

Why The Billable Hour Fee Model For Lawyers Is Broken and Why Alternative Fee Arrangements Are Preferable.

By: Steven J. Shanker, Esq.

The profession and practice of law is demanding. Our jobs are chronically demanding and involve long hours. A lot rides on our success and behavior, and this pressure only increases as lawyers rise in their profession in both law firms and in-house legal departments. I think it is fair to say, regardless of income or the type of law practiced, most lawyers work long stressful hours. Working as a lawyer is a great way to impact the world, to learn, to grow, to feel accomplished, and sometimes even to find happiness, but it can become a problem when lawyers do so at the expense of themselves and the people closest to them. Too many of us find ourselves spending so much of our lives on the proverbial treadmill of work that we do not have enough energy to sustain both work and a home life. There has to be a way to balance the two.

Most lawyers intrinsically intertwine their value with the number of hours that they spend on any particular matter. This is the primary reason lawyers have typically charged based upon the number of hours they work. Lawyers love to hate the billable hour where days are sadly measured in terms of our yearly, monthly, weekly, and daily targets. Most lawyers know how much time is needed to bill on a weekly if not daily basis to meet pre-determined targets. These targets may be imposed by our firms (with weekly reminders) or by ourselves (with constant reminders).

The billable hour is a form of economic tyranny that has controlled most lawyers' working and personal lives. Recording our time; getting our time in; billing out our time; collecting for time billed — these are our preoccupations. Many lawyers hate reducing the relationship with the client to billable units but are nervous about changing the billing model. Most lawyers cannot fathom the possibility of alternate fee arrangements (i.e., charging the client on some basis other than the billable hour).

I am keenly aware of the fact that there is a purpose to billable hours. For the lawyer and law firm, it is a way in which to provide predictability. You work 5 hours, and you get paid for 5 hours, at least in theory. For the client, it is a way to ensure, theoretically, that you are not overcharged and only pay for time actually worked. I say theoretically because the client does not know if the lawyer spent 1.2 hours on the case or actually spent .8 hours but billed for 1.2 hours. It involves a certain level of trust. Unfortunately, when a large portion of the public still does not trust lawyers, the same public is not going to trust their lawyer to bill them for the exact amount of time they actually spent on a matter. The billable hour has created a crisis of confidence. It is our job to restore confidence to the legal profession.

The billable hour may be the most reviled payment structure in history. Clients hate it because they think it encourages busywork and padding. The biggest problem is that while clients want high-quality legal services and we have a professional obligation to provide them with such, the billable hour method does not reward efficiency or quick resolutions. Even more insidious, there is nothing in the billable hour system that encourages innovation, but there is plenty that discourages it. The lack of reward for efficiency pits the lawyers' interests against that of the client.

Billable hours not only have a negative impact on the psyche of the client, but it surely has an adverse impact on the physical, emotional and psychological well-being of the attorney. When you have a job that requires billing by the hour, your life revolves around every 6 minutes. I have heard horror stories of people that have to rush through going to the bathroom because it is time wasted when the lawyer could have been working on a client matter and recording their billable time. This is no way for an attorney to live a life. The treadmill of work and inability to sustain both a work and a home life leads to burnout as well as physical and mental health issues. It is no wonder lawyers experience a higher risk of mental illness and addiction than the general population. One in four lawyers suffer elevated feelings of psychological distress, including depression, anxiety, and burnout. These feelings can and often do cause anger, fear, regret, remorse, grief and sometimes can even lead to suicide.

The law firm culture of billable hours encourages workaholic behaviors that lead to stress-related illnesses and dependencies, as confirmed by research showing that lawyers suffer from alcoholism and use at rates far higher than non-lawyers. Divorce rates among lawyers also appear to be higher than divorce rates among other professionals. Although lawyers represent some of the best-paid professionals, they are disproportionately unhappy and unhealthy. The result is a profession full of burnouts and resentment. Without something more, today's lawyers will continue to struggle. Fortunately, there is another way.

On the other hand, the billable hour model also engenders distrust of the legal profession. Let's face it. Anytime a client receives a bill from a lawyer where billable hours is involved, one of a number of things happens. Either the client looks at the bill and delays paying it, or they look at the bill and question whether or not the lawyer actually spent three hours working on a motion (as opposed to whether another lawyer could have done the same task in 2 hours) or the client eventually calls up and seeks a reduction of the amount of the bill for whatever reason. This means that the lawyer will either reduce their bill and accept less than was bargained for or the lawyer will raise their fees in the future and build into the cost the likelihood that the client is going to seek a reduction. This is not a good way to start or maintain the attorney-client relationship. When the legal industry is already reeling from a crisis of confidence, the last thing that we need is clients who simply do not trust their lawyer. Clients want high-quality legal service and we have a professional obligation to provide them with such a service.

Personally, I have never been a fan of the billable hour. Early on in my career, over 20 years ago, it seemed extremely tedious to have to keep track of every 6 minutes of every workday. It also seemed that utilizing the billable hours method was a disincentive for clients to contact a lawyer when an issue arose. Think about it. If somebody has a problem, whether it be an existing client or prospective client, there is no doubt about it that, due to billable hours, they are going to think twice about whether to contact a lawyer when there is a legal question. Why pay for a lawyer when the prospective problem may never come to pass. It is often a simple legal question that can be answered in short order by counsel that can prevent full-scale litigation. Some lawyers they like this mentality because it generates litigation which generates billable hours which generates money. I do not like the billable hour model not only because it discourages efficiency and perpetuates distrust of the profession, but because there is another alternative that I believe works to restore client confidence in the legal profession, strengthens the attorney-client relationship, encourages efficiency and at the same time provide provides predictability to both the attorney and the client.

I have said it before, and I will say it again. Law Firms that fail to innovate do so at their own peril. If we learned anything from the 2020 COVID pandemic is that you have to be prepared for all contingencies. Law firms that relied upon billable hours from companies that were hard hit by the COVID pandemic saw themselves in crisis mode. The courts shut down for a while and any person or company who did not have an emergent legal matter simply told their lawyers to hold off on the case, hold off on the matter or to hold everything in abeyance until further notice. Many law firms immediately lost their stream of income because the billable hour became useless. No work equals no billable hours which equals no money. No money means cut-backs, layoffs, and sheer hard times. Sometimes you cannot fully prevent this but sometimes you can. By now, law firms should see the importance of pushing outside the mold, doing something different and coming up with a new model. So, what is the alternative?

The answer, in part, is that law firms must start shifting toward Alternative Fee Arrangements “ALAs” including flat-fee models. Flat rates cure most of the inefficiencies of billable hours and shift the risk of uncertainty from clients back onto their attorneys, who are better equipped to anticipate and price those uncertainties. Flat fee models give attorneys the incentive to work efficiently and innovatively, since they make the same money whether they take 2 or 20 hours to complete a flat-fee task. While there will certainly be cases where an attorney spends more time than they anticipated on a task, smart attorneys will find ways to drive efficiencies and improve their effective hourly rate.

Clients love flat rates, too, because they know exactly what they are going to pay for the service they ask for and receive. Many attorneys love flat rate fees because they know what to expect from each matter/case that they handle in terms of the work required. The attorney can also accurately predict what they will be paid. No more late payment of invoices, no more reduction in payment of bills. The parties come together from the outset, agree upon a flat rate and the full amount or the balance is paid within 30 days of completion. Some attorneys say they cannot use the flat fee-based model because how can you accurately predict how much time it will take to handle a case as there are always variables that cannot be fully predicted. My answer to that is easy.

If you have been practicing long enough you can predict with pretty decent precision how much time it will take to handle a matter. If you cannot make an accurate prediction, then just look at your past history of how long it took on average to handle similar matters. Some say that this may work for transactional matters such as drafting a contract, preparing a will, a real estate closing, etc., but not for litigation. My answer to this is to say that the ability to predict is there. Even with litigation, with sufficient experience, we know on the vast majority of cases how long it takes to prepare an answer, prepare discovery demands, take a deposition, draft a motion, etc. Look at the worst and best-case scenario. If you underestimate and you spend way more time on a matter than anticipated, then either you have not been efficient enough and need to figure out how to be more efficient or use that experience to be able to more accurately predict it for the future. You may also want to consider the utilization of up-to-date technology to not only be more efficient, but to arrive at the right pricing structures.

If you overestimate and received a very fair amount of money for the work performed, you will be happy. If you way overestimated to the point of being obscene, then you can even consider refunding some of the money to the client or reducing the final bill. A client will surely not object to a refund or voluntary discount. In fact, it would tend to engender trust and even a sense of loyalty. Either way, there is more predictability for both the attorney and the client and no need for the pressure of billable hours. Spend your time working on the case rather than billing and worrying about billing. Less worrying leads to less stress. Less stress leads to a happier lifestyle. Happier lifestyle leads to a happier person in general.

I start with AFA's about 15 years ago. It was so successful in terms of the financial and other benefits that I took it one step further. About 10 years ago I took it to the next level. The business model that I created helped stabilize my law firm, my work life and my finances. It also made me happier, gave me more time to spend with my wife and family and took away a massive amount of stress and anxiety. Surprisingly and happily, it helped strengthen the relationships I had with my clients. In fact, the relationships were so good that they became my biggest source of referrals to new business and new clients. My clients were so happy with my work and the pricing structure that they frequently referred me to everyone they knew who needed a lawyer. Finally, this business model helped me get through the COVID crisis without being financially harmed. Let me explain a bit.

Approximately 10 years ago, a client of mine, who is the CEO of a NYC company and someone who I have great respect for, was unhappy with the billable hour model. I did perform regular work for him, and he wanted to keep my firm as his counsel, but he simply did not like the uncertainty of how much it would cost each month. I asked him how can I be able to come up with some new arrangement without knowing what the future would bring. He said he did not know, but if we don't come to a new arrangement, he may have to consider his other options. I did not want to lose him as a client and was backed into a corner. It was at that moment that I had the proverbial "Ah-Ha" moment. I said what if we agree upon a certain scope of work for a certain amount of money each month for one full year. I would perform all work within an agreed upon scope and he would pay me the yearly fee in 12 equal installments by the 1st of each month. At the end of the year, we will review the amount and nature of the work performed, the work that is anticipated to be performed in the future, see how satisfied he is with my work and we both see how satisfied we are with the finances of it all. I threw out a number and he agreed. We shook on it. Never had a contract with him and never had to. I know I am good for the work and I know his word for payment is good as gold.

This was a huge risk for me. I could have been stuck performing work the entire year for this one company and not have time to work on anything else, much less run my law firm and have time to spend with my wife and kids. On the other hand, I would have a guaranteed payment each and every month for 12 months and would not have to worry about how much would be paid, when it would be paid or whether it would be paid at all. Most of all, I didn't have to worry about billable hours.

Fast forward one year. Not only was the arrangement beneficial for both of us, but we each agreed that we mutually wanted to continue on the same terms for another year. Now, after a year of experience with this one company, I knew with pretty good precision how many transactional matters I would have to handle for them and how many litigation matters I would be responsible

for. In other words, I was able to figure out how many hours of the week I would be dedicated to this company. It also enabled me to pretty accurately determine how many hours per week I would have to dedicate to other companies and other cases. What happened thereafter was amazing. First, our attorney-client relationship grew closer and stronger. My client got me involved in more and more legal and business matters. He loved the fact that he could pick up the phone and call me without worrying about being billed for a 12-minute call or a 6-minute email. By my client not having to worry about picking up the phone to call me for fear of the cost, I was able to be more proactive with his company. I also took the initiative to get involved in certain things that I thought my client would benefit from me helping with. My client loved it because he was paying my firm the same no matter what I chose to take on. Over time, the things I chose to take on became so important to my client for me to handle that my client soon began to rely upon me to take these things on. Do you see what is going on here? The additional work I took on inadvertently generated more work and a better relationship with my client.

Soon thereafter, I was doing such a good job for this one company that the CEO referred me to the CEO of another NYC company. I offered the same flat fee yearly arrangement, but they wanted to start with hourly billing. I said OK. After about one year or so they wanted to know if the yearly flat fee arrangement was still available. I said sure. I did the same thing with this client as I did with the first client. I would perform all work within an agreed upon scope and he would pay me the yearly fee in 12 equal installments by the 1st of each month. At the end of the year, we would review and see how happy we were. Over time, with this client, I became the right-hand man of the CEO. I became the go to guy. He got me involved in so much work that I had to increase his fees after 2 year and he gladly agreed. He also loved the fact that he could pick up the phone and call me without worrying about being billed and he enabled me to be more proactive with the company. So much so that in certain instances, in his absence, I was designated to run the company for him.

Word soon got out. Steven J. Shanker, Esq. was a fair and honest lawyer who does a great job, is responsive to his clients, is reasonable with fees and is a man of his word....and he knows how to get the job done. Hence, that's why I started to call myself their "trusted advisor". I liked this better than simply the lawyer. I liked it because I was more than their lawyer. I soon had this arrangement with multiple companies in NYC. So much so that I was unable to take on new clients.

As a result of the succes I personally saw with this model, I then took it to the next level. I created what I call the "Outside General Counsel". What this means is and what I offer to clients and prospective clients is that I acts as in-house counsel for a select number of companies, but they pay me as an independent contractor. Again, just as stated above, I perform all work within an agreed upon scope and get paid a yearly fee in 12 equal installments due by the 1st of each month. At the end of the year, we review and see how happy we each are. I essentially act as an in-house counsel would, by being the go-to person not just for all legal matters but any matter that the C-suite needs me for, and I get paid to do so on a regular basis. Essentially it is guaranteed pay like an employee but with the freedom of an independent contractor. My obligation is to ensure my clients needs are well attended to, that I make myself available when my clients need me and that I handle each case and matter entrusted to me with excellence. I do this and have been doing it all to the satisfaction of my clients.

More importantly, I have personally seen the effect I have had on being able to be pro-active for my clients. I used to and still say a lawyer such as myself and the services I provide can make me be akin to either a fireman or a doctor. If I act as a fireman, that means a client calls me when there is a problem and when there is a problem that usually means litigation. Hence, the house is on fire. I tell the client, there is going to be damage (heavy costs) and I will do my best to contain the fire (the damages) but there is no guarantee in terms of the outcome or the costs, due to billable hours. In the other hand, I can be a doctor who is on staff to give regular check-ups (be available to ensure compliance) provide diagnostic tools (proactive to mitigate risk) and if a problem arises (threat of litigation), it can likely be taken care of or neutralized with minimal costs. Hence, the choice is up to the client. If they go the route of me being a fireman, then they don't have to pay me a penny to be their outside general counsel. But if a problem arises, we go the route of billable hours and it will get costly. If they go the route of me being a doctor, then they pay me perhaps sometimes when they wouldn't have to, but on the whole having me around causes them less headaches, prevents more problems and helps keep their businesses running smoothly. I am sure I don't have to reiterate that me as the fireman is much more expensive than me at the doctor. All of my clients have seen the good and the bad. They choose for me to be their doctor. It works well for them.

Best of all, for me, I work 9:00 am to 5:00 pm. I only work Monday through Friday. I don't deal with criminal law so there is rarely an "emergency" that has to be dealt with before 9:00 am, after 5:00 pm or on the weekends. My clients appreciate this unspoken rule and respect it. So now I know if they call me after hours or on a weekend, someone must be in some serious trouble. Financially, I can say that I make more money now than I ever did. I don't really care a lot about money. I believe money is just a way to pay the bills. I do believe money is the root of all evil. All I really care about is my wife and family. So, if I am happy doing my job, my clients are happy with the service I provide to them and my bank account is flush, then so be it.

Finally, when COVID hit in March 2020, most lawyers went into a frenzy. Some were laid off, some were paid less, some lost their jobs, many saw their clients put a hold on all work and hence all income came to a sudden stop. I don't want to say that I am immune to the economic effects of COVID, but because of the business model I have, my clients, so long as they still have a business, they cannot say to me to stop all work or we cannot pay you. They know that I work my ass off many months at a time when the pay for those months is lower than it would be under a billable hours' model, but I also get the benefit of getting paid the higher amount when the work is less. Now that the ebb is low, meaning the work has decreased, I get the benefit of getting paid the same agreed upon monthly amount. It is an ebb and flow type of arrangement and that is how it works.

Despite my ability to tell my clients they must pay me the agreed upon amount of money as contracted before COVID hit, I did not do that. While they would have paid my bill if I had insisted, I am loyal to my clients and think for the long term. If I didn't reduce my fees then they could say to me at the end of the yearly period, they don't want me or can't pay me. Also, they may have been disgruntled because everyone is taking bite of this big COVID shit sandwich and my failure to take a hit is a reflection upon my character. That is why I said to myself, since my clients' businesses were hurt by the pandemic, I am going to take the hit with them. As such, I volunteered to reduce my monthly fees until this all blows over. I believe I am a decent human being and a loyal person. My generosity in reducing my fees for my clients was well received and well appreciated. Money can't buy you love, and it can't buy you happiness. Also, one can't buy loyalty or trust or honor. Those have to be earned. I believe through my business model and my acts of

generosity towards my clients during this pandemic has gone a long way to strengthening my relationship with them long into the future as well as ensuring that my good name is preserved.

So, to wrap it all up. With all this in mind I can honestly say, not only are my clients happier, but I am happier. I don't have to worry about billable hours, don't have to worry about collection or involuntary fee reduction. I don't have to even have to worry about new business because it keeps coming in. While NYC is a big city, I found out that it is a small business world, and if you have a good reputation, it will precede you. Most of all, I am less stressed, have more time to spend with my family and do the other things I love to do other than play lawyer, such as play guitar, paint, drive fast cars, shoot guns, ride my Harley motorcycle and enjoy the summer on the beach. Life is too short to be on the treadmill of the billable hour

I am in the best place I have ever been in my career and I love it. I was reluctant to even write about it for fear of superstition creating a hex on me for sounding confident. I don't know what the future will bring, but I am doing all I can to be the best lawyer I can be today and planning my practice to be doing the best it can for all my clients tomorrow.

The bottom line is this. The billable hour model is broken, and lawyers need a new model to keep clients happy, keep themselves happy and to stay more relevant to the times. If you do not consider AFAs, you are leaving a HUGE marketing advantage on the table. If you are in an industry where everyone bills by the hour, it is a great opportunity to stand apart from the crowd.

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