

## Information Concerning Legal Fees & The Slow Death of Hourly Billing

*by Steve McDonough, Esq.*

Misunderstandings surrounding legal fees can be stressful for client and attorney alike and have a damaging effect on the lawyer-client relationship. When facing divorce, having to spend thousands or even tens of thousands of dollars on your divorce can be frustrating. It can also be frustrating for a lawyer that is working diligently on a case to have a client to frequently complains about legal fees. It is time consuming for an attorney when a client falls behind on their fees or is slow to replenish funds to the client's trust account.

In family law matters, as in many other kinds of cases, lawyers and mediators traditionally bill by tracking their time. The question of whether this traditional billing system in the legal profession is the best option for clients (and their lawyers) has been debated for years, but there is a renewed interest in fixed fees by many law practice management experts.

### *Traditional Hourly Billing - Rewarding the Inefficient Lawyer*

Although hourly billing remains the most common billing system, there appears to be a movement away from hourly billing. It is gradual, and some traditional firms are petrified while other forward-thinking firms have abandoned hourly billing altogether.

Commonly, hourly time is tracked in tenths of an hour, or 12 minute increments. Billable time includes things like telephone calls and communications by electronic mail, drafting and reviewing documents, travel time, appearances at meetings and hearings, and legal research. The Divorce Collaborative does not charge extra for usual expenses such as postage, telephone use charges, and faxes unless they are beyond the normal range. Many law firms do recover these costs from clients.

When a new case is opened, an advance deposit (frequently called a retainer) is obtained before any work is started on a case. This retainer is held in a regulated trust account carefully administered by the firm. As the attorney or mediator performs work on your case, the time is tracked and then an invoice is prepared, typically on a monthly basis. Shortly thereafter, the earned fees are transferred from the trust account into the firm's operating account as it is then "earned." If there are retainer funds remaining at the conclusion of your case, then such funds are returned to you. If your retainer funds are low, yet more time on your case is required or anticipated, you would normally be requested to provide additional retainer funds to replenish your trust account.

Clients tend to hate this billing system, as do some lawyers. Unfortunately, some attorneys and mediators have never experienced anything else and do not understand alternative methods of compensation and billing. For those attorneys, hourly billing can be a scary proposition as they think they will lose money. For example, if a client calls me for a three minute telephone call, the fee for such call would be the minimum .2 of an hour, or 12 minutes. The telephone call would cost the client \$60.00 if the hourly rate was \$300.00 for example. There is a good chance the client does not feel the call was a good value at \$60.00, and the client may hesitate to want to

have communications with his or her attorney. This makes me wish I could bill for talking to some relatives, and that I hope they do not read this.

It is often stated that one of the reasons there is a minimum charge is to account for the disruption of a new task, and the time it takes to stop what one was doing and switch gears to the new task and back again. Personally, if I was a client, I would prefer not to be considered a *disruption*.

As stated above, criticism of this billing method is nothing new, although it does seem to be gaining momentum. In 1989, the American Bar Association noted in a comprehensive study that hourly billing often “***rewards the inefficient practitioner and penalizes the well-organized efficient lawyer.***” That does not seem like a great system for the client at all, but probably good for those inefficient professionals.

Others, such as California appeals attorney John Derrick, have criticized the billable hour by arguing that it encourages an irrational set of incentives. Clearly, the attorney (or mediator) who delivers quickly is penalized. A practitioner that slowly struggles through a task or lacks focus will be rewarded. This system also encourages work that is not inspired, and has been termed “the lethargic hour.” When one considers these statements, it seems to make perfect sense. Everyone is human, sometimes we are tired or perhaps not at our very best. Maybe the .2 on Monday is an unintentional .5 on a different day?

Uninspired time can also be contrasted with work that is quite valuable or skillful, yet does not take very much time. Shouldn't the efficient, organized attorney that moves a case along skillfully and effectively reap a financial award for his or her efforts?

For example, if an experienced and skilled surgeon completes a heart valve replacement in 45 minutes, yet another doctor takes 2 hours, should the more efficient surgeon receive a smaller fee? This criticism was levied back in a Harvard Law Review in 1956 by George Hornstein.

Hourly billing can also be annoying to clients when unskilled work is charged, such as for travel time. I like to consider myself an excellent driver, all of that law enforcement training and experience allows me to engage in skillful operation of a motor vehicle even while balancing a coffee and donut. Still, I don't think I would like to be charged my hourly rate for driving someplace.

### *Flat Fees - Gaining Momentum*

*The truth is fixed (or flat) fees worry most lawyers.* When discussing the concept of fixed fees, most attorneys fear they will lose money. Flat fees are results-oriented. Clients want results after all, they do not want to just purchase time in 12 minute increments.

Nationally known divorce lawyer and law firm management and technology expert (and my old boss) Lee Rosen owns the largest divorce-only law firm on the east coast, and *all* fees are fixed and collected at the beginning of a case. The flat fee client agreement is limited in time, one way to protect the firm if a client is unreasonable and refuses to follow advice or reach an agreement on a case, even when the agreement is good for the client. If the client agreement expires and the case is not completed, then the client can purchase additional time periods. Of course, a firm could decide to extend the time period if delays were due to something beyond the client's control.

Fixed fees also liberates the lawyer from being completely fixated on hourly billing and tracking every minute. Some attorneys are transformed into zombie-esque slaves to the billable hour and tracking every second of the day.

Bathroom: .2

Talk to spouse on phone: .2

Walk to water cooler, drink water, throw away cup. Chat with paralegal about Red Sox game: .3

Dinner with family: .5

Drive to in-laws house for dinner: 1.4

Anyway, you get the point.

I thought fixed fees for most all divorce cases worked well, although I think fixed fees for more contentious litigation cases are trickier to set. I think my personal comfort level with fixed fees has a lot to do with the fact that my first attorney position was all fixed fees. The Rosen Law Firm has even developed a *fee calculator* on their website. It provides an estimated range to potential clients, the actual fee is set at the initial consultation.

Under the flat fee system, clients are empowered in a number of ways. They did not have to worry about calling or emailing their lawyer. They knew what the fee was in advance, and there were no surprises with large unanticipated legal bills. If the client decided to adopt an unrealistic position and not budge, the client would have some responsibility for this stance as it may increase the fee.

Some firms will offer a flat fee only for a simple uncontested divorce, meaning a couple has basically agreed to all issues and needs a divorce agreement drafted and the court documents created. It does not involve any negotiations, and is really a fee for drafting documents and reviewing some basic financial information for the client.

At the Rosen Law Firm, even complicated litigated cases were charged a flat fee. The system is not perfect, but overall, I do think it is better. Many other lawyers are extremely resistant to flat fee billing. These same lawyers may also think social media websites are just a fad and that it is OK not to call clients back for a week or two, and that the world is in fact, actually flat. Perhaps they are just ingrained in the ways of yesterday.

Responding to critics of the flat fee, Lee Rosen said in an interview “If someone at Lockheed can put a price on a jet, a lawyer can put a price on a case – the variables they deal with are so much more complicated than those we deal with... We should be expert enough in our areas of law so that we can do it.” Hard to argue against that statement in my opinion.

### **The Divorce Collaborative Fee Options**

At TDC, clients can select what fee structure they are most comfortable with, hourly or fixed. This is extremely uncommon to offer both options to clients, and another part of The Divorce Collaborative Advantage. Clients are encouraged to discuss these options during their consultation before selecting the plan that will best suit their needs and personality.

Personally, I think fixed fees make a lot of sense. The interests of the client and lawyer or mediator are much more aligned under this system, and once the fee is paid then the focus is on getting good results, not billing and worrying about how a client might react to an invoice or if they will have the money to replenish their trust account.