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In Scandal's Wake, Billable Hour Seems Less Almighty

By Carolyn Matthews
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Bartlit Beck's Brenza Advocates Alternatives

DENVER — The drawbacks of using the “almighty billable hour” are great — from risk of associate burn-out to allegations of fraud as in the recent case of Denver attorney Frank Sledge.

Despite attempts to move from this highly criticized system, its presence continues to dominate the legal world.

In 2002, the American Bar Association released a report panning billable hours. It outlined the negative aspects of the system and offered alternative methods. The report's preface suggests “it has become increasingly clear that many of the legal profession's woes intersect at the billable hour,” which is “fundamentally about quantity over quality, repetition over creativity.”

The creators of the report admit that completely eliminating the billable hour is implausible, but adopting new methods should be a goal for the legal profession.

Many firms use several billing methods. The commission reports that 79 percent of 100 large law firms surveyed use partial or whole contingent fees, 74 percent use flat fees, 42 percent use result-based premiums, 11 percent use retainers and 11 use stock in exchange for fees.

The report indicates the most frequently used alternative fee arrangement in firms of all sizes was fixed or flat fees. More than half of the firms report using this method in the survey. Between 54 and 63 percent of firms with between two to 50 lawyers have used this alternative in three



LINDLEY BRENZA

number of “units” for a given task, no matter how many actual hours it takes).

* Outsourcing/partnering of a certain category of work (such as all intellectual property or antitrust work), using fixed or budgeted pricing per matter or portfolio.

months leading up to the report, nearly double the percentage of larger firms, which had a 30-38 percent rate.

Moving away from the billable hour is harder than simply implementing new billing methods, argues Lindley Brenza, partner with Bartlit Beck Herman Palenchar and Scott.

“If you have a big pyramid structure, you cannot do something non-hourly and do it efficiently,” Brenza said in an interview with *Law Week Colorado*. “Generally, firms that have tried alternative methods without restructuring don't do it

POSSIBILITIES:

* Fixed (or budgeted) price by task, matter or portfolio.

* Contingency fee per task, matter or portfolio.

* Other bonus arrangements (annual or end-of-project allocation from a bonus pool, based on predetermined objectives and/or subjective assessment factors).

* Risk corridors (such as used in health care pricing).

* Full Time Equivalent (FTE) allocations (such as used by corporations for virtually all internal functions).

* Work units (a concept of charging a pre-determined

well.”

Bartlit Beck was formed in 1993 by a small group of attorneys from the Chicago firm Kirkland and Ellis. The firm was based around not following the tenets of the average law firm.

“We had three ideas to change law firm practice,” Brenza said. “First was to get away from the billable hour. Second was a departure from the pyramid structure and finally to use labor-saving technology.”

Today, the firm has more than 60 attorneys with offices in Chicago and Denver. Brenza said typically the firm uses a

monthly flat rate to bill its clients. Payment methods are often client-defined, he said. They use reverse contingencies in defense cases, where the amount of damages incurred will determine how much the firm gets paid.

Other methods include success-based billing with bonuses for summary or preliminary judgment.

“It all depends on clients' needs,” Brenza said. “Sometimes the client wants things to finish quickly, so we'll have something where we'll do better if the case ends within the first few months.”

Bartlit Beck is one of the few firms to offer such a system. However, the problem isn't simply a matter of supply.

“Many times the client is reluctant to move away from the billable hour,” said Pete Peterson, a legal consultant with Maxfield Peterson Richards.

Brenza notes that many clients that come to Bartlit Beck have trouble overcoming the emotional and psychological hurdle of breaking away from the traditional method.

“The hard part of the non-hourly billable structure is the beginning and the end,” he said. “In the beginning, clients are not familiar with it and not sure how it works. Generally, clients can figure out in the first day what the litigation will probably cost them if it goes all the way through trial and they are confronted with a very large number. At the end, the client has to write a big check, which no matter the result, can be

difficult.”

While many clients turn away, those who have hired Bartlit Beck tend to be lifelong customers. The firm’s clients include Merck, Celestial Seasonings, Bayer, Pfizer, General Motors, Verizon Wireless, Hewlett Packard, the Mayo Clinic and Sears.

The advantages to this system include its predictability and the lack of confrontation or renegotiating in the midst of a trial.

“We never have to worry about the normal question in the middle of a trial like ‘Why did it take you a week and a half to prepare for this?’ If we bring four people to a deposition, that’s our problem,” Brenza said.

One of the ABA’s critiques of the billable hour is the conflict of client’s interests with those of the lawyer. The system promotes negative impacts such as discouraging communication between lawyer and client, penalizing the efficient and productive lawyer and not rewarding the lawyer for productive use of technology.

“Normally, the client’s interest is to resolve a matter or complete

a project efficiently and quickly,” the Commission reports. “If hourly billing is utilized, the efficient and quick lawyer will earn a lower fee than an inefficient and slow lawyer.”

Bartlit Beck recognizes this disconnect and seeks to use the most efficient strategies on the market. With all the firm’s attorneys from partners to associates utilizing technology, the firm prides itself on its efficiency.

“The billable hour is a disincentive to use technology. If you can side check your brief in 15 minutes with an automated system whereas you could have kept four associates busy for a week doing that, you’ve lost a lot of money as a billable hour firm,” Brenza said.

The practice of billing hourly in the law offices started in the 1950s and became widespread in the 1960s, according to the ABA report. Budgets were created around this system, and expected billable hours soon became billable-hour commitments as a result of a fluctuating economy and competition. The ABA reports that in the 1990s billable

hour commitments reached “unreasonably high levels.” Today, many firms require associates to bill sometimes more than 2,100 hours per year, which averages to more than 10 hours a day within a six day work week.

The pyramid structure of many inexperienced associates with a few partners discourages the movement away from billable hours. The traditional firm with a huge pyramid makes money by making its new associates bill substantial hours.

“When [the associates] eventually learn how to practice law, they’re fired,” Brenza said. “The clients are paying for this incredible churning effect that doesn’t result in excellent legal work.”

Brenza describes the difference between partners and associates at his firm as almost non-existent and that the firm works as a “seamless team.” However, he admits that without dozens of associates, there can be disadvantages to the seasoned partner.

“One down side, the senior lawyers never stop working,” he said. “But, that’s the reason why

client gets better quality. I’m willing to bet that when I do my own work, it’s better than when seven second-year associates do the same thing.”

Some of the more frequently suggested approaches include:

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