

Ep #41: How to Transition From Hourly Billing To Flat Fees, One Phase at a Time



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John E. Grant

[The Agile Attorney](#) with John E. Grant

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For well over a decade now, the legal industry has been talking about moving away from hourly billing. But the latest Clio legal trends report not only shows how technology is really accelerating efficiency and legal practices, it cautions that attorneys who stick with the hourly billing model are facing very real risks to their revenue.

In today's episode, I'm sharing strategies to help those of you who are billing hourly, adjust your existing workflows and practices in ways that will give you the information and insight you need to know what parts of your practice you can switch to flat fees and maintain or likely increase your profitability. And if you're already using flat fees, these strategies will help you refine your approach and boost your bottom line. Ready to become a more agile attorney? Let's go.

Welcome to *The Agile Attorney* podcast powered by Agile Attorney Consulting. I'm John Grant and I've spent the last decade helping lawyers and legal teams harness the tools of modern entrepreneurship to build practices that are profitable, scalable, and sustainable for themselves and their communities. Each episode I offer principles, practices, and other ideas to help legal professionals of all kinds be more agile in your legal practice.

Hey, everyone, welcome back to the podcast. So, I'm going to continue this week discussing some of my thoughts and impressions coming out of the Clio Cloud Conference, which was held in Austin, Texas at the beginning of October. And specifically, today I'm going to dive a little bit into some of the findings of the Clio legal trends report. And I won't dive too, too deep into the data because I want to make it actionable for you.

But one of the things that really since Clio first published its legal trends report back in 2016, that has been sort of a headline number, is how few hours the typical lawyer is actually working on billable work relative to their sort of total time in the day. And I don't have in front of me, but as I recall

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back in 2018 that number was something on the order of 2.5 to 2.7 hours a day that were billable relative to what lawyers were working overall. And one of the implications early on was that by using Clio, lawyers would be able to increase the number of hours that they were billing a day.

And it sort of turned into this funny, almost dirty little secret for a number of years where every year Clio would release the report, there would be that headline number. And that billable hours number wasn't really budging, it's fluctuating somewhere between 2.5 and 3 hours. And in the most recent one, the 2024 report, that number is up to 2.9 hours a day, which is better. It's not nothing. But it is interesting that overall, the number of billable hours that a lawyer is working on average is remaining pretty static.

And I think there's some interesting reasons for that, that maybe Clio isn't fully picking up on in their report. And specifically in the 2024 report, there's another data point that shows that the average Clio user is actually handling about 20% more matters per year in 2024 than they were when the report first started getting published back in 2016. And that on the one hand is a pretty good success. And I think again, the implication is that by using Clio Grow, Clio Manage, using the systems, that firms are able to actually bring more work into their practice.

However, if you've been listening to me for any length of time, you'll know that more work is a double edged sword. We have this problem of utilization rate where the more highly utilized a resource is, the slower that resource becomes at delivering any one unit of work on average. That is a relationship known as Little's Law. And the problem is, is that if more work is coming in to law firms that are using Clio and maybe law firms not using Clio. Obviously the Clio report is largely made-up of anonymized data from Clio users.

But if Clio is bringing in that much more work, it might actually be a success for Clio that the number of billable hours has gone up. Because if the total

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amount of WIP in the system is higher, there's going to be all this other little administrative cost associated with managing more cases or more matters. And a lot of that cost isn't billable. It's the meetings. It's the openings and the closings of the files. It's the little check-ins on client homework or other stages that just add up to a fair amount of non-billable time.

And it probably is true that Clio is helping firms be more productive, but it's not quite keeping up with the added needs or the added administrative cost of that excess demand. And in another way, it's a pretty good illustration of something that I've said, I think multiple times in this podcast and elsewhere. Which is, if intake isn't your bottleneck, meaning if you are focusing on getting the work pipeline and trying to push work into your system. That your system doesn't actually have capacity to do.

Your system is already running at full capacity or close to full capacity, but it doesn't matter how many more cases you have. You're not going to make any more money because you only have so much time in a day to do that billable work. And all of the little overhead costs of that new work are actually going to add up and threaten to make things worse.

Almost inevitably in my work with my law firm clients, once we've made the work visible, put it on a Kanban board, start to orient our systems and our people to the flow of work as opposed to just the processing of tasks. Then one of the things that becomes obvious to the law firm owner is that they probably need to slow down their intake or even pause it entirely in order to allow, they're delivering the work system, they're doing the work pipeline to catch up. To actually get some work out the door and generate that capacity associated with getting work done.

And then they can better balance their intake system with their delivery system so that they're pulling work into their delivery system as opposed to having their sales and marketing pushing work in and therefore causing problems. And I'll say it again, just to be crystal clear, if your bottleneck is in

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your delivery system, you don't want to optimize or improve the flow of work anything upstream of where your bottleneck is. Because you're just going to put more pressure on the bottleneck, and that's actually going to make the flow of work worse, not better.

You don't make a traffic jam on the freeway better by pushing on the last car. You have to pull from the front, from the right side, not push from the left. Alright, so that's that piece of the legal trends report.

Another piece, and this was actually a really major focus of the entire conference is this idea that with the rise of generative AI. There are now more and more tasks or work items inside of a law practice that are at least potentially automatable. And you'll notice you haven't heard me talk about AI a lot on this podcast. And I do think AI is cool. I'm using AI. But I also take a little bit more reserved view in that AI is just another technology tool. It might be a really good technology tool, but it's just another tool that is meant to help us with productivity.

And it's going to be a while before it gets to the level of quality and before I think we understand how to use it well, etc. That said, the story of technology tools being able to automate certain tasks that were otherwise done by humans is nothing new. It just is sort of new in this white collar, knowledge work world that we live in as lawyers and I think we need to pay attention to it.

And the data point that Clio is using is that by reviewing a bunch of things and I won't go deep, but it looked at different task categories. It compared those task categories with some other research from third parties around what are the capabilities of AI relative to certain tasks. And it found that 74% of the tasks done by law firm professionals, and that includes lawyers, paralegals and administrative team members.

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And so, Clio is saying and they've got the data to back it up, that 74% of law firm tasks are automatable or potentially automatable using generative AI or other technology tools. And the implication of that is especially if you are an hourly biller, that's actually a very real revenue risk. And Clio has gone so far as to put a number on that revenue risk. And the number that they talked about at the conference and in the report is that just based on current capabilities, AI automation could reduce the hourly billing per lawyer by about \$27,000 a year, and that's real money.

And that's just the lawyer side. That's not looking at work that might be billable coming from paralegals or other team members. And again, I take that number itself with a little bit of a grain of salt, but directionally I don't think it's wrong. I've said 100 times and it's pretty well known, efficiency is not the friend of hourly billing. And so, if you have tools available to make you more efficient, then that means billing fewer hours if that's your revenue model.

And so, the upshot of all this is that Clio, and I think we'll probably start seeing this in a lot of places, are really starting to talk more and more about lawyers needing to shift at least some of their services to flat fee pricing or value pricing or other forms of non-hourly billing. And that doesn't make me sad at all. I am a fan of flat fee pricing. I'm a fan of alternative billing structures to the billable hour. I'm not an absolutist. I think there are still places where the billable hour is either easier or makes sense for now.

But I do think that if you're not already billing things on a flat fee basis, it probably is time to start thinking about it. That said, I also think that the way that most lawyers and even a lot of the conventional wisdom around how to transition a practice to flat fee is not great advice. And you probably know this or maybe you've even done some form of this.

The typical way that people do flat fees is they say, "Okay, well, I'm going to look at my maybe historical data or maybe I'm just going to go on my gut

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and say, okay, for this type of matter, it typically takes me this many hours to do the work. I'm going to multiply that average times my hourly rate. I'm maybe going to pad it by 10 or 15% to cover for some overages. And I'm going to set that as my flat fee." And again, intuitively I get that that makes sense, but that is a really blunt way of going about it and I think there are some better options.

The first one, and I talked about this in the talk I gave at Clio Con this year is, don't think that you have to flat fee an entire matter. And in fact, I would strongly recommend against flat feeing an entire matter. The bigger a chunk of work we're talking about and especially the longer the timeline for delivering that work, the more surprises are going to come up. The harder it is to estimate accurately what the total amount of work is going to look like. And so, my recommendation is to break it down and this is nothing new.

Going back to the earliest days of project management, we talk about things like work breakdown structures and project milestones using an Agile approach. We've turned that into more of a focus on iterative development and the ability to break the work into phases. So that we can number one, make sure that we're delivering value consistently through the overall project and that we're getting things in front of our customer, what lawyers would call our client. And making sure that the thing we're building is actually working for them.

It's an opportunity to get feedback from the client and get their input. It's also about discovering information and getting smarter about the overall project or the overall matter and basically delivering work in a way that increases your knowledge. In a way that you are capturing and responding to, as opposed to just treating it as sort of the overall evolution of a case. And the beauty of this Agile approach, this iterative way of delivering a case or a matter or a project, whatever you want to call it, is that you don't have to switch to flat fee billing in order to begin to take this approach.

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In fact, my recommendation, if you are an hourly biller thinking about moving to flat fees is, start taking this iterative milestone phase based approach and see what you learn in the process. And then maybe think about flat feeing one or more of the phases that turn out to be relatively stable, relatively predictable. And then you can even use the information you get from the earlier phases to come up with a more accurate flat fee for a downstream phase.

So let me give you a specific example to help you understand what I'm talking about. And I'm going to use family law in this example or divorce cases specifically because that's one of the practice areas that I hear all the time. "Oh, I couldn't possibly do a flat fee in a divorce. There's just too much craziness that comes into play. And I would wind up losing money if I tried to flat fee my clients' divorces." And again, to that, I say, "Don't flat fee an entire divorce." In fact, I agree that would be crazy.

But what you can do is break the divorce into stages and you probably do this already. And again, if you're not in family law, then you can think of what the phases or the stages might be for your own work delivery. But in a divorce there is an early phase that usually begins with sort of that initial intake and the lawyer and the client getting to know each other. And specifically, the lawyer getting to know the client's situation. What are the facts of the case? What is sort of the emotional and personality tendencies of the client?

As much as you can, what are the emotional and personality tendencies of the client's ex or soon to be ex? And then maybe even what are some of the traits of that ex's lawyer if they are also represented by counsel? You also get to understand the relative complexity of the issues involved. Are these well off people? Do they have kids? Do they have retirement accounts? Do they have real estate? Or is it a little bit simpler where there's maybe a house, a car and a bank account, but no kids, no retirement, savings, whatever it happens to be.

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And the thing is, doing the work to build that initial assessment of the case isn't actually that different based on the complexity. You're just gathering information and you're assessing what's going on. You're trying to understand it, but the complexity associated with all of those complex elements, kids and retirement and whatever, doesn't really kick in until further downstream in the case. So that initial assessment is a golden opportunity for a flat fee engagement.

You're not engaging the entire divorce. You're saying, "I have an initial phase that is intake and strategy or engagement and strategy. And I'm going to do these things and I'm probably going to have a meeting with the client. I'm probably going to get a lot of information from them. There might be some client homework." But then I'm going to come to an understanding about what I think the complexity of the rest of the case is going to be.

And I'm going to make up a number here, but let's just say that you as a lawyer could do that assessment and charge the client \$2,000, might be high, might be low, I don't know, but it's a nice round number. Or again, maybe you still bill hourly and that's fine. The key is to come up with some definitions around what is this phase? What is the beginning? What are the inputs or the information I need? What is the work I need to do in order to increase my understanding? Maybe to document that, in fact I'll talk about this in a minute, but I would say definitely to document that.

And then sort of put a pin in the ground and say, "Great, this is where we are. Based on what we've learned I now believe that we should take this course or we should consider these options." But we've again, we've stopped it and we're saying the strategy is a deliverable in and of itself. It's not just something you do along the way to the future parts of the case. We're saying the strategy is valuable.

And communicating that strategy with the client and getting feedback from the client and having them reflect on what they think is right or wrong about

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that strategy is also incredibly valuable. Better yet, if you can tie that strategy to a deliverable, a strategic roadmap document or an initial case strategy document. But something that is tangible and deliverable to the client itself, that's going to really help you sort of put bookends around what is it that I'm doing. How do I know what I need in order to do this? And how do I know when I'm done?

And I'm telling you, clients will pay for this. In fact, they will love you for it. If we go all the way back to episode six of this podcast where I talked about what clients really want and if we think about the two practical needs that clients are trying to solve for when they reach out for professional legal help. One of them is mitigating risk and the other is navigating complexity. And what a strategic plan does is, number one, gives people a really good synopsis of what are the risks and opportunities of this particular legal case.

But more importantly, it helps them understand what is the roadmap. What is the complexity that I have to navigate? And it starts to give them a plan for doing that. And I'll give you two real world examples of this working. One is at the lowest end of the marketplace the work I do with the Commons Law Center in family law. Where we initiate all of our engagements with a strategic coaching call where we're doing just that. We're gathering the information from the client. We're trying to understand where they are.

And then we are sense making for them. We're giving them something of a road map that says, "Great, based on what we've heard from you, here's where you are right now." And sometimes we're catching people deeper in their family law case than just the beginning. So, it doesn't necessarily have to be at the beginning of the case, but it's definitely the beginning of the engagement with the client for the Commons. So, we're doing that sense making. We're letting them ask questions.

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We're letting them express their fears and concerns and their wants and their needs and their goals. And then we're helping them put that into something that makes sense for them. And gives them something that is actionable and empowering, especially in the Commons situation where sometimes that might be the only legal help that these clients are getting in their entire divorce.

I'm going to take it to the other end of the marketplace and this isn't a divorce example. But one of my sort of longest time clients does relatively high end estate planning in Southern California. And when I first started working with this firm, they were under the impression that this sense making around what is currently going to happen with all of your assets, based on either your existing estate plan or the intestate succession laws or whatever the influences on this person's estate are.

The firm was sort of saying, well, helping the client understand what their current state is initially, they thought this was part of their sales cycle. So, they were kind of doing this work for free as part of their marketing and outreach and intake process. And then they were using it almost as a loss leader in order to delve into the more complicated estate planning, which was very lucrative and is very lucrative.

But the pivot that they made a few years ago that was groundbreaking for them was that they realized that there is a ton of value in that sense making process for the client. And eventually we worked together, although they did a ton of this work on their own to define and build a product that they call a strategic wealth assessment. And it is essentially all of the things that they used to be doing that they considered part of the ramp up to the case and now they're delivering that product on a flat fee basis and they're getting really good money for that flat fee.

So, here's where it starts to get cold. We've got that initial assessment again, whether it's family law, whether it's estate planning, whatever the

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area of law is. We have quoted a price. We have a very tight defined process for delivering something. And then we have an actual deliverable at the end. And I do think that the deliverable itself is really key to this working for two reasons.

Number one, it creates what I sometimes refer to as a tangible manifestation of value for the client. They paid money, they get a thing. It's a very transactional piece. And the feedback loop in terms of the delivery or the relationship between the value that they paid and the value that they received is nice and tight. And that is always a good strategy for keeping clients happy.

The other nice thing about a deliverable is that from a process standpoint, it helps you to really understand when you're done with a phase. And you're done with a phase when you've created the deliverable. And this can be one of the challenges of hourly billing, where we're getting paid to work on a case instead of to deliver a thing. And there's always going to be a question in the lawyer's mind of, do I need to go down this other pathway? Do I need to learn this other piece of information? Where do I end with this sort of information gathering, sense making?

Because again, on the one hand, it's something you're doing throughout the course of the case. But by having a clear deliverable for a phase of your work then you've got something that you can say, "Okay, great. I have ticked off all the boxes on my checklist for building this deliverable, I can now consider this to be done." And I usually encourage presenting this deliverable to the client in real time, whether that's in person or over a phone call or a Zoom meeting or whatever.

I think that there is really tremendous utility in getting clients feedback in real time. I think there's also a tremendous sense of value that's conveyed when you do this sort of in person or again, across the phone as opposed

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to just emailing it to them and saying, “Okay, great. Here’s my report. Tell me what you think.”

The last thing and when you have this deliverable, when you create this report, this plan, this document, whatever it happens to be. There probably should be a section about recommended next steps. And those recommended next steps should probably include some price quotes. And the information you get from that initial planning session and I’m going to flip back to my family law example.

If it is a relatively straightforward case and that’s what you learn in your assessment process or your strategic analysis process, then your recommended next steps might be, “Hey, I can actually do, this is a straightforward divorce. I can do maybe the entirety of the rest of it on a flat fee basis.” And you can quote a fee that you think is reasonable for that piece. I’m still not a huge fan of that. I still think you can break it down and say, “I’ll tell you what? I can get you all the way through maybe the pleadings and the required disclosures or the pleadings, the required disclosures and the initial discovery requests if you’re going to do them.”

Whatever it happens to be, I think you can put another set of bookends around what is the next phase and quote that as a flat fee. And then maybe that gets you all the way up to a negotiation or a mediation or again, whatever the next part of actually getting this dialed in might be. And of course, the key for that next phase, I think is to tie that to a deliverable as well and maybe multiple deliverables.

If it is again, doing the pleadings and doing the required disclosures and maybe requesting some documents from the other party. Those are all tangible deliverables that you will have to create in order to get through that phase. I also think that regardless of what your next phase is, one of the deliverables should be an updated strategic plan. So, this plan becomes a living document that you say, “Okay, great, now that we’ve got this

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information, now that we've sort of poked the other side a little bit," I don't know what the right word is.

But in the form of the pleadings and the document requests, whatever and we see how they respond. Now I have better information about how the rest of this case is going to go. And I can use that information to better estimate how I want to deal with the next phase after this one. And this is really key to Agile values, to some of the principles out of the Kanban method, which is my favorite Agile technique. And specifically, in Kanban we talk about seeing work as a series of knowledge discovery steps. And I think that's important.

The work itself isn't inherently valuable. What's valuable about the work is what you accomplish for the client or for the customer and what you learn by doing the work. And in the phases of a legal matter, we're doing both. It also gives you a lot of opportunity to adjust course and basically update your client's expectations and sort of your relationship with the client on a planned basis as opposed to dropping a bomb on them. And saying "Okay, my God, I thought we were going this way, but this crazy thing happened and now we have to completely change course."

Basically, using this Agile, this phase development, this iterative approach, what we're saying is, "Look, course changes are part of the process." We're going to really clearly define phase one, phase two, phase three. We're going to take a step back at the end of each of those phases and we're going to reassess, we're going to do it together. And like I said, that communicates tremendous value to the client. It generates feedback for you.

It gives the client options. It helps keep them in control of their own matter. It helps keep you in control of the matter. It may be something comes up that you realize that maybe you need out, or maybe you need to do something vastly differently. It just is a better overall way to manage your

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relationship with the client and with the work. And I'll say this again, it doesn't matter how you bill in order to approach your work this way.

In fact, I strongly recommend that even if you're billing hourly or maybe, especially if you're billing hourly, that you start to think of your work in these phases. And I should probably go ahead and make explicit the fact that I see these phases as the columns on a Kanban board as you're working through the matter. And each phase of work, each column on the board will have a set of precursors that you need in order to enter that column. That is your definition of ready.

It will have processes and tasks that you need to do while you're doing that work and then it will have a definition of done. We're not going to be complete with this phase until all of these things are true, or at least accounted for. And one of the things that needs to be true is that you have delivered whatever deliverables you have said are part of this phase.

Here's the beauty of it is, if you're billing hourly and you take this phased delivery approach, it's going to help you understand which of these phases you can safely or comfortably convert to flat fee work. And I do this with my clients all the time. In fact, it's part of the lifecycle for a lot of the firms that I work with is that they do come to me as hourly billers and we implement this phased approach to the delivery of work. And we work on improving processes at each of those phases so that things are moving a lot more quickly, a lot more smoothly.

And that includes tools and templates, that includes process improvements, that includes training for the team. But all of these things usually add up to team members spending fewer hours, less time doing the actual delivery work. And so, the transition that happens in people's heads is, holy cow, I am so much more efficient at doing this work, which feels great, but I'm starting to lose money because of this efficiency.

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And that is the great impetus for saying, “Maybe I should go to a flat fee on this because I’m consistent. I’m predictable. I’m not worried about losing my shirt on this particular phase of work.” Now I can comfortably think about transitioning this in a way where I am exchanging my work for a value perceived by the client as opposed to how I value my effort in creating the deliverables. It also, it makes you less afraid of the efficiency.

It means that you actually might look to ways you can incorporate technology, whether that be generative AI or other things, in order to make you more efficient. Because once you make that pivot and you say, “Great, this particular chunk of work is worth,” again, I’ll use the same number, \$2,000 to the client. The game for the profitability of your practice, the model, not necessarily a game, it shifts.

And I don’t mean to sound too flippant here, but really the ideal business model when you’re an hourly biller is, how many hours can I get away with working that the client will pay in order for me to get to a quality product without sort of generating turbulence in the relationship? Either unpaid bills or complaints about the bill or things like that. But you’re trying to maximize revenue by maximizing effort.

Once you’ve flipped to a flat fee model or another form of product or value based pricing, now the model is completely different, which is, how can I deliver a quality product to my customer, to my client with as little effort as possible? And again, the quality still has to be there. But you’re now rewarded for the investments that you make in making your team more effective, in upgrading your technology and in making your processes more efficient. And that can really help you drive profitability.

Now, one of the other challenges with shifting to flat fee pricing again, whether it’s for an entire matter or whether it’s for phases of a matter is that you no longer want to optimize for what we have historically called billable hours for effort. Because again, you are going to make better money on the

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cases or on the individual phases of work, not by increasing the effort you put into them, but by increasing the velocity at which you deliver them and the frequency at which you deliver them. It becomes more of a volume play, really.

But if you're tracking billable hours, it winds up being a little bit against what you're trying to accomplish. And so, one of the things and I'm kind of workshopping this with you all right now, so I'd love you to email me and let me know what you think. I think we need a different term than billable hours when we're talking about the work we put into delivering one of these phased deliverables or one of these deliverables under a flat fee model.

So instead of billable hours, I've had two different thoughts. One is to call them productivity hours. Another is to call them delivery hours, either way, it's one of the things that we're doing that are directly on the value chain for producing something or delivering something that is going to be valuable to the client.

One of the reasons why, and I'm going to talk about this more in my next episode because this one's already getting a little longer than I meant for it to. But I talked in my Clio talk about the three killers of profitability under a flat fee model, or really under any non-hourly model. And one of them is scope creep, which sometimes I hear referred to as matter creep, but it's the same thing. We are doing work beyond what the agreed scope of the flat fee work was. And I think that's pretty obvious to anybody that that can kill your profitability if you're over-delivering what you promised against.

A second one is delay. When we're talking about things that kill flat fee profitability, the amount of time it takes to deliver the widget, the unit of work. The longer it takes, the less profitable it's going to become and there's two reasons for that. Number one, the longer a particular piece of work is in your system, the more administrative overhead it takes to keep

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track of it and make sure that you know where it is and where it's going and what the status is.

And most of that administrative overhead isn't value generating. So, you're expending more effort just to manage the case as opposed to on that delivery stream for the work that you're doing. The other is that the longer something takes, the more likely it is that something is going to change. Either new information is going to come in, the client's enthusiasm for doing the work is going to wane. Your enthusiasm for doing the work is going to wane. Whatever it is, the tighter you can get the timeline, the more likely it is that the assumptions you made at the beginning of the work are still going to be true at the end of the work.

And the third one, and this is the one that is, I think, maybe hardest for a lot of law firms to reckon with because we're so used to setting up our systems around a conventional wisdom around how to manage a law practice. But hourly compensation models, whether that is billable hour targets for your core salary, whether that is tied to an incentive compensation of some sort, whatever it is. Effort based incentives will kill your profitability under a flat fee model.

You are incentivizing effort but you, as the law firm owner, are being rewarded by efficiency. And you don't want to be in that situation where you're actually rewarding your team and yourself for something that is working against your revenue model. So, I'm going to talk more about that in the next episode.

For now, let me leave you with this. Think about what are the phases of your most common matter types, your most common pieces of work. And how can we break it down into discrete chunks that have a beginning, a process, and an end. Ideally tie that work to a deliverable and really think hard about how I can orient my systems and my people to creating that

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deliverable as opposed to just doing the work that needs to happen in that phase of work.

And if you do that in sort of a daisy chained way throughout the course of the matter, even the most complex matters will start to show you phases that you might think about changing your billing structure, your value structure, your business model for delivering that work. Again, you don't have to rush into flat fee. If you're already billing hourly, you can do this while you're billing hourly. But it's going to really help you improve the delivery of value to your client regardless of how you're receiving money in return for that value.

Thanks for listening to *The Agile Attorney* podcast. I'm your host, John Grant. If you found today's episode interesting or useful, please share it with someone who you think would benefit from a more agile approach to their legal practice. If you have any questions, feedback or maybe a topic you'd like to hear me cover, you can reach me at john.grant@agileattorney.com.

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