

ENDING THE TYRANNY OF THE BILLABLE HOUR: *A Mandate for Change for the 21st Century Law Firm*

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I. INTRODUCTION

Remember when . . . a newspaper cost a dime? Trials went forward on time as originally scheduled? People viewed the practice of law as a “profession” and not a “business”?

To be sure, the practice of law has become more complex, just like the cases attorneys are called upon to litigate these days. The challenges do not end there. Economic times are tougher. Clients are scrutinizing every penny they spend on legal fees. Corporate clients have shut off their “payment faucets” to firms. They are demanding more predictability to their legal fees, increased efficiency from their attorneys and maximum value for their money.¹ And they will not hesitate to take their business elsewhere to firms that can deliver.

So what is a 21st century law firm to do in order to manage change and remain competitive in the marketplace? For starters, attorneys need to go back to the basics and remember that the legal profession is about providing quality service to clients and about nurturing client relationships. Given the number of business articles published over the past year about clients demanding changes in attorney billing practices, it may be safe to say that the biggest impediment to providing quality service and nurturing client relationships is the billable hour system upon which most law firms still rely. This article will demonstrate why continued reliance on the billable hour system is a detriment to the legal profession and how easily change is within reach.

II. CREATION OF THE “BILLABLE HOUR MONSTER”: A BRIEF AND UGLY HISTORY

Many attorneys in practice for 20 or less years would be surprised to learn that the practice of billing by the hour has a relatively short history in the legal profession. During the 1800s, legal fees were capped “per service” by state law, and litigation fees were usually paid by the losing party.² However, as the industrial revolution waged on during

the 19th century and stricter standards of economic regulation were loosened, such maximum-fee laws were eventually repealed.³ By the early 20th century, lawyers used a combination of billing methods: fixed fees for particular tasks, annual retainers, a discretionary “eyeball” method, and contingency fees (which the American Bar Association (ABA) approved as ethical in 1908).⁴ By the 1940s, however, an attempt at uniformity in billing practices re-emerged as state bars began publishing the minimum fees to be charged to clients for various services performed by attorneys.⁵

This new billing system seemed to have less to do with protecting clients’ interests and more to do with assuring that attorneys made what the majority considered a respectable living from their profession. In her article “The Hours: the short, unhappy history of how lawyers bill their clients,” Attorney Niki Kuckes noted:

While nominally voluntary, schedules were enforced by the threat of disciplinary action against a lawyer whose fees were regarded as too low. The Virginia State Bar, for example, warned that attorneys who “habitually” charged less than the suggested fees would be presumed guilty of misconduct. The ABA’s model ethical code, which was in effect until 1969, said that it was unethical for an attorney to “undervalue” his legal services.⁶

In fact, in its second fee schedule report issued in 1969 when it raised minimum fees, the Virginia State Bar stated that attorneys should feel free to charge *more* than the recommended fees and went even so far as to warn members of the bar that “to publicly criticize lawyers who charge more than the suggested fees herein might in itself be evidence of [improper ethical conduct].”⁷

It was therefore perhaps inevitable (and entirely justifiable under the circumstances) that the U.S. Supreme Court held in 1975, in the case of *Goldfarb v. Virginia State Bar*, that minimum fee schedules as published by the state and local county bar associations and enforced by the state bars violated §1 of the Sherman Act, thereby rendering minimum fee systems illegal.⁸ At that same time, law firm consultants were urging attorneys to keep more accurate time records, suggesting that attorneys who billed by the hour would make more money.⁹ The idea

of tracking time was first widely promoted in a 1958 ABA pamphlet contending that attorneys were bad businessmen in comparison to other professionals who were out-earning them, and advancing the remedy of more closely tracking time and keeping more detailed records.¹⁰ By the late 1970s, billing by the hour became the standard method of billing clients. At the time it seemed to be the best way to meet the competing demands of providing clients with more certainty as to legal fees while providing attorneys with a more “businesslike” system for providing services at an acceptable rate of compensation in a modern economy.

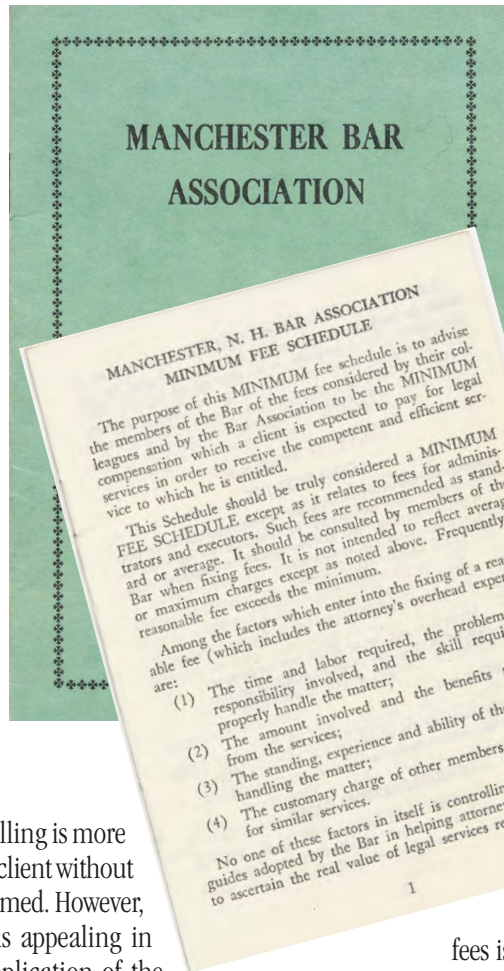
Sadly, it appears that the creation of the billable hour system was motivated by a profession more concerned with its own financial interests than with the clients it served.

III. IS THE BILLABLE HOUR SYSTEM MORE ETHICAL?

Most attorneys would agree that hourly billing is more ethical than simply submitting an invoice to a client without any explanation of the services actually performed. However, while adoption of the billable hour system is appealing in its simplicity and appearance of fairness, application of the billable-hour system has become so contorted that its widespread use in legal representation and as a metric for advancement within the profession may no longer be appropriate. Under a law firm budget based upon billable hours, the best way to increase revenue is either to increase the billing rate or increase the number of hours billed. As competition among law firms has increased over the years, the ability to raise rates has depended largely upon the economy. The classic supply-and-demand model dictates that raising rates far above what is generally charged in the marketplace will reduce demand for services by that practitioner. With rate increases limited by such economic influences, law firms desiring to increase their revenues resort to increasing the number of hours billed. The result of increasing the number of hours billed, however, heightens ethical dilemmas for the profession. The reliance on billing by the hour as the major form of lawyer compensation and as a metric for measuring a lawyer’s productivity and value to the firm paints a rather harsh picture of the legal profession. Consider the conflict between the economics and the ethics:

Rule 1.5 of the New Hampshire Rules of Professional Conduct provides in relevant part:

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee or expenses include the following:



- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

While the rule includes the element of time as a proper consideration for the setting of legal fees, the shift to making time the most significant factor in setting legal fees is not mandated.

In the American Bar Association’s Commission on Billable Hours Report (2001-2002), the ABA proposes a total expectation of 2,300 hours of billable and non-billable time per attorney as a best practice, 1,900 of which should be billable client work.¹¹ However, accepting the standard guideline for billable hours that it takes approximately 10-12 hours to bill 8 hours, in order to achieve the ABA expectations, attorneys would be expected to work 12-15 hours daily. For any attorney with obligations and interests outside of his or her professional practice, working 12-15 hours per day, five to six days per week, 48 weeks of the year, is simply unsustainable. This regimen, many attorneys have observed:

- Penalizes efficiency and productivity
- Encourages duplication and excess layering of efforts for a given task
- Encourages padding of time sheets

All of these practices directly conflict with the profession’s ethical obligations to clients. Some may even argue that use of the billable hour in its current form is unethical. However, if one were to assume that most attorneys try to be ethical in their hourly billing, it could also be argued that at a minimum, every law firm using a billable hour system should at least be required to disclose other billing alternatives to clients, and provide them with a meaningful choice to better fulfill the profession’s ethical duty to avoid conflicts of interest between the client and the law firm.

IV. THE CURRENT ECONOMIC CLIMATE SPURS DEMAND FOR ALTERNATIVE BILLING ARRANGEMENTS

The economic downturn is driving changes in the traditional law firm business model, which now focuses on the issues of predictability, value and risk sharing.¹² Clients are looking closely at their budgets and are complaining that legal bills are unpredictable. Traditionally, corporate legal departments have offered ballpark figures of anticipated legal fees to their clients without anything more specific.¹³ Corporate clients are seeking a predictable stream of fees over a period of time and are demanding both clear-cut projections of their legal fees up front and alternatives to the traditional billable hour fee arrangement.¹⁴ This is particularly noticeable where clients are involved in complex litigation, since legal expenditures can have a huge impact on the financial results of the company.¹⁵

In today's economy, both individual and corporate clients seek greater value for their money and do not want to pay for lawyer inefficiency.¹⁶ While the billable hour system forces the risk of internal inefficiency onto the law firm's clients, alternative billing arrangements, by contrast, provide for a sharing of risk between client and firm.¹⁷ As a result, alternative billing arrangements provide clients with greater control over their legal costs. Briefly speaking, "a true alternative fee is one where the amount is tied to the quality of the lawyer's work, not just the hours. . . the lawyer and the client both have to have something at risk where excellence and efficiency are rewarded."¹⁸

V. IT'S POSSIBLE TO CREATE A WIN-WIN SITUATION FOR LAWYER AND CLIENT

With all of the above-mentioned advantages for clients, why would a firm voluntarily shift from the billable hour approach to an alternative billing program?

It is about firm survival. The traditional hourly billing system is no longer a sustainable business model.¹⁹ To survive the economic downturn, firms need to get creative to stay in business and remain competitive.²⁰ If a firm refuses to offer alternative billing arrangements to its clients, another firm will.

Firms offering alternative fee arrangements to longtime clients find that giving clients options helps to cement that relationship.²¹ The work flowing from a solid client relationship will continue over a longer period of time.²²

Alternative billing shifts the attorney's focus away from the constant monitoring of six-minute increments of time to a more rewarding way of practicing law based upon accomplishment of tasks for a client.²³ It provides increased freedom to train newer attorneys and the ability to bring them to depositions, mediations and trials without the concern of having to adjust their time on a monthly bill.²⁴ An added benefit is that neither firm nor client has to expend time and money tracking the hours.²⁵

Switching from billable hours to alternative methods can help build the relationship between the firm and the client. Most firms want to see their clients do well and vice versa.²⁶ Neither firm nor client will wish to enter into an agreement unless they believe that the arrange-

ment will work for both parties.²⁷ In addition to clients preferring the predictability of legal fees, some firms actually prefer the predictability this approach brings to their budgets.²⁸

Alternative fee arrangements as opposed to the billable hour method are not new. Other successful professions have utilized fee options for years. In the medical field, often surgeons "charge certain amounts for certain operations because they know in advance how much time it takes to do it."²⁹

VI. TOOLS FOR IMPLEMENTING ALTERNATIVE BILLING ARRANGEMENTS ALREADY EXIST

The variety of alternative fee programs is almost endless³⁰ and many are already being used by firms throughout the country. These programs include:

- Matrix-like fee schedules for use in defense litigation³¹
- Monthly fixed fee arrangements for basic law firm counseling for corporate clients³²
- Fixed fees for a specified time period when firms take on an entire portfolio of work for a client³³
- Fixed rates when a large corporate client bundles together and sends certain types of similar work to a firm³⁴
- Fixed rate arrangements used by firms to obtain national litigation counsel status, in which the firms supervise local counsel, record providers, court reporters, etc.³⁵
- Performance of basic tasks for a flat fee, with the rate shifting to an hourly fee when tasks evolve that are too unpredictable to handle with a flat fee³⁶
- Conversely, utilization of a "periodic fixed-fee plan" in which hourly billing is initiated due to case uncertainties, but shifts to a flat fee arrangement once the case is under way, if the attorney is able to predict the legal procedures in upcoming months³⁷
- "Segment billing" in which each phase of a project is independently priced³⁸
- "Hybrid billing", a combination of contingency fees and hourly rates³⁹
- Contingency fees and "success fees"

Implementation of an alternative billing arrangement for clients is not for the lazy. Attorneys need to fully assess a case in order to price it.⁴⁰ Those stuck in the traditional billable hour rut will complain that it is simply easier to start the clock running rather than take the time to map out a complete schedule for the client.⁴¹ That may be true, but what is the long-term cost to a firm when clients leave to go to another firm that offers a wider variety of fee options?

VII. CREATING A WIN-WIN SITUATION FOR THE PROFESSION IS NECESSARY TOO

The billable hour system is not only corrosive to long-term relationships with clients but it has hurt the legal profession as a whole.

The American Bar Association's Commission on Billable Hours analyzed the effects of the billable hour system on the profession and the delivery of legal services. The commission summarized the effects in this way:

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.⁴²

Moreover, "as billable hours have become the benchmark by which law firms define one's commitment to the profession, there is no time left for other relationships."⁴³ As such, the pressure of the billable hour system is disproportionately felt by those attorneys, both men and women, raising families or caring for aging parents and those who simply seek to have greater balance between their professional lives and their personal interests.

Changes in the level of participation of women in the profession over the past several decades may be indicative of what may result for the private practice of law if the billable hour continues as a primary indicator for advancement. "It's well-documented, for example, that the majority of women lawyers end up in government, corporations or small law firms, which may be more flexible in allowing lawyers to balance their professional and personal lives."⁴⁴ A recent survey of Massachusetts attorneys illustrates this. While women attorneys make up approximately 36 percent of active working attorneys in Massachusetts, women comprise more than 50 percent of the attorneys working or practicing in non-profits and government (excluding judges).⁴⁵ Equally as striking, women make up about 60 percent of inactive attorneys in Massachusetts.⁴⁶ The Massachusetts report raises the question of whether this departure from the profession is due to the difficulty in balancing a career with family obligations.

While the pressures of working mothers in the profession may have received the most attention to date, it would be naive to simply surmise that the billable hour system is a "working mother" issue. Numerous articles have been published recently on the impact that incoming attorneys, both men and women of the so-called "Millennial Generation", are having on the practice of law. "They reject the notion of "face time" in the office as a means of success and expect clear assignments, regular feedback, and reward for their efforts. They also expect to be active and engaged parents, which requires having the time to parent. Members of this generation will not stay with an employer for long if they do not understand the big picture and the opportunities that lie ahead."⁴⁷

With women of all generations and both men and women of the Millennial Generation (the largest generation since the Baby Boomers) seeking a more satisfactory balance between their professional and personal lives, private law firms relying on the billable hour system for evaluating its attorneys will be at a disadvantage in recruiting, which, in turn, will impact their ultimate survival.

VIII. CONCLUSION

The practice of law is not about preserving lawyers' own social and economic status within the community to the exclusion of all else. The practice of law is mainly about providing service to our clients. The time has come to take a serious and meaningful look at how law firms balance their own economic interests with those of their clients to share business risks, rather than shifting risk entirely to the clients. Adopting alternative billing arrangements for clients is key to achieving this balance.

There is no one billing arrangement that works for all clients on all cases.⁴⁸ Moreover, offering alternative billing options does not require a complete abandonment of the traditional billable hour method, and the goal is not cutting attorney fees. It is about maximizing value. It is about increasing firm efficiency and providing work of the utmost quality. It is about being creative and coming up with billing alternatives to better meet clients' needs. The use of alternative billing arrangements advances the goal of securing a talented and diverse professional workforce for the long-term success of law firms. By changing to an alternative billing system, firms can cement client relationships so that clients keep coming back and create a work environment that will keep attorneys of all generations engaged and focused on professional excellence.

As reluctant as some attorneys may be to make this transition, economic times have clearly changed. Reliance on the traditional billable hour approach is no longer a sustainable business model.⁴⁹ Many law firms have to either jump on the alternative fee bandwagon or dig in their heels and wait to be forced into it when alternative fees become the "new" standard practice . . . that is, if those deciding to wait are still in practice.

ENDNOTES

1. Robert Celaschi, *Corporate attorneys push for flexible billing*, Business First of Columbus (October 9, 2009).
2. Ronda Muir, *A Short History of the Billable Hour and the Consequences of Its Tyranny*, Law People Blog.
3. Niki Kuckes, *The Hours: The short, unhappy history of how lawyers bill their clients*, Legal Affairs (Sept. 2002).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 793 fn 2 (1975).
8. *Id.* at 780-793.
9. ABA Comm'n on Billable Hours, *ABA Commission on Billable Hours Report: 2001-2002*, 3 (2002).
10. Ronda Muir, *A Short History of the Billable Hour and the Consequences of Its Tyranny*, Law People Blog.
11. ABA Comm'n on Billable Hours, *ABA Commission on Billable Hours Report: 2001-2002*, 49-51 (2002).
12. William-Arthur Haynes, *Law firms adjust billing methods as clients clamor for savings*, San Jose Business Journal (August 7, 2009).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

17. *Id.*
18. Richard Bilbao, Law firms give clients a break with alternative billing, *Orlando Business Journal* (May 8, 2009).
19. William-Arthur Haynes, Law firms adjust billing methods as clients clamor for savings, *San Jose Business Journal* (August 7, 2009).
20. Robert Celaschi, Corporate attorneys push for flexible billing, *Business First of Columbus* (October 9, 2009); William-Arthur Haynes, Law firms adjust billing methods as clients clamor for savings, *San Jose Business Journal* (August 7, 2009).
21. Eric Young, More Bay Area firms adopt creative legal fees, *San Francisco Business Times* (January 1, 2010).
22. *Id.*
23. Robert Celaschi, Corporate attorneys push for flexible billing, *Business First of Columbus* (October 9, 2009).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Andy Giegerich, Flat-fee billing settles in; billable hour stays king, *Portland Business Journal* (May 29, 2009).
30. Robert Celaschi, Corporate attorneys push for flexible billing, *Business First of Columbus* (October 9, 2009).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. Richard Bilbao, Law firms give clients a break with alternative billing, *Orlando Business Journal* (May 8, 2009).
38. William-Arthur Haynes, Law firms adjust billing methods as clients clamor for savings, *San Jose Business Journal* (August 7, 2009).
39. *Id.*
40. Robert Celaschi, Corporate attorneys push for flexible billing, *Business First of Columbus* (October 9, 2009).
41. *Id.*
42. ABA Comm'n on Billable Hours, ABA Commission on Billable Hours Report: 2001-2002, ix (2002).
43. Lauren Stiller Rikleen, Ending the Gauntlet: Removing Barriers to Women's Success in the Law, 57 (2006).
44. Jeri Zeder, Are We There Yet? Imagining New Paths to Professional Equality for Women Lawyers, *Northeastern Law Magazine*, 11 (Winter 2009).
45. Employment Issues Committee of the Women's Bar Association of Massachusetts, Where Are We Now? A Report on the Occupational Status of Women Attorneys in Massachusetts (2009).
46. *Id.*
47. Lauren Stiller Rikleen, How the Millennial Generation Works, published by the American Bar Association Young Lawyers Division, found at <http://abanet.org/yld/tyl/may08/rikleen.html>.
48. Robert Celaschi, Corporate attorneys push for flexible billing, *Business First of Columbus* (October 9, 2009).
49. William-Arthur Haynes, Law firms adjust billing methods as clients clamor for savings, *San Jose Business Journal* (August 7, 2009).

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