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Dumping the Billable Hour

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Tired of the Billable Hour?

Is every month a fight to meet your billable hour quota so you can meet the overhead? Is every month a continual battle to encourage your staff and associates to meet their quotas? Does the production in the firm come to a complete standstill at the end of every month in an attempt to generate bills? Do you hate reviewing bills? Are you sick and tired of feeling like you can't enjoy a cup of coffee with a fellow lawyer or staffer because you are "wasting billable hours"? How about Saturdays? Do you sit at home on Saturdays feeling guilty that you are losing billable hours? Or worse, are you up at the office on Saturdays billing?

From the client's perspective, are you tired of hearing complaints from clients about getting charged \$60 for a two minute call? Have you grown tired of looking at a huge bill that you know is going to be a shock to the client, but that you know you must send anyway?

From a practice perspective, are you tired of accounts receivable? Are you tired of dealing with clients who don't pay the final charges at the conclusion of the work?

For most of us, the billable hour is the only thing we know, even though we are sick of it, we don't know what else to do. There is an alternative and it is called "Value Pricing."

ABA and Other Leaders in the Change

Work on this topic began with the ABA Law Practice Management Section Task Force on Alternative Billing Methods in 1989. This Task Force published *Beyond the Billable Hour: An Anthology of Alternative Billing Methods*. In 2002, the ABA Commission on Billable Hours published its report.

The report contained a preface by ABA President Robert E. Hirshon that discussed the many reasons for abandoning the billable hour. In the first sentence of his preface, he opines that "many of the legal professions contemporary woes intersect at the billable hour." He writes that the

billable hour is responsible for a lack of balance in lawyers' lives, negative impacts on lawyers' families, loss of professional mentoring, decrease in lawyer service, less collegiality and a loss of focus on efficiency.

No less an authority than The Honorable Stephen G. Breyer, associate justice, Supreme Court of the United States, weighed in on the side of dumping the billable hour, writing in the foreword of the report, in part:

The villain of the piece is what some call the "Treadmill"—continuous push to increase billable hours... How can a practitioner undertake pro bono work, engage in law reform efforts, even attend bar association meetings, if that lawyer also must produce 2100 or more billable hours each year, say 65 or 70 hours in the office each week?

The Committee's technical task, then, concerns not just a better or more efficient way to run a law firm. It concerns how to create a life within the firm that permits lawyer, particularly younger lawyers, to lead lives in which there is time for family, for career and for the community. Doing so is difficult. Yet I believe it is a challenge that cannot be declined, lest we abandon the very values that led many of us to choose this honorable profession.

There have been three important ABA publications on alternative billing: *Beyond the Billable Hour: An Anthology of Alternative Billing Methods*; *Winning Alternatives to the Billable Hour*; and *Billing Innovations New Win-Win Ways to End Hourly Billing*.

In *Winning Alternatives to the Billable Hour*, Hirshon writes, "The billable hour, such as it is, encourages too many of the wrong principles and suppresses too many of the right ones." Foreword, viii.

In *Billing Innovations*, author Richard Reed minces no words about the demise of the billable hour: "[I]t is probable that straight hourly billing (billing by hours spent without limit and without regard for the benefit conferred) will virtually disappear in the years ahead....The time

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has come to say goodbye to time as the *sole* criterion for measuring the value of legal services."

Lately, a new force has entered the picture, CPA and author, Ron Baker who has authored several books on the subject, including, the following:

Pricing on Purpose: Creating and Capturing Value. New Jersey: John Wiley & Sons, Inc., 2006.

Professional's Guide to Value Pricing. 5th ed. New York: Aspen Publishers, 2004.

The Firm of the Future: A Guide for Accountants, Lawyers and Other Professional Services (with Paul Dunn). Wiley, 2006

In his first work, *Professional's Guide to Value Pricing*, Baker traces the history of hourly billing to the 1940's when large Wall Street firms adopted time sheets. Baker argues emphatically for the demise of the billable hour and presents a lengthy "how-to guide" for practitioners on how to convert from hourly billing to what he calls "Value Pricing." Baker argues that customers do not buy *efforts*; they buy *results*. *Value Pricing*, at 82.

The Ethics

The ethics of making the conversion away from hourly billing is always a concern. Any lawyer contemplating the change must carefully review the ethics policies in his or her state. Our survey of cases indicates most states approve of alternative billings such as fixed fees or retainers and pricing by the project or month with the ultimate criterion being the "reasonableness" of the fee.

The New York State Bar Association has weighed in favorably on alternative billing, holding that any agreement between a lawyer and a client is reasonable, by definition:

Indeed, subject to the economic realities of the situation and an attorneys's professional obligations, virtually any billing method that attorney and client can both agree upon and abide by will result, almost by definition, in a fair fee. *Cited in Baker, Value Pricing*, at 332.

Florida has permitted value pricing and has gone so far as to recognize the value of reputation:

On the other hand, a lawyer of towering reputation just by agreeing to represent a client may cause a threatened lawsuit to vanish and thereby obtain a substantial benefit for the client and be entitled to keep the entire amount paid to him, particularly if he had lost or declined other employment in order to represent that

particular client. *Bain v. Weiffenbach*, 590 So. 2d 544, 545 (Fla. App. 2 Dist., 1991).

Our informal survey of the jurisdictions indicates most, if not all, states will permit value pricing, usually subject to a reasonableness test. Colorado clearly bars non-refundable retainers, so practitioners there should carefully review their ethics provisions. *Colorado Ethics Committee Rule 1.5*.

Taking The Plunge

If you are ready to take the plunge, here is a simple step-by-step recommendation:

1. Read the ABA and Baker publications cited in this article.
2. Interview someone who practices fixed fees or value pricing. Oftentimes, criminal defense lawyers, DUI lawyers, estate lawyers and bond lawyers charged fixed fees.
3. Analyze your case base to see what kind of work you are doing, what it costs and why.
4. Pick a new case that poses little risk and just try setting a fee.

Conclusion

The billable hour is all we know. So, it is hard for us to conceive another way to do things. But if we think about it, the billable hour has been around for only a small portion of the life of law practice. We should also take comfort in the knowledge that a justice of the United States Supreme Court and leadership of the ABA have led the charge for change. If you are willing to do the work and take the risk to make the change, you may just find that you have transformed your life and your law practice for the better. FLR



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