

## **Alternative Billing Practices - Beyond the Billable Hour**

By Wendy L. Werner

When I speak to individuals or members of organizations who utilize legal services, the two biggest concerns that I hear about how lawyers work are 1) they charge me every time I talk to them on the phone, and 2) I can't believe how much they charge for Xerox copies or mailing services. This is, in reality, a commentary about how lawyers choose to bill their work.

Few services outside of law or accounting charge for time when the professional is not actively engaged in the actual work necessary to complete the job. Most routine activities that are part of doing business are not part of fees. No other professionals could be accused (accurately or not) of charging two clients simultaneously for time spent waiting for a docket call. Over the years businesses and individuals have both become more sensitive to attorney billing. Legal audit firms have sprung up as a result of these concerns, and almost all lawyers in private practice have become increasingly sensitized to providing clients with detailed billing.

Simultaneously, the expectation of greater numbers of hours billed per year has grown as well. When associate salaries spiked a few years ago as a response to the dot.com boom it was obvious that billable hour expectations would have to increase commensurately. At the same time, a number of recent law graduates were being lured to law firms under the public relations umbrella of 'quality of life'. Rising salaries, increased billable hour requirements, and quality of life is a formula that does simply cannot add up. These growing expectations inevitably contribute to lawyers feeling more time starved, newer attorneys not living up to billable hour expectations, and these same new lawyers feeling lured by false advertising of a balanced life.

A practice based upon billable hours is one that insures an income cap. No one can bill twenty-four hours a day. Few clients want to be the last two hours billed on a fourteen-hour day. In spite of how some people behave, human capacity for work is in fact limited.

Lawyers, like other professional consultants may want to think differently about how to bill for services to the benefit of both themselves and their clients.

### **Retainers**

Some clients will want your services on an ongoing basis. One of the ways to charge these clients is a monthly retainer. If you study the way in which this client has utilized your services in the past you can determine a fee arrangement based upon your estimate of usage and a reasonable profit margin. This monthly fee would be based upon an offering of day-to-day advice for a flat rate. Some months the client might underutilize the service, and other months they might oversubscribe. In either case, you can be assured of a steady income stream, paid up front (or twice monthly) that a client will pay. For your own purposes, it probably makes sense to keep track of hours worked for this client, but it will no longer be necessary to track every phone call, e-mail, or messenger service.

If you are aware of issues that are forthcoming for this client, you may want to talk about areas that you assume that you will be working on for the duration of this fee agreement in your written services agreement.

Set a time period for this arrangement; probably something more than six months and less than a year. At the end of the period, after a prior assessment of usage and income, you may go back to the client to determine if the arrangement has been mutually beneficial.

### **Proposals and the RFP**

Some government or not for profit entities require an RFP for any service provider. More

companies shopping for legal services are requiring law firms to complete an RFP to bid for available legal work. Some very large firms have staff members whose sole responsibility is responding to RFP's. But in reality, the RFP is like most other open bidding processes – not as open as it may look. Before committing a significant amount of time and lawyer resources to an RFP process, it is wise to be aware of the buyer's previous relationships with law firms, do some sleuthing about who the economic buyer really is, and understand the cost-benefit of putting time into this process.

There are some situations where submitting a proposal for the process, win or lose, is essential. Perhaps you have done previous work for the organization. Maybe you see potential for future work with the organization. But submitting proposals when it is clear without a great deal of analysis that there is a probable winner could be a waste of attorney time.

## **Project Billing**

One of the most attractive ways to bill clients is on a project basis. Although this technique may not work for complex cases and some litigation, there are many circumstances where a project fee for a set piece of work can be very advantageous. A client hiring an attorney to write a contract, a non-compete agreement, or even an uncontested divorce is interested in hiring the attorney's expertise. The current billable hour system rewards inefficiency and a long drawn out project. What the client is actually paying for is the attorney's background, experience, and special knowledge that comes from years of creating similar kinds of documents or participating in cases of a similar nature. There is no reason that an attorney should not be able to charge a premium for this service whether or not it takes twelve hours or twenty hours. Clients are often much happier knowing up front what the bill will be, and not being charged for routine calls or questions about the project.

The other advantage is that this process removes the often despised task of time keeping from the lawyer involved in the project. This is not to say that the attorney shouldn't have some knowledge about the time invested to determine profitability, but rather that it need not be recorded in six-minute increments.

I know that the objection to project billing is that no attorney can be certain at the start of a project what amount of time the project will take, or what underlying issues may exist. But many other consultants in a wide variety of fields write proposals and complete the work profitably. It is possible to write into the contract a contingency for cases that linger on beyond reasonable expectations, or a changing fee structure for a project that becomes litigation. Project billing carries some risks for the lawyer considering its usage, but many benefits as well.

## **Value Billing, Success-based fees and Fee incentives**

Additional ways to price legal fees include value billing and success-based fees. It always makes sense to talk about fees in terms of value. What separates you from your competitor is not simply that you will each do quality legal work, but that you provide a unique understanding of the value this service provides your client. Hourly billing can be the antithesis of value-based services. What is it worth to your client to avoid expensive litigation? What is it worth to your client to operate a business free from worry about meeting legal deadlines and having compliance issues handled in a timely and accurate manner? Providing a value added service you become a trusted advisor focused on your client's business success, rather than a service provider sending monthly invoices that record the time and cost of telephone calls and faxes. It is hard to quantify the value of prevention. But any client who has been through costly litigation should have an understanding of the value that a strong partnership with a legal advisor can bring.

A business owner friend of mine recently said that never, during his forty-year business career, had an attorney ever contacted him about changes in the law that might impact his business. He further indicated that any lawyer who had taken the time to audit his business policies and give him notice of how he might benefit from certain pre-emptive policy or procedural changes would have been his business attorney for the rest of his

career. This is a client looking for a long-term value-added business relationship who would have been happy to pay for it.

Every year the American Lawyer publishes a survey of the lawyers who make the most money in a single year. Inevitably, these are lawyers who charge, not on an hourly basis, but on a contingency basis. This could be regarded as a success fee, and is usually reserved for plaintiff's lawsuits. However, there is no need that this kind of results oriented fee be reserved for plaintiffs. Attorneys can build in fees for outcomes that exceed client expectations, and create success-based fees and other incentives that demonstrate the lawyer's desire to partner with the client for a successful result. Certainly there are ethical considerations involved, and ways in which lawyers may be prohibited from sharing the financial success of a client, but alternative arrangements that build on the contributing value of the attorney should be investigated.

Lawyers are highly trained professionals who have special skills and expertise. Basing income solely on a minute by minute accounting of your day is tantamount to being an hourly employee. Trying to have a family and community life while working by the hour has become increasingly difficult. Rethinking billing practices and offering clients an alternative arrangement could bring more life to your practice, and more life to your life.

If you are interested in reading a good book for consultants that addresses the issues of hourly billing, check out "Getting Started in Consulting", by Alan Weiss. He talks a great deal about how to market services based upon value based billing, and how to demonstrate to your client that it is to their advantage. You may be surprised to learn they agree with you.

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Wendy Werner is the owner and principal of Werner Associates, a law firm consulting and career coaching organization. She also coaches lawyers on marketing issues, writes job descriptions, screens resumes and interviews candidates on behalf of law firms and corporations. She can be reached at [WernerWL@yahoo.com](mailto:WernerWL@yahoo.com)