

# Flat-Fee Legal Billing Can Liberate Attorneys

By **Lawrence Ebner** (November 4, 2019, 1:43 PM EST)

Have you discovered the joy of set legal fees? I have. For me, as an appellate lawyer, handling an appeal or writing an amicus brief for a set fee — rather than billing by the hour — is almost always a professionally and personally satisfying experience.



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## Pros and Cons

Like most of you, I know the pros and cons of billing at hourly rates. Law firm managers love hourly billing, especially when a team of attorneys is assigned to a case. Many lawyers, partners as well as associates, also are quite happy racking up billable hours, which look good when compensation decisions are based on attorney metrics and analytics.

In BigLaw, and in many smaller firms too, inefficiency can pay substantial dividends, despite the psychological pressures imposed on lawyers by having to bill for virtually every minute of effort or thought devoted to a litigation matter.

Except for the most sophisticated, litigation-savvy corporations, companies that agree to be billed at hourly rates usually are in the dark about the ultimate cost of litigation. Sure, clients ask for estimates (or even guesstimates), but outside counsel routinely caution that the twists and turns of litigation are unpredictable.

And even though, compared to trial work, the course of an appeal is generally known in advance, it still is difficult to foretell how many billable hours an attorney (or team of attorneys) will need to review a trial court record, research and write an appellate petition or brief, or prepare for oral argument. The same is usually true for amicus brief writing, especially if the issues are new to amicus counsel.

## It's About Quality, Not Quantity

I dislike having to bill, or even record, every hour of time when I am handling an appeal or writing an amicus brief. My aversion is not only about being reluctant to bill clients for time spent spinning intellectual wheels, or alternatively, having to face the consequences of writing off or writing down too many billable hours. For me, it also is about the quality of my work.

Simply put, I usually think and write better when I am free to spend as much time as I need to ponder, research, draft, edit, proofread and polish. In my experience, not having to bill by the hour is truly a liberating way for appellate lawyers (and other litigators) to practice their craft.

How can this be accomplished? My answer is enter into a set-fee (i.e., flat-fee) arrangement with your client. If you are handling an appeal, it probably is unrealistic to agree at the outset on a single flat fee for the entire proceeding. Instead, consider proposing a set fee for the initial phase of the appeal (e.g., up to the point of drafting your opening brief). You then can agree to agree on successive set fees for each subsequent phase of the appeal.

For example, if you are representing the appellant, agree on a set fee for reviewing the record, analyzing the lower court's decision, identifying the issues to be pursued on appeal and providing your recommendations. After you become more familiar with the case, you will be in a better position to propose a set fee for researching and drafting the opening brief. After that brief is filed, you can agree on a set fee for reviewing the appellee's brief, performing any necessary additional case law or other research and drafting a reply. And then, you can agree on a set fee for preparing and presenting oral argument.

Your client, which may be thinking about settlement, benefits by knowing in advance exactly how much each phase of the appeal will cost. And you are free to devote the time you need to handling the appeal.

Similarly, if you are engaged to write an amicus brief, agree in advance on a set legal fee. A set fee for amicus work benefits clients, which often are trade associations or other nonprofit organizations that cannot afford to pay amicus counsel by the hour. And again, you will be free to draft your brief without worrying about looking at the clock every six minutes.

Persuading law firm management to authorize this type of alternative fee arrangement, such as for an appellate matter, may be difficult.

They probably will want to know why, from the firm's viewpoint, a set-fee arrangement is better than hourly billing; how many hours you (and your team) expect to devote to an appeal or amicus brief; whether handling the matter will divert you (or members of your team) from other clients' billable hour work; how promptly or when the set-fee client will pay the firm; and whether handling an appeal or amicus brief at a potential (if not probable) loss compared to hourly rates can be justified by the prospect of additional and profitable business from the client.

From management's viewpoint, these are reasonable questions that you will need to be prepared to answer.

### **Achieving Nirvana**

If you succeed in obtaining your law firm's approval to bill an appellate or other litigation matter on a set-fee basis, that is terrific. But in my opinion, you still are only halfway to nirvana. To experience the real joy of set legal fees, you need to refrain from tracking the time that you spend on the matter. I realize that turning off the timer would be taboo in most law firms. In fact, I did not stop tracking the time that I devote to set-fee matters until I departed BigLaw and started my own solo-practice appellate litigation boutique.

When you are in a true billable hours-free state of mind, however, the pressure that you will encounter (aside from court-imposed or client-imposed deadlines) is internal: You not only will feel free, but also compelled, to spend as much time as you need to produce your highest quality work. This may not be the most cost-effective way to handle an appellate matter, but in my experience, it is the most gratifying way to work.

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