reduce his fee for Phase Three by \$1000 by having his legal assistant attend the DHS Medicaid application interview instead of going himself.

As we saw in the litigation model of task-based billing, attorney Stephen Voltz broke out the components of a typical lawsuit and set a fee for each task. Not every lawsuit includes a venue motion, but for those that do, Voltz would charge \$6000 for a claim under \$150,000. If the claim exceeds \$150,000, he charges more for, presumably, the same amount and time expended on the particular task. It should be apparent by now why Voltz would charge more: there is more money at stake, even though the legal issue might be the same. The value of the lawyer's services for the task is not based on the amount of time expended on the task – that is, the time-billing method (hourly billing). Attorneys A, B, and C at least have gotten away from that seriously flawed billing method.¹

Transitioning to Value-Billing

To use value-billing successfully, your law firm must have a complete understanding of its practice. You must be able to quickly and accurately estimate: (1) the resources it will take the firm to accomplish a given task, including the time expended and the staffing required; and (2) the benefit to the prospective client. Utilizing these two variables, a law firm can determine whether a mutually acceptable basis exists for doing business. If it does, your law firm should continue negotiations to close the sale. If it doesn't, your law firm should move on to the next prospective client. When estimating resources and value, take the following factors into consideration:

¹ Gill Wagner and I expose the flaws of the time-billing method in an article we wrote for the Technolawyer Community. See "Value Billing: Its Time Has Come," September 11, 1998. The article has appeared in print and on the Web several places since then; it is on my Web site at <http://www.tn-elderlaw.com/valuebilling.html>. The next section of this paper is drawn from that article.

Staffing

Estimate the number of persons in your firm needed to handle the matter and the amount of time they will spend on the matter. Determine whether any of these staff members possess special expertise (foreign language, prior experience) that will make them appear more valuable to the client.

Competition

Determine what other law firms would charge for the matter. If a competitor's price is lower, either match price or develop a logical basis for a higher fee (expertise, better result, etc.).

Complexity

Gauge the complexity of the matter. Are you planning for one spouse or both spouses? Is your case likely to involve a Medicaid appeal? Are there several items of property that need to be dealt with?

Operating Costs

From a law firm's point of view, the cost of doing business represents the most important consideration of all. Clients, however, do not want to hear about expenses so don't bring it into the negotiation process unless absolutely necessary to close a sale.

Benefit to Client

Learn as much as possible about your prospective client beforehand. You will find a carefully-drafted client workbook invaluable for this task. What is the prospective client seeking in this representation? Why did the prospect seek your services and not someone else? Who referred the prospect to you? What is the potential cost to them if you are unable to do business with them? Once you have learned as much as you can, you can then discuss the concept of value with them during the "closing of the sale" process.

Murphy's Law

Despite careful preparation, unforeseen circumstances will inevitably arise in most cases. No law firm wants to quote a fee based on the above considerations only to discover that it miscalculated the complexity of the matter. Therefore, law firms must inform their clients that their quoted fee only encompasses known and controllable factors and that any unforeseen circumstances (e.g., a Medicaid denial resulting in an appeal not as a result of the firm's planning) will result in a higher fee.

Value-billing is not an exact science, which partially explains the popularity of time-billing. However, with a little practice, value-billing will add value to your law firm where it counts most -- in the bottom line and in client relations.

Value-Billing the Medicaid Plan

The value of the elder law firm's Medicaid Plan is not bound up in how much time is expended on it or even on the units or tasks that comprise the Plan but on the value of the service to the client. How is value established and how do you sell value to the prospective client?

You and your staff members have invested and will invest hundreds of hours learning Medicaid, Medicare, and other aspects of the long-term care system. Clients and their families come to you in the hopes that you will guide them through the system, including how to implement strategies to enable them to leave a financial legacy to their children and grandchildren.

When setting and presenting your fee, you should focus on the value of your services to your

clients, not the amount of time you anticipate spending on delivering them or on the steps that it takes to obtain the end result they are seeking. After all, value is what your clients are interested in, not in how much time you spend on their case or what you did to get there. What interest they do have in the hours you spend is almost wholly negative -- that is, the more time this lawyer spends on my case, the client thinks, the more this is going to cost me.

How do you get started on value billing? First, of course, you have to become comfortable with the concept: you have to believe in it. If you don't believe in it, you will not be comfortable quoting a fixed fee and your clients will know it. Second, you have to recognize that setting the fee is not an exact science, as the value-billing article points out, but that there are factors that you can take into consideration in setting the fee.

My guess is that in most states, there are no more than a couple of dozen lawyers who know elder law well enough to give adequate counsel. If one of those lawyers is you, then you should charge according to the value and scarcity of your services, not by the amount of time you spend on the case.

So you should not feel uncomfortable about charging your clients what you may think now are very high fees. A typical client facing imminent nursing home care might come in with \$100,000 in countable assets. That's her life savings. If you can save that client \$60,000 to \$70,000, a fee equivalent to the cost of at least a month or two of nursing home care for your services is modest compared to value, even if you spent only two or three hours of your time on the case. Remember: time spent is largely irrelevant to what elder law attorneys do, or at least is only one factor that your state bar's ethics board will take into consideration if you are ever accused of charging an unreasonable fee.

Obviously, competition is an important factor: if you charge twice what every other attorney in your locality charges for a power of attorney, you had better be able to justify the price difference to your prospective client. Most general practitioners will do powers of attorney, but there are very few that can or would or should take on a Medicaid spousal case. You have much less competition there.

Remember that Murphy's Law always holds true. I am asked, occasionally, "Aren't you worried that you will have to do more work than you were paid for?" That question comes from the lawyer whose attitude toward servicing the client is more "how can I avoid losing money on this case?" instead of "how can I bring value to the client?" Lawyers who regard the value of their services as primarily or even solely based upon the time expended think this way. In the small-firm practice in which I started, over 20 years ago, I was taught to think in terms of the hourly rate, and it's a hard habit to break. It's a negative way of thinking, and it puts money and time in between the positive and value-based relationship you want to establish with your clients. On occasion, you will find that you guessed wrong and your assessment of the five value-billing factors was erroneous. You will find that the matter is *less* complex and required *less* staff and *less* firm expertise and generated *less* firm overhead to bring to a conclusion than you calculated.

Bundling versus Unbundling

We now need to discuss what I regard as the major flaw in the billing methods employed by Attorneys A, B, and C. This is the breaking-out of the representation into the component parts, or "phases," as Attorneys B and C call it. This is a mistake. Most clients resent it (although they will never tell you that they do), because it is antithetical to the goals of nearly every client. We know this because we do spend a significant amount of time in our first meetings and even ask in our client workbooks what the client hopes to accomplish by the representation.

Let's review what the Phase One, Two, and Three approach does. Phase One is essentially providing to the client what is often called the "Medicaid Planning Letter." Under our Unit-Billing Agreement, the elder law attorney has developed and given to the client, in writing, a Medicaid Plan. The client pays a set fee for the Plan. If he wants more (implementation, Medicaid application) there is an additional fee for that.

Now, what is the client supposed to do with this written Plan? How does ending the representation with a written Medicaid Plan advance the goals of the client? How many clients actually come into the elder law attorney's office requesting that the attorney give them a road map to attain Medicaid eligibility, just to leave the lawyer's office without a road to travel on, a car to drive in, and a navigator to steer them safely home? What good is a map in these circumstances, other than to serve as a source of bewilderment and frustration and resentment?

The goal of the client who purchases a Medicaid Plan is to attain eligibility for Medicaid nursing home benefits. They want their hands held throughout the process. They want to be told what to do and how to do it. They want you to apply for Medicaid for them. They dread the ordeal of going to the Department of Human Service on their own seeking benefits from the government. They want you, the elder law attorney, to do it all for them. What is the value to the client of a single package of services, all tied up for them? As most of us who "bundle" the package know – a lot. And our clients are willing to pay for it.

Elsewhere I have written about our "Life Care Plan": the package of services that we offer to our clients and family members who are immersed in a health care crisis.² What motivated us to develop the Life Care Plan was our recognition that our families are not just looking for asset protection planning but are needing our help navigating through what our office calls the "long-term care maze."

It costs money to provide this level of service, however. The popularity of the "Medicaid Planning Letter" for many attorneys is that it is document-centered not people-centered. An attorney could write two plans a month and earn a good living doing little more than selling their clients paperwork. (That's what the living trust mills do, and it's what the elder law attorneys who worry about the non-lawyer Medicaid planners taking business away from them do.) The value of what my staff and I do is not in the "Plan" that I write and give to the clients. It is the personal service, the hand-holding, the phone calls, the conferences, and the shepherding-through-the-long-term care maze that we do. That is what our clients are paying us for, *not* the Medicaid planning letter. That is where the real value of what we do lies, and as long as our focus remains on providing this value to our clients and their families, we will always have work to do.

² Timothy L. Takacs, *The Life Care Plan: Integrating a Healthcare-Focused Approach to Meeting the Needs of Your Clients and Families Into Your Elder Law Practice*, NAELA QUARTERLY (Winter 2003).

Stephen M. Voltz's Sample Litigation Fee Schedule (Task-Based Billing Example)

Task	Size of Case			
	Under \$150,000	\$150,000 to \$500,000	\$500,000 to \$2 Million	Over \$2 Million
Case Evaluation and Initial Complaint	6,000	8,000	10,000	12,000
Answer	3,000	4,000	5,000	6,000
Written Discovery Requests	900	1,200	1,500	1,800
Response to Written Discovery	1,200	1,800	2,400	3,600
Discovery Motion	2,250	2,900	3,750	4,500
Agreed Protective Order	600	800	1,000	1,200
Personal Jurisdiction	6,000	8,000	10,000	12,000
Venue Motion	6,000	8,000	10,000	12,000
Motion for Continuance	450	600	750	1,000
Arbitration Motion	6,000	8,000	10,000	12,000
Deposition Prep and Notice	450	600	750	1,000
Response to Subpoena	300	400	500	600
Summary Judgment	18,000	24,000	30,000	40,000
Scheduling Order	600	800	1,000	1,200
Pretrial Order	4,500	6,000	7,500	9,000
Status Conference	600	800	1,000	1,200
Monthly Budget/Strategy Conference	450	600	750	900
Witness List	450	600	750	900
Exhibit List	450	600	750	900
Trial Brief	6,000	8,000	10,000	12,000
Jury Charge	3,000	4,000	5,000	6,000
Drafting Findings/Rulings	3,000	4,000	5,000	6,000
Supplemental Discovery	1,500	2,000	2,500	3,000
Motion to Disqualify	6,000	8,000	10,000	12,000
Temporary Restraining Order	6,000	8,000	10,000	12,000
Preliminary Injunction	7,500	10,000	12,500	15,000
Attachment	3,000	4,000	5,000	6,000
Preparing Draft Orders	300	400	500	600
Preparing Judgment	600	800	1,000	1,200
Third Party Subpoena	450	600	750	900
Motion to Withdraw	450	600	750	900
Notice of Removal	750	1,000	1,250	1,500
Motion to Remand	2,250	3,000	3,750	4,500
Motion to Amend	1,500	2,000	2,500	3,000
EEOC/MCAD Response	6,000	8,000	10,000	12,000

Motion to Sever or Consolidate	1,500	2,000	2,500	3,000
Motion to Bifurcate	1,500	2,000	2,500	3,000
Motion in Limine	6,000	8,000	10,000	12,000
Motion for Directed Verdict	2,250	3,000	3,750	4,500
Notice of Appeal	300	400	500	600
JNOV Motion	6,000	8,000	10,000	12,000
Motion for New Trial	4,500	6,000	7,500	9,000
Appeal Brief	22,500	30,000	37,500	45,000
Coordinate Expert's Report	2,250	3,000	3,750	4,500
Conduct Deposition	3,000	4,000	5,000	6,000
Defend Deposition	1,500	2,000	2,500	3,000
Mediation	2,250	3,000	3,750	4,500
Witness Interview	600	800	1,000	1,200
Audit Response (per matter)	150	200	250	300
Settlement Documents	1,500	2,000	2,500	3,000
Review Client Documents	1,500	2,000	2,500	3,000
Review Opponent's Documents	1,500	2,000	2,500	3,000
Pretrial Conference	450	600	750	900
Trial (per partner per day)	2,000			
Trial preparation (per partner per day)	2,000			