



## Ban the Billable Hour: Alternate Fee Arrangements in Business Disputes

By Jesse Gessin

Oliver Wendell Holmes, Jr. once quipped, “Lawyers spend a great deal of their time shoveling smoke.” This is especially true in business litigation, where letter writing campaigns turn into epic battles of sound and fury, and discovery becomes divorced from what is necessary for the case. These inefficiencies are pervasive because clients have historically paid for them. It is high time to turn off the smoke machine of business litigation, the billable hour.

People pay to receive results. A mechanic’s client expects his brakes to stop squeaking. A restaurant patron expects her steak to be medium-rare. A concert attendee expects to be entertained. With these services and products, the downside of unmet expectations is negligible. Customers can ask for their money back, exchange the item, or do nothing and temporarily experience disappointment.

But the cost of unmet expectations in litigation is difficult to swallow. So stop shouldering the entire risk. Stop agreeing to pay by the pure billable hour. That arrangement insulates lawyers – not the client – from a negative outcome and incentivizes needless litigation exercises.

When lawyers also shoulder some of the risks, clients no longer pay for shoveling smoke. Alternate fee arrangements (“AFA”) are defined in this article as fee structures besides the pure billable hour. These AFAs force outside counsel to take on the risk of litigation and to “walk a mile” in their clients’ shoes. Making your lawyers put skin in the game changes the dynamic for both the attorney and the client.

This article examines a few potential AFAs for business disputes.

### Contingency and Reverse Contingency Fees

The most commonly known alternate fee structure is the contingency fee or partial contingency fee. This is when the attorney receives a fixed or scaled percentage of any monetary recovery. While contingency fees are common to the plaintiffs’ bar, reverse contingency fees are gaining traction with the defense side. This is when the winning attorneys receive a fixed amount they “saved” the client. The key to a reverse contingency fee is correctly valuing the case. Experienced trial attorneys, with the assistance of a valuation expert, will have insight into damages likely to be awarded by a jury. A reverse contingency fee AFA only works if a matter is properly valued.

The benefit of contingency and reverse contingency fees are that the attorney has a stake in the outcome. The downside to contingency and reverse contingency agreements is that companies rarely see cases through to their conclusion, may switch counsel, or may settle for something other than money or for an amount far less than outside counsel thinks is wise. For these reasons, outside counsel may have trepidations about a “pure” contingency in business litigation.

### Hybrid Fees

“Hybrid” means a combination of reduced hourly rate fees plus a percentage of the client’s recovery or money saved. There are many benefits to a hybrid arrangement. The commonality of all contingency fees is that the attorney is sharing in the risk and therefore has a reason to win the case. The reduced hourly rate reduces the client’s cash outflow while allowing attorneys to fund their day-to-day operations. The hybrid keeps the cost of litigation down, which gives the lawsuit staying power and in turn increases the potential recovery.

### Flat Fees with a Success Bonus

A “fixed” or flat fee sets legal fees for each stage of the proceedings, such as summary judgment, settlement or trial. The downside to flat fees is the risk that litigation counsel may be forced by circumstances (an out-of-control opposing

counsel, the need for more intense motion practice than was anticipated) to work many more hours than what was built into the fee. Outside counsel might then be disincentivized to work the case as hard as possible. But adding a success fee tied to outcomes, such as settlement or trial verdict in a certain amount, or a “clean sweep” defense verdict, will keep litigation counsel’s interests aligned with those of the client.

### An Example: PetNation v. Pickles’ Pet Supply et al.

From the outset, companies must decide on an end goal for any litigation. Common goals include monetary damages, injunctive relief, a complete defense verdict, or mitigation of damages. After that, companies should think about what it will take to achieve that goal through discovery. This includes the breadth and scope of documents and witnesses needed to prove or defend the case, and the information, documents, and witnesses the opposing side will need and likely seek. Honesty is important here.

Imagine an antitrust case where the market is dominated by three pet food suppliers: Pickles’ Pet Supply, Pepper’s Puppy Chow and Vienna’s Dog Food. All three pet food suppliers lower their prices on lamb-flavored dog food in tandem during a year. PetNation, the largest pet store in the nation, files a lawsuit to stop the anti-competitive behavior because the conduct is negatively affecting sales of its white label lamb flavored dog food. Here, although a consulting valuation expert places damages at \$5 million, recouping monetary damages is not the primary goal.

The value is not large enough to justify hiring PetNation’s normal outside counsel, Big Bigger & Biggest Law. So PetNation looks for a boutique law firm that will agree to an AFA. Sarah Smith is interested in taking the case. PetNation proposes a flat fee of \$500,000 with a success bonus of \$500,000 for any recovery of \$5 million or over. There is no success bonus for a recovery of less than \$5 million. Sarah is concerned that the case will be time intensive and that \$500,000 is not enough. Sarah proposes a hybrid arrangement that reduces her hourly rate from \$550 to \$350 with a contingency fee of 20 percent. This AFA is attractive to PetNation, as they normally pay \$750 per hour for counsel at Big Bigger and Biggest Law. PetNation also likes that Sarah will be motivated to be aggressive so she can recover her contingent fee.

### Conclusion

Outside counsel with “skin in the game” are less likely to blow smoke. AFAs go a long way toward clearing the air, preserving your cash flow during litigation, and incentivizing outside counsel to maximize recovery for your case.

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