



Feature

Creative Billing: Is the Reign of the Almighty Billable Hour Over?

By Cary Griffith

Back in the late 80s, Stephanie Morris graduated from law school, clerked for a federal judge, and then started practicing as an associate in a reasonably sized, big city law firm. "It was mandatory that every associate bill 1,800 hours a year," she remembers. She labored in the firm, before a trip to the doctor confirmed her belief that her work environment "was crazy and disgusting." She'd developed an ulcer. Her work was literally making her sick.



Today Ms. Morris is a successful, healthy bankruptcy attorney with a thriving San Francisco practice. Her transformation from firm associate on a partner track to successful solo practitioner was not easy. But when she recalls the way she saw her fellow attorneys "churning files just to meet their

numbers," and "pitted against each other, scrambling for work so they wouldn't get fired or so they'd get their bonus," she made a promise to herself. "I swore I would never bill that way."

More than 20 years later, Ms. Morris has kept her promise. Her current practice—primarily bankruptcy but with occasional estate planning and family law issues—is almost entirely flat fee. The flat-fee approach means clients pay a fixed amount for a bankruptcy filing, divorce, or most of Ms. Morris' other legal work. Ms. Morris prefers flat-fee billing because, she explains, "I don't like the idea of paying myself or anyone else by the hour. Humans are basically good, but I see too much of an opportunity for abuse" when people bill by the hour.

Ms. Morris is not alone. More and more law offices and their clients are beginning to explore creative billing options. These alternate billing practices can vary widely, but their common denominator is dissatisfaction with charges by the hour. Some lawyers, like Ms. Morris, have visceral reactions to the practice because young lawyers, forced to bill draconian hours, are faced with serious ethical issues. Others, like Sidney N. (Skip) Herman, Managing Partner with Bartlit, Beck, Herman, Palenchar & Scott, prefer alternate billing solutions because "it's a better business model." And still others feel alternate billing is much more conducive to cultivating "a long-term relationship," comments Julie S. Mazza, DuPont's Manager of Law Firm Partnering.

The Current Fix of Billable Hours

In August 2002, the ABA released "The ABA Commission on Billable Hours Report: 2001-2002." [available online at <http://www.judicialaccountability.org/articles/ABABillableHours2002.pdf>] The Commission was created because over the past four decades, it has become increasingly difficult for lawyers to commit serious time and effort to public service, either in government, for non-governmental organizations, or in pro bono work. "The villain," the Commission believed, "is what some call the 'treadmill'—the continuous push to increase billable hours. As one lawyer has put it, the profession's obsession with billable hours is like 'drinking water from a fire hose,' and the result is that many lawyers are starting to drown."

The ABA Report went on to note that in today's legal marketplace, "Most law firms bill the majority of their clients on the basis of the hours worked by lawyers and paralegals multiplied by their standard billing rates."

The problem, of course, is not with the practice of billable hours, but in the way—over the last four decades—it has spun out of control. In 1958, the ABA published a pamphlet called "The 1958 Lawyer and His 1938 Dollar." In it, the ABA asserted that there were "only approximately 1,300 fee-earning hours per year." In figuring that number, it assumed most lawyers would work a normal five-day workweek with time for non-billable activities and half days on Saturday.

Today it's not unusual for law firms to require their associates to bill 2,100 hours per year. In his article "The Death of an Honorable Profession," Carl T. Bogus noted that "a lawyer working six days a week needs to work 10 hours a day to produce 2,000 billable hours per year, 11 hours a day to produce 2,200, and 12 hours a day to produce 2,400." And that's a six-day workweek!



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As one lawyer quipped, getting on that treadmill and staying on that treadmill is like winning a pie contest in which the grand prize is more pie.

Given today's exorbitant billable-hour requirements, is it any wonder that talented attorneys like Stephanie Morris are driven to the doctor's office, out of the profession, or worse?

Some Alternatives

Lawyers don't have to look too far back to find a time when billing practices were entirely different than charging by the hour. According to Professor Nikki Kuckes, "By the early 20th century, lawyers used a combination of billing methods: set fees for particular tasks, annual retainers, a discretionary "eyeball" method, and contingency fees, which the ABA approved as ethical in 1908. They rarely billed by the hour." ("The Short, Unhappy History of How Lawyers Bill Their Clients," September/October issue of *Legal Affairs: The Magazine at the Intersection of Law and Life*).

While the 2002 Commission found that the majority of law offices still charge by the hour, they also noted that of the 100 large law firms it surveyed, several were beginning to use alternative billing solutions.

- **79%** used partial or whole contingent fees
- **74%** used flat fees
- **42%** used result-based premiums
- **11%** used retainers
- **11%** used stock in exchange for fees

Reasons For Alternate Billing

The reason most often cited for alternate billing practices is the pain and anguish created by extreme billable-hour requirements. Even at 1,800 hours a year, Stephanie Morris' perspective, and ulcer, was not that unusual. And that, of course, was in the '80s. Today billable-hour requirements are hovering around 2,000 hours per year. It doesn't take a Ph.D. in agronomy to know those kinds of requirements cultivate a fertile ground for deceptive billing practices and lawyer angst.

But there are also excellent economic reasons law firms and corporate legal departments are forging new relationships and new billing practices. In a move that in 1992 seemed revolutionary, the DuPont legal department consolidated the number of outside law firms with which it worked from 350 to 34. Today it has 42 law firm partners.

"One of the criteria we used in making the selection was whether those firms were open to alternative billing arrangements," says DuPont's Julie Mazza. "We're currently using alternative fees in litigation, and we've reduced costs across the board."

But she's quick to point out that what has been good for DuPont has also been good for their law firm partners. Not long after DuPont began consolidating its law firms, a small group of Kirkland & Ellis lawyers broke away from the firm to create Bartlit, Beck, Herman, Palenchar & Scott. These lawyers recognized a weakness in fees based on billable hours. While it mattered whether they won or lost, it didn't affect their financial outcome. And they were winning much more than losing. These lawyers realized a different business model might be beneficial to both them and their clients.

Today, Bartlit, Beck has 50 attorneys, with law offices in Chicago and Denver. And, says Skip Herman, "95% of our billing is done on a non-hourly basis." The most typical case fee schedule involves a monthly fixed fee out of which the client holds back 10-20%. Upon the successful conclusion of the case, the firm is paid the 10-20% held back. Additionally, if the outcome of the case is favorable, the firm gets paid a bonus—"a multiple" of the hold back fee. If the outcome is not favorable, the firm may relinquish both the hold back fee and its bonus.

"It works well for us if we keep winning," notes Herman. "Not if we don't."

One of the key reasons DuPont's Julie Mazza appreciates the alternate billing approach is that it fosters a "long-term partnering relationship" between the company and the firm, and it focuses on value, not hours.



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"You become more of a partner," agrees Herman. Their flat-fee arrangement with a hold back bonus "takes out the issue of the

client having to manage the number of people working on a case. It shifts the management burden from the client to us."

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