

BETTER VALUE: PROBLEMS WITH THE BILLABLE HOUR AND THE VIABILITY OF VALUE-BASED BILLING

Brooke MacKenzie*

This article explores the drawbacks of the billable hour and considers the viability of a value-based alternative, the fixed fee. It argues that billing models premised on hourly rates facilitate unethical practices, reward inefficiency, and fail to provide clients with certainty and accountability. The article will proceed to consider if a value-based system would introduce different problems, such as estimating appropriate fees that are fair to both the client and the lawyer. The article concludes that value-based billing is a viable alternative to the billable hour, and suggests that its practical implications warrant further exploration.

Cet article examine les inconvénients relatifs aux heures tarifées et offre comme alternative une approche fondée sur la valeur, soit le tarif fixe. D'abord, l'auteur fait valoir que les modèles de facturation fondés sur le tarif horaire facilitent les pratiques contraires à l'éthique, valorisent les comportements inefficaces et empêchent souvent les clients d'y voir clair. L'auteur poursuit ensuite en examinant si une approche basée sur la valeur créerait des problèmes notamment quant à l'établissement des frais de services acceptables tant pour les clients que des avocats. Finalement l'auteur conclut en mentionnant que la facturation à tarif fixe est une alternative rentable et propose que les implications pratiques soient l'objet d'une étude plus approfondie.

1. Introduction

Q. How many lawyers does it take to change a light bulb?

A. How many can you afford?¹

We've all heard the jokes. The problem with jokes about lawyers, however, is that lawyers don't think they're funny, and nobody else believes that they're jokes.² Lawyers have an image problem. The reasons behind the negative public perception of lawyers are no doubt complex, but it appears

* JD 2012, Queen's Faculty of Law. The author wishes to thank Erik Knutsen for his helpful guidance in the preparation of this article, Barbara Boake for her generous assistance, and Jeffrey Leon and Gavin MacKenzie for their thoughtful insight.

¹ *Lawyer Jokes*, online: <<http://brainden.com/lawyer-jokes.htm>>.

² *Ibid.*

that this problem, at least in part, relates to legal fees. The general public does not understand how legal fees are arrived at, and in any event believes legal services cost too much. One study by the American Bar Association suggests that sixty per cent of people believe lawyers are greedy, and over half believe lawyers' fees are excessive.³

This is not to say that lawyers' fees are unjustifiable. Rather, it is to say that, to the public, legal fees are not clearly justified. It is hard to blame laypeople for this confusion. The vast majority of legal work is billed by the hour,⁴ a system that brings about a host of problems.

Much has been written about the ethical issues with hourly billing by lawyers.⁵ Those lawyers and legal academics who have criticized those who take advantage of the billable hours system through bill padding, double billing, and other questionable tactics are certainly right; ethical issues are no doubt a major flaw with the billable hours system. However, the ethical problems enabled by hourly billing are only the beginning. Time-based billing presents numerous inherent problems, which hurt the clients of even the most scrupulous lawyer. Billing on the basis of time fails to create an incentive for lawyers to work efficiently; on the contrary, it can reward lawyers who work inefficiently. Moreover, hourly billing often fails to offer predictability to clients on a budget, which undoubtedly does not help the public's perception that lawyers are insufficiently accountable.

³ Deborah L Rhode, "The Professionalism Problem" (1998) 39 *Wm & Mary L Rev* 283 at 285.

⁴ An article by Anne Macaulay, "The Billable Hour – Here to Stay," online: CBA Practice Link, <<http://www.cba.org/cba/practicelink/mf/PrintHtml.aspx?DocId=1848>>, suggests that 85% of Canadian legal work is billed on an hourly basis. Another study found that 97% of law firms use hourly billing as their principal type of billing, and that 92% of corporate counsel reported that "most" or "all" of the work done by outside counsel was billed by the hour. See also Robert E Litan and Steven C Salop, "Reforming the Lawyer-Client Relationship Through Alternative Billing Methods" (1994) 77 *Judicature* 191.

⁵ See e.g. William G Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Durham, NC: Carolina Academic Press, 1996); Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should Be Done About It" (2004) 83:3 *Can Bar Rev* 859 [Woolley, "Time for Change"]; and Adam C Altman, "To Bill, or Not to Bill?: Lawyers Who Wear Watches Almost Always Do, Although Ethical Lawyers Actually Think About It First" (1998) 11 *Geo J Legal Ethics* 203.

Criticisms of hourly billing are hardly new.⁶ But notwithstanding the fact that billing on the basis of time creates ethical dilemmas, produces misaligned incentives, and lacks certainty, it persists as the primary billing method for Canadian lawyers.⁷ The flaws of hourly billing contribute to the poor public opinion of lawyers, but the profession has done very little about it. It has been said that lawyers, who defend others ably, have done a poor job of defending themselves.⁸ Lawyers looking to improve the reputation of the profession could take a step in the right direction by addressing the fundamental shortcomings with how they bill their clients.

This article does not aim to address criticisms that lawyers' fees are too high; whether legal services are sufficiently financially accessible to potential clients is itself a complex issue. Rather, this article aims to consider the underlying problems with the billable hours method of charging clients, and whether a system based on value rather than time would address these problems without introducing too many of its own. Complaints about excessive legal fees are unlikely to disappear; the least the profession can do is bill those allegedly excessive fees in a reasonable and defensible manner.

Part 2 of this article will briefly explain how the billable hour came to be the primary method of charging clients for legal work, and will describe the system that preceded it. Part 3 will discuss three fundamental problems with the billable hour – the system enables ethical problems, rewards inefficient work, and lacks predictability for clients. Part 4 will outline the alternatives to hourly billing, and illustrate that many alternatives used by firms are still time-based, and thus fail to address the core problems discussed in Part 3. Part 5 will consider value-based alternatives in greater depth by assessing the obstacles to the implementation of fixed-fee billing. Finally, Part 6 will propose a few additional considerations with respect to the viability of value-based billing, and how it may be implemented moving forward.

⁶ In 1989, Richard C Reed released an anthology of articles relating to alternative billing methods entitled *Beyond the Billable Hour* (Chicago: American Bar Association, 1989). In 1994, the journal *Judicature* featured a special issue on “Legal Billing: Seeking Alternatives to the Hourly Rate.” See Sarah Evans Barker, “How the Shift From Hourly Rates Will Affect the Justice System” (1994) 77 *Judicature* 201; Herbert M Kritzer, “Lawyers’ Fees and the Holy Grail: Where Should Clients Search for Value?” (1994) 77 *Judicature* 187; Zoë Baird, “A Client’s Experience with Implementing Value Billing” (1994) 77 *Judicature* 198 ; and Litan and Salop, *supra* note 4.

⁷ See note 4 above, with respect to the very high proportion of legal work that is billed on an hourly basis.

⁸ Kenneth E Howie, “Lawyers Under Fire” (1991) 25:2 *L Soc’y Gaz* at 164.

Although value-based billing introduces a few difficulties of its own, this article argues that its implementation would be a step forward. Value-based billing would better align clients' and lawyers' interests in efficient work leading to positive results, create an environment where clients could more accurately budget their legal expenses, and reduce billing-related ethical conflicts. The time has come to critically assess the way lawyers bill their clients, and consider if this can be improved to better serve clients, as well as the profession.

2. *A Brief History of the Billable Hour*

Although the billable hour has predominated throughout the careers of most lawyers who are practicing today, this has not always been the case. Prior to 1960, time-based billing was the exception, not the rule.⁹ At that time, the primary billing method was "retrospective billing," through which lawyers set fees at the conclusion of a matter on the basis of the amount of work completed, the outcome for the client, the market value of the work, and the financial circumstances of the client.¹⁰ Clients were provided with a bill that set a lump sum amount "for services rendered."¹¹

Lawyers began to keep track of the time they spent on files in the 1960s only as client demand for their work increased and created a fundamental economic issue for lawyers; they realized that retrospective billing did not measure the time costs of working on clients' files, and that this was a factor in lawyers' incomes falling behind those of other professionals. Timekeeping was suggested as a means to compare the differences in costs and profitability in different practice areas, and to determine whether lawyers had assessed fees appropriately given the time costs they had incurred.¹²

⁹ Alice Woolley, "Evaluating Value: A Historical Case Study of the Capacity of Alternative Billing Methods to Reform Unethical Hourly Billing" (2005) 12:3 *Int'l J Legal Prof'n* 339 at 342 [Woolley, "Evaluating Value"].

¹⁰ F Leary Davis, "Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovation" (1994) 16 *Campbell L Rev* 147 at 150; Woolley, "Evaluating Value," *supra* note 9 at 344. Another common form of billing in Canada was through tariffs, which were set by law societies and bar associations as a guide to appropriate fees. Tariffs were abandoned in Canada due to anti-competitive concerns shortly after the United States Supreme Court decision in *Goldfarb v Virginia State Bar*, 421 US 773 (1975), which held that minimum price schedules violated the *Sherman Anti-Trust Act*. For more on tariff billing, see Woolley, "Evaluating Value," *ibid*.

¹¹ Woolley, "Evaluating Value," *ibid* at 344, citing C T Bogus, "The Death of an Honorable Profession" (1996) 71 *Ind LJ* 911.

¹² *Ibid* at 346.

At about the same time, the structure of legal practice was changing. Law firms began to grow from small shops to businesses in which partners would manage numerous professional employees. Subjective assessment of bills became more challenging in this context. Moreover, time records were further integrated into practice, as they provided an apparently objective basis upon which to measure associate performance.¹³

Once time records were integrated into lawyers' practices, they were quickly used as the basis of billing, rather than a mere cost accounting tool.¹⁴ Hourly billing was attractive to lawyers for its simplicity; it was much easier to multiply the time by a fixed dollar factor than to step back and exercise subjective judgment to evaluate the appropriate value of a case.¹⁵ Hourly billing was also attractive to clients, as it provided a seemingly objective basis and greater detail for the bill (as compared to a subjectively-determined lump sum "for services rendered").¹⁶

Time-based billing was an appropriate solution to the problems of the 1960s; it created a valuable cost accounting tool, and appeared to eliminate the subjectivity of assessing bills as a lump sum "for services rendered" after the matter was completed. Today, however, lawyers and clients alike recognize that the system presents numerous problems likely unanticipated when the billable hour was introduced.

3. Problems with the Hourly Rate

The 2002 American Bar Association *Commission Report on Billable Hours* summarized the billable hour's deficiencies as follows:

The billable hour is fundamentally about quantity over quality, repetition over creativity. With no gauge for intangibles, such as productivity, creativity, knowledge or technological advancements, the billable hour model is a counter-intuitive measure of value.¹⁷

This article will focus on three specific problems with the billable hour that render it a "counter-intuitive measure of value": it enables questionable ethical conduct; it rewards inefficient work and penalizes productivity; and

¹³ *Ibid.*

¹⁴ Mary Ann Altman, "A Perspective – Value Billing to Time Billing and Back to Value Billing" in Reed, *supra* note 6, 11 at 11.

¹⁵ *Ibid.*

¹⁶ Woolley, "Evaluating Value," *supra* note 9 at 347.

¹⁷ American Bar Association, "*ABA Commission on Billable Hours Report*" (2002), online: American Bar Association <<http://www.judicialaccountability.org/articles/ABABillableHours2002.pdf>> at ix.

it fails to offer clients predictability and accountability with respect to their legal fees.

1) *Ethical Issues*

In his book *The Honest Hour: The Ethics of Time-Based Billing by Attorneys*, William Ross suggests that the first step towards improving billing practices is recognizing the “harsh truth” that hourly billing creates an inherent conflict between the client’s interest in expeditious work and the lawyer’s interest in billing a substantial amount of time.¹⁸ Although lawyers owe a fiduciary duty to reasonably and effectively serve the client’s best interests, law firms use billable hours not only as the basis for clients’ fees, but also associate evaluations, promotions, and bonuses; a lawyer’s job security depends on her dockets.¹⁹ In such a culture, the billable hour creates numerous ethical temptations, and, as we will see, the unfortunate reality is that many lawyers give in.

Alice Woolley breaks down the ethical problems arising from hourly billing into three categories: first, lawyers fail to docket their time contemporaneously, which typically results in inaccurate estimations and clients paying for more time than was actually spent on their files; second, lawyers will inflate the number of hours they record, whether consciously or subconsciously; and third, lawyers perform as much work as possible on client files, with little or no consideration for whether such work will actually further the clients’ interest.²⁰

In spite of the existence, prevalence, and simplicity of technology that permits lawyers to record the time they work on each file precisely as that work is completed, contemporaneous recording is not the norm. Rather, lawyers tend to estimate how much time they spent working on a client’s file at the end of the day (or worse, at the end of the week or month).²¹ Although it is possible that this tendency to approximate leads to underestimations of client bills, this appears unlikely in a culture where lawyers face billable hours targets, and the amount of time they bill is used as a measure of their legal ability.²² Furthermore, it is very easy to forget about or underestimate the time spent on coffee breaks, trips to the restroom, or personal phone calls. As Roy D Simon Jr explains, “If you know that you got to the office at 8:30 and didn’t leave until 7:30, that sounds like 11 hours. But that doesn’t account for chats in the hall, or

¹⁸ Ross, *supra* note 5 at 6.

¹⁹ Altman, *supra* note 6 at 207.

²⁰ Woolley, “Time for Change,” *supra* note 5 at 864.

²¹ Ross, *supra* note 5 at 63.

²² Woolley, “Time for Change,” *supra* note 5 at 866.

stopping to read a magazine on the reception table. Those five and 15 minutes add up.”²³ It is in this way that eleven hours are billed for eight hours’ work; at a few hundred dollars an hour, it does not take long before even an innocent miscalculation can be substantially detrimental to a client’s interests.

Bill “padding,” or inflating the number of hours recorded on a client file, is the most frequently discussed aspect of unethical billing. One survey in *The Honest Hour* reports that “at least five percent of all billable time is the result of padding.”²⁴ Although our respect for the profession often leads us to presume that the vast majority of lawyers bill their time ethically, the evidence demonstrates that dishonest billing is disconcertingly prevalent. For instance, in a survey of recent law school graduates working in large firms discussed by Dennis Curtis and Judith Resnik, almost half of the respondents reported inflating their hours, whether intentionally or accidentally.²⁵ The authors describe the means by which these lawyers “padded” their bills: some reported adjusting their hours upward when they fortuitously found information more quickly than they anticipated, thus charging a client for the time the work “should” have taken; some billed clients for time spent cleaning their office and arranging files; and others billed for time thinking about the client’s issues while driving to work or taking a shower.²⁶ In all these examples, the client is paying for time that was not spent moving her file forward.

Woolley makes a compelling argument that “over-working” files – while not obviously an issue of dishonesty – is, in fact, an ethical problem. When a lawyer completes excessive research on a file without assessing whether this work will truly benefit the client, she is privileging her interests above those of her client. Woolley notes that from the client’s point of view, there is little difference between paying for work that creates no benefit and paying for work that was never done at all; in either case, the client is paying something for nothing.²⁷ Ross notes that “the almost infinite amount of time that is expended upon research into even the most minute legal issues” likely stems from a genuine belief that the work serves the client’s best interest, even if that belief is merely a subconscious rationalization of the lawyer’s desire to increase a client’s bill.²⁸

²³ Quoted in Ross, *supra* note 5 at 62.

²⁴ *Ibid* at 29. Sixty per cent of in-house counsel and fifty per cent of private practitioners agreed with this statement when surveyed.

²⁵ Dennis Curtis and Judith Resnik, “Teaching Billing: Metrics of Value in Law Firms and Law Schools” (2002) 54 *Stan L Rev* 1409 at 1417.

²⁶ *Ibid* at 1417-18.

²⁷ Woolley, “Time for Change,” *supra* note 5 at 864, note 13.

²⁸ Ross, *supra* note 5 at 113.

Of course, to represent their clients effectively, lawyers often must pursue theories that may turn out to be dead ends. We must refrain from being overly critical of a lawyer's attempt to thoroughly investigate the potential contingencies her client may face. There is, however, a line to be drawn. Research into unlikely contingencies, research that is carried "well beyond the point of sharply diminishing returns," and research conducted inefficiently ought to be discouraged as being contrary to a client's interest.²⁹ Lawyers spinning their wheels and "leaving no book unturned"³⁰ where the benefit to the client is negligible are doing a disservice to the client and billing for work without value.

Finally, the use of time-based billing creates an ethical grey area with respect to what activities are properly construed as billable work. Clients and lawyers would likely disagree as to whether a lawyer's normal billing rate should be charged for travel time, clerical work done incidentally by the lawyer, getting up to speed on an inherited file, intra-office conferences, and social conversations with clients.³¹ Such situations find a lawyer prevented from using the time for alternative legal opportunities, but not actually doing legal work for a particular client. This article does not purport to define what is appropriately classified as billable, but it is worth noting that significant ambiguity exists on this front, and that ambiguity is frequently resolved in favour of the lawyer who sets the bill.

Regardless of whether lawyers act intentionally or subconsciously, through bill padding or inaccurate docketing, the billable hour system facilitates unethical behaviour by effectively authorizing lawyers to docket time that does not provide any value to the client's file or gain any ground towards the client's desired result. It is not fair to charge clients something for nothing.

2) *Promoting Inefficiency*

A time-based billing system is inherently counter-intuitive because the number of hours spent on a file is not a measure of productivity or value. In the billable hours system, clients pay for the amount of time spent on their file, regardless of whether that time was used effectively. The system fails to create incentives for lawyers to work efficiently to bring about client results – in fact, it creates the opposite incentive. Lawyers are, in

²⁹ *Ibid* at 114.

³⁰ *Ibid* at 113.

³¹ One study suggests that almost 90% of law partners bill for social conversations with clients, although over 90% of corporate executives expect not to be billed for such time; see Curtis and Resnik, *supra* note 25 at 1416.

effect, rewarded with greater compensation for taking longer than necessary on a client's matter.

Time-based billing hurts both clients and lawyers with its misaligned incentives. In one Harris poll, 68 per cent of lawyers surveyed stated that they would prefer to be compensated according to the quality of work and outcome of efforts rather than a billable hours basis.³² This should come as no surprise; efficient and hard-working lawyers do not receive appropriate credit for the value they provide clients under a time-based system. A lawyer who produces four hours of work for one client while on a four-hour train ride to a hearing in Ottawa for a second may not bill eight hours' work for this interval; she must bill a maximum of four, which was the actual amount of time elapsed. A lawyer who spends the train ride to the hearing watching movies, however, may also bill four hours.³³ There is thus little incentive for the lawyer to multi-task where appropriate, as her dockets – a primary measure of her value as a lawyer to her firm – will not reflect her efficiency and value. A typical competitive business environment ties pay to performance. Why should legal practice be any different?

Many other similarly inefficient practices are frequently reflected on clients' legal bills. Lawyers may engage in excessive discovery; fail to take advantage of a relevant work product produced for an earlier file; prepare long formal opinions where a short memo or phone call would do; and engage in excessive intra-office consultation. All these activities will increase a client's bill, but none will even marginally improve the quality of the work the client receives.³⁴ The hourly billing system, however, serves to encourage these practices.

³² Baird, *supra* note 6 at 199.

³³ In practice, there is a great deal of debate about the propriety of double-billing, and lawyers appear to exercise their personal judgment in deciding whether or not to do so. The "rule" that one must not double-bill is taught to students in law school and espoused by firms as they teach lawyers how to docket in practice – and one can see the obvious difficulty with charging a client for more than 24 hours of work in a day. However, while it is understood by many as an ethical *faux pas* to bill two clients for the same period of time, this is not stipulated in lawyers' rather open-ended rules of professional conduct; see Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2012) [*Rules of Professional Conduct*]. Ideally, within the billable hours model, the lawyer would spend the four-hour train ride preparing for the hearing in Ottawa and billing that client accordingly – but such a decision would result in the lawyer prioritizing her work on the basis of billing requirements rather than on need. The double-billing debate aside, this situation is quite plausible, and it illustrates the ambiguity relating to the appropriate classification of billable time, and the confusion and inefficiency that may arise as a result of the billable hour.

³⁴ Litan and Salop, *supra* note 4 at 192.

The billable hour does not just promote inefficiency with respect to time spent on a file, but also with respect to the technology used to complete legal work. Relatively recent developments in online research services and electronic document management create the capability for increased productivity. Because lawyers bill by the hour, however, they are effectively discouraged from taking advantage of such efficiencies. An online research service subscription, for instance, is a fixed cost greater than the cost of the books it replaces. This cost usually cannot be passed on to clients who refuse to pay for overhead, but using the service would dramatically reduce the amount of time needed to complete legal research.³⁵ In such a scenario, lawyers would be paying more to earn less. Unless their clients agree to higher hourly rates to compensate for the new technology, lawyers must face gradually declining revenues as a consequence of their increase in efficiency. Although common sense would suggest that lawyers providing better value to clients should realize greater revenues, billable hours create the opposite result.

3) *Lack of Predictability*

That most other professionals do not charge on such a basis should suggest to lawyers that the billable hours system may be flawed. When one goes to the dentist for a root canal, for instance, she can expect to pay the dentist the amount she anticipates from her earlier consultation, whether the procedure takes one hour or all day. Ronald Rotunda emphasizes the absurdity of paying for the time it takes to provide a service rather than a fixed price for the service itself by analogizing the billable hour to the cost of airline tickets. We would no doubt be frustrated if asked to pay *more* when a flight is delayed, particularly because the airline would have no incentive to provide its services efficiently when it collects more profit from using resources inefficiently.³⁶

The cost of providing legal services, particularly in a litigation setting, can no doubt be difficult to estimate. This does not mean, however, that clients must be faced with the significant uncertainty the billable hours system creates for them, and left with the unpleasant surprise of a bill that does not link their expenses to the value they received.

In order to promote positive and long-lasting relationships with clients, lawyers ought to provide some guidance as to the total a client might expect to pay for a particular legal matter. With a time-based billing

³⁵ Stephen W Jones and Melissa Beard Glover, "The Attack on Traditional Billing Practices" (1998) 20 U Ark Little Rock L Rev 293 at 296.

³⁶ Ronald D Rotunda, "Moving from Billable Hours to Fixed Fees: Task-Based Fees and Legal Ethics" (1999) 47 U Kan L Rev 819 at 838.

system, however, this is rarely the case. The system makes it difficult for clients to budget their legal expenses. The Chairman of the Board of IBM is reported to have lamented that IBM's general counsel was "the only department head to whom we've given an unlimited budget – and he's already exceeded it."³⁷ Clients, individual lawyers and firms, and the profession as a whole would benefit from a system that does not rely on time as a proxy for value.

4. Alternatives to the Hourly Rate

The flaws of hourly billing have been known for years now, and many firms have attempted to allay clients' concerns about billing; they have introduced alternative fee arrangements in an effort to reduce legal fees for clients on a budget. Very few of these alternative arrangements, however, have addressed the core problem of the billable hour: that clients' fees are based, quite simply, on time. Although alternative fee arrangements may answer a client's complaint that her bill is too high, they typically do not respond to the concerns that her lawyer is docketing in a questionably ethical manner, that her lawyer has no incentive to work efficiently, and that she does not have an accurate sense of what her bill will be once the matter is complete. So long as the billable hour serves as the basis of a fee arrangement, these concerns will not be addressed.

This part will discuss a variety of alternative fee arrangements, broken down into two categories: time-based and value-based arrangements.

1) Time-based

Some of the most popular alternative fee arrangements include volume rates, blended hourly rates, incentive billing, unbundled fees, and fee limits.

Firms frequently establish a volume discount for clients who provide a great deal of business. In this situation, the firm may agree to charge the client at hourly rates discounted by, for example, ten percent, in exchange for a certain volume of work or for exclusivity of representation.³⁸ This arrangement fails to address any of the core problems of the billable hour, as it remains premised on it.

Although a lawyer typically bills at a rate related to her experience, a firm offering a blended hourly rates arrangement averages the rates of all

³⁷ *Ibid* at 823.

³⁸ *Ibid* at 824.

members of the firm who will be working on a file. Regardless of whether a senior partner, associate, student, or paralegal completes the work, the firm charges the client one blended rate for all time spent on the file. This system allegedly encourages firms to staff files efficiently.³⁹ In practice, however, one wonders if this system actually encourages *inefficient* staffing. If a student or junior associate was billing at a rate higher than normal, would it not be in the best interest of the firm to use the file as a “learning experience” for the juniors, who will inevitably take longer than necessary to complete the task? After all, it would be an inefficient use of the partner’s time to be particularly involved in the file, as she will be billing at a rate lower than her usual level. It seems that such an alternative, although controlling the rate clients are charged, does little to address the problem of too many unnecessary hours being spent on a file.

Incentive billing is instituted where a firm charges a reduced hourly rate, but becomes entitled to a bonus for success in achieving particular objectives.⁴⁰ This arrangement better aligns lawyers’ interests with those of their clients with regard to the result, and provides the firm with a financial stake in the outcome of a case.⁴¹ It is hard to see, however, how this arrangement addresses any of the problems with the typical system of hourly billing. It is *always* in a lawyer’s interest to provide her client with a positive outcome, as the lawyer will hope the client will return with further business or refer her colleagues and friends. Although this arrangement may be desirable for clients in that it reduces a client’s bill if she does not achieve her desired outcome, it fails to encourage lawyers to work efficiently, to offer the client predictability, or to address the ethical concerns with docketing. Moreover, the added financial incentive for a positive outcome may exacerbate problems of “over-working” files, serving to further inflate a client’s bill.

A law firm may also offer “unbundled” fees to clients, meaning that the clients have the option either to hire other parties to perform some of their law-related work, such as document organization, duplication, and messenger services, or to do the work themselves. This option is appealing to large corporate clients who already have in-house services that perform these services for their business quite cheaply.⁴² Unbundling, however, is merely a cost-cutting measure – although it reduces some of the work that is subject to billable rates, it does nothing to address the billable hour’s core problems.

³⁹ Baird, *supra* note 6 at 200.

⁴⁰ Rotunda, *supra* note 36 at 824.

⁴¹ Baird, *supra* note 6 at 200.

⁴² Rotunda, *supra* note 36 at 824.

A fee limit arrangement is premised on hourly rates, but comes the closest of the time-based alternatives to solving the problems of the billable hour. In this arrangement, the firm and client negotiate a maximum fee that the client's legal services will cost, based on the lawyer's reasonable estimate of the time the legal work will take if she is working to provide good value to the client. The work is then billed on a standard hourly basis, subject to the agreed-upon cap.⁴³ If the lawyer's docket amount to less than the limit, the matter is charged on a simple hourly basis; if it exceeds the cap, the lawyer must bear the loss (unless the lawyer has arranged for an option to re-negotiate the cap, contingent on client review and approval).

A fee limit arrangement thus addresses the uncertainty problem – a client leaves the engagement meeting with a strong sense of how much to budget for that matter's legal expenses. Such an arrangement also addresses the efficiency problem, at least in part; although the client bears the risk of inefficient work in a standard hourly fee arrangement (in that she has to pay the costs of inefficient work), the lawyer must assume this risk in an arrangement with a fee limit.⁴⁴ In such a scenario, however, the lawyer fails to reap the benefits if she works in a particularly efficient manner; in such a case, she will receive remuneration simply for the time the task took. The lawyer thus has an incentive to rack up the client's bill to the agreed upon maximum. So long as billing is based on time, the three core problems with the billable hour cannot be fully addressed.

2) *Value-based*⁴⁵

Fixed fees go one step further than fee limits. Rather than functioning as a cap on a lawyer's typical hourly bill, a fixed fee arrangement specifies the bill for the client's legal task at the outset of the arrangement. Like a fee

⁴³ *Ibid.*

⁴⁴ Kritzer, *supra* note 6 at 190.

⁴⁵ This article will not address contingency fees, through which the lawyer typically receives a percentage of the award won by a plaintiff. Although they are undoubtedly value-based, contingency fees tend to be suited to limited types of legal matters (typically plaintiffs' personal injury cases or class actions), and there is a perception that they encourage lawyers to pursue premature settlements in order to secure their fee for a limited amount of work. Although "reverse contingency fees," where defendants pay their lawyers a percentage fee based upon the amount of money the lawyer is deemed to have saved the client, have been implemented in some cases, they are relatively untested, and create additional difficulties with respect to determining the purported value of the file; see Donald C Massey and Christopher A D'Amour, "The Ethical Considerations of Alternative Fee Billing" (2001) 28 *SUL Rev* 111 at 119-20. In any event, because their use is limited to few areas of legal practice, contingency fees are beyond the scope of this article.

limit, a fixed fee may be negotiated between the client and lawyer or law firm, and will be premised on a reasonable estimate of the time a lawyer will take to complete the legal work and the value of the work to the client.⁴⁶ It remains prudent for the lawyer to keep track of her time, but the client's bill is fixed from the outset; whether the lawyer's docketed time at her hourly rate falls above or below the fixed fee is of no consequence to the client's final bill.

Fixed fees not only solve the problem of uncertainty for clients, but also provide strong incentives for lawyers to get organized, set priorities, and work efficiently to serve the client's interests.⁴⁷ Although lawyers must bear the risk of inefficient work, they may also realize the rewards of efficient work; if a task is completed in less time than anticipated, the law firm keeps any profits.⁴⁸ As fixed fees remedy the misaligned incentives of the billable hour, the risk of the ethical problems mentioned in Part 3A is eliminated, at least with respect to the lawyer-client relationship.⁴⁹

Finally, fixed fees allow clients more easily to compare legal costs for a matter with different firms, and may have the added benefit of allowing clients to put legal work out for bid and use the competitive pressures of the market to reduce their legal fees. Bidding arrangements for hourly fees within the current system have little value, as the dominant factor in determining a bill is the number of hours worked, rather than the hourly rate at which that work is billed.⁵⁰

This article does not propose that firms revert to the old retrospective billing model, but rather that they use the lessons learned from their experiences with hourly billing to build a model that responds to the realities of the current legal marketplace. Although fixed fees "for services rendered" were replaced fifty years ago, largely due to their subjectivity and failure to account for costs, law firms' experience with hourly billing will likely ensure these problems will not arise again. First, as we will discuss in Part 6A, fixed fees implemented in today's legal market would have a wealth of data and research as their basis; although they may not be

⁴⁶ *Ibid* at 118.

⁴⁷ Litan and Salop, *supra* note 4 at 194.

⁴⁸ Rotunda, *supra* note 36 at 827.

⁴⁹ Assuming that lawyers continue to track their time for internal firm purposes in such a scenario, there remains the possibility that associates will continue to docket for time not actually spent advancing a client's file. Under a fixed fee system, however, this problem would only affect the relationship between employee and employer, and not the relationship between lawyers and their clients or lawyers and the public. This article will proceed to discuss the potential ethical complications with the fixed fee in Part 5(1).

⁵⁰ Litan and Salop, *supra* note 4 at 194.

based on a seemingly objective unit of measure (time), they could hardly be called subjective. Moreover, fixed fees would be negotiated with the client prior to the retainer, ensuring that any subjectivity is agreed upon by the parties, rather than unilaterally imposed, as was the case previously. Finally, the issue of internal firm cost accounting can also be resolved with advance planning; as we will discuss in Part 5(2) fixed fee retainers would be based on budgets, and firms may still use time as an accounting tool if desired to assess their costs and profits.

3) *More Regulation*

Woolley suggests that the best way to address the problems brought about by the billable hour is for law societies to impose strict disclosure obligations.⁵¹ She argues that before representation, clients should be advised about the basis on which the bill will be calculated, including specifically which tasks will and will not give rise to billable hours. She also argues that lawyers should be required to provide estimates of the likely costs, a list of circumstances that will lead to the estimate being revised, and a written amendment to the estimate if a change is required. Finally, after the work is completed, Woolley argues that lawyers should provide a detailed accounting of the hours worked and billed and what was done in those hours.⁵²

Woolley's suggestions would certainly address some of the problems created by the billable hour. Specifically, she provides for predictability in client bills and a deterrent for "over-working" files or billing for tasks that are not properly classified as billable work. Her argument for increased professional regulation does not, however, modify the backwards incentives created by the billable hour. Woolley's suggestion remains premised on the time-based billing status quo, where inefficiency with both time and technology is promoted.

Moreover, to implement the additional professional regulation Woolley suggests would require of lawyers and law firms a great deal of additional work. Such work may be a worthy investment to remedy the problems created by the billable hour, but lawyers' efforts would be better placed in a strategy that addresses *all* the core problems of hourly billing.

5. *Potential Problems with Value-based Fee Arrangements*

This article has thus far argued that fixed fees, an alternative fee arrangement based on value rather than time, are preferable to billable

⁵¹ Woolley, "Evaluating Value," *supra* note 9 at 354.

⁵² *Ibid.*

hours as the basis for charging clients for legal services. No fee arrangement, however, is without its flaws; billing inherently creates tension between a lawyer's interest to earn more and a client's interest to pay less. Our profession would be well served to acknowledge this tension and analyze how different billing options achieve our goals of ethical behaviour, efficiency, and client service, and reduce incentives for billing abuse.

We will proceed to examine three primary concerns with implementing fixed fees. First, are there any ethical issues that will plague this alternative arrangement? Second, what should the parties do about fee payment when the lawyer-client relationship must be terminated before a legal matter is complete? Third, how will lawyers address the challenge of estimating fixed fees?

1) Ethical Issues with Fixed Fees

The starting point for considering any ethical concern in practice is law societies' rules of professional conduct. In Ontario, the *Rules of Professional Conduct* state that a lawyer's fees shall be "fair and reasonable and ... disclosed in a timely fashion."⁵³ The commentary connected with this rule suggests that a fair and reasonable fee depends on a number of factors, including (a) the time and effort required and spent; (b) the difficulty and importance of the matter; (c) whether special skill is required and provided; (d) the value of the subject matter; and (e) the results obtained.⁵⁴ In short, the *Rules of Professional Conduct* do not prescribe any manner of fee determination, but are no doubt permissive of fixed fee billing.⁵⁵

Various commentators have noted a few ethical concerns with fixed fee billing. First and foremost, it has been argued that fixed fees create a conflict of interest in that lawyers may neglect to spend the time and incur the expenses necessary to achieve the client's desired result.⁵⁶ In other words, some believe that the intrinsic incentives for efficiency in the fixed fee method will push lawyers too far – they will be *so* efficient that they will skip steps and fail to do quality work for the client. If this concern

⁵³ *Rules of Professional Conduct*, *supra* note 33, r 2.08(1) at 44.

⁵⁴ *Ibid* at 44.

⁵⁵ In fact, one could argue that the factors stipulated would favour fixed fee billing, as such a system better incorporates the numerous factors than a billable hour system, which focuses primarily on just one: the time and effort spent.

⁵⁶ Rotunda, *supra* note 37 at 835. See also Litan and Salop, *supra* note 4 at 194; and Jesse A Nelman, "A Little Trust Can Go a Long Way toward Saving the Billable Hour" (2010) 23 *Geo J Legal Ethics* 717 at 723.

came to fruition, the fixed fee would create a problem converse to the ethical issues of the billable hour: lawyers would “under-work”, rather than “over-work” files in order to increase profit margins.

With a fundamental tension between the interests of lawyers and clients, ethical temptations are unfortunately inevitable when it comes to billing. Numerous safeguards are in place in our profession, however, which would, one hopes, reduce the likelihood that this aspect of the fixed fee would induce lawyers to compromise the quality of their work.

Lawyers generally desire repeat business and referrals from their clients, and are always cognizant of their professional reputation and that of their firm. In order to remain competitive and earn a living, a lawyer must do quality work that keeps clients from taking their business elsewhere. Moreover, rules of professional conduct dictate that lawyers must work in their clients’ best interests, and may be disciplined for misconduct if they fail to do so. Finally, as a further deterrent from skipping steps in the interests of efficiency, professional negligence actions enable clients to seek redress if their lawyers fail to adequately represent them. These safeguards do not appear to be entirely successful at preventing billing abuse under the billable hours system, but are likely well-suited to prevent lawyers from neglecting their duty to do quality work for their clients under a fixed-fee regime that encourages efficiency.⁵⁷

Others worry that fixed fee billing creates the opportunity for lawyers to misrepresent the value of legal work; as lawyers will be offering subjective estimates of the amount of work required, they may be tempted to overstate how much a task should cost, leaving clients vulnerable to billing abuse.⁵⁸ This may be cause for concern, and in many ways reflects the problems with bill padding – lawyers may be tempted to overstate how much their hard work “should” cost. As with concerns of “underworking” files, however, various considerations can reduce the incentives for lawyers to act unethically.

First, as stated above, ethical rules require lawyers to charge “fair and reasonable” fees, and lawyers may be disciplined if they are dishonest and fail to do so. More practically, perhaps, the determination of a fixed fee is

⁵⁷ See e.g. Woolley, “Time for Change,” *supra* note 5; Ross, *supra* note 5; Curtis and Resnik, *supra* note 25. The problem with the billable hour is not the work product, but rather the fee charged for that work product. Professional responsibility rules say very little, and negligence actions can do little, about charging too much for good work. These tools can, however, be used to intervene when a work product is inadequate, and they thus serve as a disincentive to “under-working” files.

⁵⁸ Nelman, *supra* note 56 at 723-24.

subject to negotiation between lawyer and client. It is the client's prerogative to discuss the factors determining a fixed fee with her lawyer, and to shop around with different firms to determine an appropriate rate. The market can serve as a guide to help clients understand appropriate rates for their legal services. Where hourly rates provide little guidance to clients with respect to the value of work and the total cost they may anticipate, fixed fees aim to provide greater accountability.

2) *Terminating the Lawyer-Client Relationship*

Lawyers may be concerned with how fixed fees should be apportioned in the event that the lawyer-client relationship is terminated during the course of the engagement.⁵⁹ It is not entirely clear whether the client or lawyer is entitled to the fee.⁶⁰ Although described in an American context, Tyler Moore discusses this issue in his article "Flat Fee Fundamentals."⁶¹ He suggests that fixed fees can be thought of as "advance payment retainers," and that as such they must be subject to a refund (as there is no such thing as a nonrefundable retainer within the ethical rules of most jurisdictions).⁶² This view is supported by the decision of the District of Columbia Court of Appeals in *In re Mance*, which states that a fixed fee remains the property of a client upon payment, because "an attorney earns fees only by... performing a legal service for the client."⁶³ Consequently, a lawyer must place the fee in a trust account upon payment, and must refund all unearned portions of the fee in the event that the lawyer-client relationship is terminated.⁶⁴

Although this may appear to be a deterrent to introducing fixed fees, it is not insurmountable. Lawyers can address this issue by dividing the work into stages, and agreeing with the client upon milestones at which each stage will be deemed complete, and a specific portion of the fixed fee earned. In a commercial litigation file, for instance, a matter may be divided into four categories: (1) work up to and including the pleadings; (2) examination for discovery; (3) pre-trial stage; (4) trial stage.⁶⁵ Each stage could be further divided into sub-categories, with portions of the

⁵⁹ Although the *Rules of Professional Conduct* limit the circumstances in which a lawyer may withdraw from representing a client, a client may terminate the lawyer-client relationship at will; see *Rules of Professional Conduct*, *supra* note 33 at 47.

⁶⁰ Barker, *supra* note 6 at 202.

⁶¹ Tyler Moore, "Flat Fee Fundamentals: An Introduction to the Ethical Issues Surrounding the Flat Fee After *In re Mance*" (2010) 23 *Geo J Legal Ethics* 701 at 703.

⁶² *Ibid* at 703-704.

⁶³ *In re Mance*, 980 A 2d 1196 (DC 2009) at 1202.

⁶⁴ Moore, *supra* note 61 at 707.

⁶⁵ Organizing a matter into stages is also likely to be a useful strategy when it comes to estimating a fee; see below, Part 5.

fixed fee allotted into each.⁶⁶ In the event that the lawyer-client relationship is terminated, the lawyer may keep the portions of the fee earned for the stages that have been completed, and refund those portions assigned to work that has not yet been completed.

In re Mance also suggests that, upon client consent, a fixed fee may be deemed to be property of the lawyer upon receipt.⁶⁷ It is not clear whether a court would come to the same conclusion upon a conflict over fixed fee refunds in Canada, and this may be an issue appropriately subject to professional regulation to ensure the approach to such conflicts is fair to both clients and lawyers. Although it is an issue that practitioners considering implementing fixed fees ought to consider, the potential for conflicts over the ownership of fixed fees upon termination of a lawyer-client relationship need not impede lawyers considering implementing fixed fees in their practice.

3) *Estimating an Appropriate Fee*

The greatest challenge facing lawyers considering implementing fixed fees is likely the ability to estimate an appropriate fee for the legal services a client requires.⁶⁸ Although this may not pose a serious problem for apparently routine transactions, some legal problems simply do not lend themselves to an early assessment of scope and complexity.⁶⁹

Although many lawyers are likely to assert that their work is unique and therefore cannot be billed on a fixed fee basis, one study suggests that this is largely not the case. William Cobb suggests that legal work can be placed on a “value curve” based on the uniqueness of the work and the relative value of the work to the client. In Cobb’s assessment, eighty per

⁶⁶ A comprehensive discussion of legal project management is beyond the scope of this paper. It is worth noting, however, that this emerging field – which requires lawyers and their businesses to plan for the competing constraints of costs, time, and scope of a project; identify efficiencies; and implement technology and processes to create a systematic and more predictable approach to solving legal problems – is an excellent planning strategy for and companion to fixed-fee billing. For more information on legal project management, see Barbara J Boake and Rick A Kathuria, *Project Management for Lawyers* (London: Ark Group Inc, 2011).

⁶⁷ *In re Mance*, *supra* note 63 at 1206-1207.

⁶⁸ It should be noted that some jurisdictions *require* fee estimates in their rules of professional conduct, although it does not appear this is actually done consistently, as a practical matter. See e.g. Ontario’s *Rules of Professional Conduct*, *supra* note 33 at 45: “Where possible to do so, a lawyer should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision.”

⁶⁹ Jones and Glover, *supra* note 35 at 306.

cent of legal work is fairly routine and can be performed by any of the many lawyers competing in that market.⁷⁰ Such work lends itself well to fixed-fee billing, as firms can use their extensive experience to estimate with relatively little difficulty.⁷¹

But what about the remaining legal work, that is truly too complex in scope to determine price estimates at the outset? This concern may be answered in a few ways. First, as discussed above, in the event of complex litigation, for instance, dividing work into stages and other project management strategies may greatly assist with estimation. As one never knows when a lawsuit will settle, breaking a legal task down into its component parts may be necessary to properly assess appropriate fee payments. Moreover, lawyers may build assumptions into their fixed fee agreements, and leave room to adjust should those assumptions prove to be false.⁷²

Second, lawyers should acknowledge that perfect estimations will not be the consistent reality. On some occasions, lawyers will find that they spend more time and resources on a matter than planned, and they may earn less profit than anticipated.⁷³ These deviations, however, are likely to be offset by other matters that are completed in less time and using fewer resources than expected.⁷⁴ With a diverse portfolio of cases, law firms are generally very efficient at spreading risk – much more so than clients, who assume the risk of inefficiencies and unanticipated contingencies under the billable hours system. Any losses in one case are likely to be balanced out by the gains in another.⁷⁵

Finally, it must be conceded that some particularly complex “bet the company” work may simply be unsuitable for fixed fees due to the

⁷⁰ William C Cobb, “The Value Curve and the Folly of Billing-Rate Pricing” in Reed, *supra* note 6, 17 at 17-22; see also Davis, *supra* note 10.

⁷¹ In Part 6(1), I will discuss various sources of data firms may use to supplement their personal experience to create reliable estimates.

⁷² For instance, they may set a fee for the examination for discovery stage of litigation on the assumption that it will take no more than one day per side to complete. If unforeseen circumstances cause discovery to take much longer, the client and lawyer may negotiate how to adjust the fee accordingly. Alternatively, the parties may agree upon contingencies in the fee agreement by setting additional fees to be paid for each additional half-day of discovery required. Such an arrangement could also work in the client’s favour by perhaps including a fee discount if an event takes less time than anticipated.

⁷³ This already occurs with the billable hour system, when firms choose to “write off” some of their time because of internal inefficiencies.

⁷⁴ Litan and Salop, *supra* note 4 at 195.

⁷⁵ Rotunda, *supra* note 36 at 838.

estimation problem.⁷⁶ Price is usually not a concern for such work, as clients typically will fight for their desired result at any cost. Hourly billing may be the most appropriate for such a case, or where it is exceedingly difficult to estimate the work required in the early stages of a matter. No billing system can perfectly suit every situation.

6. Moving Forward

If a lawyer or law firm wishes to implement a value-based, fixed-fee billing system, they must first consider a few practical issues. We will proceed to discuss how a law firm may obtain data as a basis for assessing fixed fees, and how a lawyer may engage in negotiating a fixed fee arrangement with her client.

1) The Data

Although determining a fixed fee for legal work is no doubt more challenging than simply charging time at an hourly rate, the data is out there to serve as a basis for reasonable and fair estimation in most cases. As mentioned in Part 2, law firms have been tracking their time for decades. Lawyers' dockets can no doubt provide a reliable and plentiful source of information with respect to how long specific legal tasks generally take. Large firms in particular have a wealth of information at their fingertips (or in their accounting departments); the data can be broken down on the basis of the type of task, the complexity of the task, the experience level of the lawyer who completed the task, and so on.

Such a strategy may occasion the risk of perpetuating the problems of the billable hour in a different forum. If a firm's dockets reflect the ethical concerns with hourly billing (such as bill padding and over-working), firms may end up effectively continuing to charge clients on the basis of inefficient work. This concern might be addressed by "neutralizing" the data by consulting two other sources. First, dockets may be cross-referenced with client bills, also on record within the firm, to determine whether the firm "wrote off" some of the time when billing the client. This would indicate that some inefficiency took place, and the amount deemed appropriate for that particular task could be adjusted accordingly. More importantly, perhaps, court judgments on costs awards could be consulted. Such decisions are made by a neutral arbiter and should speak to an appropriate evaluation of the costs of a matter.

⁷⁶ Cobb identifies such high stakes work as comprising about 4% of total available legal work; see Cobb, *supra* note 70, and Davis, *supra* note 10.

With such an abundance of data to assess, firms may need to hire an outside consultant to crunch the numbers. This would no doubt constitute an upfront overhead expense that may deter some firms from deviating from the status quo, but such an investment would likely be fruitful in the long run; a firm could earn a significant competitive advantage as a result of converting to a more client-friendly billing system.

2) *The Process*

When entering into a fixed-fee billing arrangement, lawyers and clients need to be clear and open with each other with respect to expectations. In her article “A Client’s Experience with Implementing Value Billing,”⁷⁷ Zoë Baird discusses the crucial elements of the engagement conversation, from her experience as a general counsel seeking legal work on a value basis. First, lawyers must work with the client to identify the desired outcome of the legal work, and the stages and goals along the way.⁷⁸ Additionally, the lawyer should strive to identify any ancillary issues that may arise in the course of achieving these goals.

If the client works as in-house counsel to a corporate client, it may be appropriate to allocate the roles of inside and outside counsel for this project.⁷⁹ Opportunities for “unbundling” legal fees⁸⁰ may arise as well, and the parties should clearly communicate expectations and responsibilities.

Parties should create an engagement agreement defining the scope of the legal matter, the general strategy the lawyer will pursue, and the necessary resources. As explained above, lawyers should state assumptions with regard to general practice and perceived likelihoods, and provide for flexibility to renegotiate terms if the assumptions prove untrue. As contingencies may occur that skew the fee in either direction, trust and communication in the lawyer-client relationship are essential.

It would, of course, not be prudent for a firm to convert all its billings to fixed fees at once. Firms may continue to collect data as they phase in fixed fees; they can learn from any misplaced estimates and adjust along the way.

⁷⁷ Baird, *supra* note 6 at 198.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ See Part 4(1), above.

7. Conclusion

Hourly billing was implemented to eliminate the opacity of retrospective billing; it is apparently objective and informs the client of the basis upon which the bill is calculated.⁸¹ Over time, however, it has become clear that the billable hour introduced its own set of problems. Time-based billing creates an environment where questionably ethical behaviour is tacitly encouraged; it rewards inefficient uses of time and technology, while penalizing those who work in a particularly efficient manner; and it fails to offer predictability or certainty to clients with respect to their final bills.

Although firms have embarked upon introducing alternative fee arrangements in recent years, many of the alternatives remain time-based, and merely cover up the problems of the billable hour by offering clients slightly lower rates. The only way to truly solve the systemic problems the billable hour has introduced to our profession is to replace it, where possible, with a value-based billing alternative.

Fixed fee billing involves establishing a set fee for a client's legal work, premised on a reasonable estimate of the time that work will take to complete and the value the work will provide for the client. It not only remedies the issue of uncertainty for clients, but also provides incentives for lawyers to work in an efficient and ethical manner.

Fixed fees are, of course, not a perfect solution – some ethical temptations remain, and lawyers choosing to implement such a system will inevitably face challenges with estimating appropriate fees as they embark on the transition. However, various safeguards are in place in the profession to reduce the incentives for billing abuse in a fixed-fee system, and extensive data is available to assist law firms with fee estimation.

One billing method will never perfectly suit the diverse needs of clients and lawyers – in this manner, fixed fees are no different from the billable hour. Although an appropriate fit for a significant majority of legal work, some files may prove to be too complex to fit in a fixed fee arrangement. The legal market is changing, however, and clients are beginning to insist on billing methods that incorporate the same market factors they must consider in operating their businesses.⁸² Lawyers should heed this call, and strive to incorporate client-friendly billing practices that eliminate the uncertainty and inefficiencies of the past. Fixed fees can help

⁸¹ Woolley, "Evaluating Value," *supra* note 9 at 356.

⁸² Jones and Glover, *supra* note 35 at 311.

the legal profession improve its relationship with the public, and finally provide clients with at least some of the accountability they've been looking for.