

ALTERNATIVE BILLING: WHERE IS IT GOING?

ONE GENERAL COUNSEL'S
PERSPECTIVE

HISTORICAL PERSPECTIVE

- Hourly method of billing really took hold in the 1960s
- Past decade plus, hourly billing has come under increasing attack
- ABA started looking at alternatives to billable hours in 1989, but action seems to have peaked in 2009 time period

HISTORICAL PERSPECTIVE *(continued)*

- ABA Commission on Billable Hours Report 2001-2002
 - Backing of Associate Supreme Court Justice Stephen Breyer
 - Believes hourly billing has diminished the profession
 - Report is thorough and thoughtful
 - Concludes hourly billing “worked” in 70s and 80s but demands started to become unreasonable in 90s and beyond

HISTORICAL PERSPECTIVE (*continued*)

According to the Commission, overreliance on billable hours by the legal profession leads to the following (not a complete list)

- Does not encourage project or case planning
- Provides no predictability of cost for client
- Many not reflect value to the client
- Penalizes the efficient and productive lawyer

HISTORICAL PERSPECTIVE *(continued)*

- Fails to discourage excessive lawyering and duplication of effort
- Fails to promote a risk/benefit analysis
- Puts client's interests in conflict with lawyer's interest
- Client runs risk of paying for: incompetency or inefficiency, associate training, associate turnover and padding of timesheets

HISTORICAL PERSPECTIVE *(continued)*

- Results in lawyers competing based on hourly rates

ADDITIONAL MARKET DRIVERS

- Besides the profession's soul searching, what are the historical and current market drivers behind alternative billing?
 - Economy
 - 2008/2009 downturn
 - Continued economic pressures today
 - Soaring Hourly Rates
 - \$1,000+ Senior Partners/\$750+ Partners/\$400+ Senior Associates

ADDITIONAL MARKET DRIVERS *(continued)*

East Coast v. Midwest – To the client, it's all relative
Unless the law firm model changes, current rate trends
will continue

- With increasing rates, pressure on hourly billing will likely grow
- Lack of Accountability
- Rewards inefficiencies
 - Win or lose, client cost is the same

ADDITIONAL MARKET DRIVERS *(continued)*

- Failure to incentivize desired goal
 - Close (Transactional)
 - Speed (Transactional/Litigation)
 - Success at Procedural Stage (Litigation)
 - Successful Settlement (within target range)
 - Favorable Trial Verdict

WHAT IS ALTERNATIVE BILLING?

Some examples (list is limited only by one's creativity and imagination):

- Flat (“all you can eat buffet”)
- Fully contingent/partially contingent
 - Success
 - Hybrid
 - Fee Cap
 - Volume Discount

CRITICAL TO AGREE AS TO CLIENT'S/FIRM'S OBJECTIVE

- Economic?
 - Cost reduction
 - Budget constraints
- Accountability?
 - Reward success/penalize less than optimal results
 - Shared accountability

CRITICAL TO AGREE AS TO CLIENT'S/FIRM'S OBJECTIVE *(continued)*

- Incentivize conduct?
 - End result: win/lose; close transaction
 - Speed
 - Predictability
 - Greater use of lower cost timekeepers
 - New client generation
 - Maintain existing client

ECONOMIC IMPLICATIONS

- Steps to help manage the economics
 - Clearly defined objectives
 - Reasonably detailed parameters
 - Monitor results closely and frequently
 - Regular communication and feedback to/with client
 - “Out” clause

ECONOMIC IMPLICATIONS (*continued*)

- Potential impact on law firm business model

Key Questions:

- If true alternative fee arrangements become the standard, and hourly billing the exception, does the current law firm business model work?
- If the current law firm business model supports very well paid partners (particularly at larger firms), are the law firms really going to be supportive of fundamental changes to that business model?

CONCLUSIONS (NEAR TERM)

- Hourly billing is not dead and will likely remain the dominant basis for billing for some time to come
- But, firms that capture the best of alternative billing in a material way will have a marketing edge
- Each firm first must decide whether to be (i) leader, (ii) close follower, or (iii) reluctant participant