

Alternative Billing

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Alternative Billing: Tools for Effective Billing without the Billable Hour

By Natalie R. Kelly

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In its purest form, alternative billing is definitely not new to the legal industry. However with the advent of unprecedented changes in the economic climate during the last couple of decades and the resulting chaotic financial backdrops for many law firms, now is a good time for lawyers to really look at what makes alternative billing both economically feasible and doable. This treatise will strive to give a practical outline of effective alternative billing tools and how to select among them.

Alternative Billing Tools

As with regular billing, the basic tools for generating alternative bills include pre-bill analysis tools, recording or logging tools, bill generation and delivery tools, and post billing analysis tools. The nature of alternative billing could be said to be simply a shift in the way firms use “time” as the commodity and to more of the “value” or the “legal service product” as the commodity.

Below is a general review of the tools as would be encountered during a generic alternative billing arrangement and billing cycle.

Pre-bill analysis Tools

Firms considering alternative billing arrangements must first analyze the current billing situation. They should pay attention to the impact of practice areas, firm compensation plans, firm access to additional capital and credit, outstanding accounts receivable and cash flow needs, and other pertinent financials for the firm.

Equally important is the need for firms to analyze and anticipate whether or not alternative fee arrangements are even wanted, and whether or not they will likely be accepted by clients. For instance, it's easy to say that current clients would prefer to have a flat or a fixed fee. However, it would be more prudent for the firm to see whether or not this is desired by most or just a few of its clients, and whether or not giving the clients a choice is going to be the most effective route for the firm.

By taking three years of a firm's financial statements and any existing budgets and forecasts, the firm should be able to look at income, outstanding amounts owed, and any anticipated future gains to help determine a starting bottom line for determining where to begin with setting up alternative billing. This information will initially allow the firm to determine if they can begin to transition both existing and new clients to alternative arrangements, and if the overall undertaking even makes financial sense for the firm as a whole. Of course, modifications will need to be made to existing fee agreements and any engagement statements that will be affected by this shift.

Special attention will need to be paid to practice areas, as it is not likely that some shifts would make sense or even be ethical in some cases. For instance, a personal injury firm may find that

it's simply easier to continue to work on a contingent basis for its matters, at least until say some periods of litigation become necessary, and it would then be more appropriate to shift to the firm standard of fixed billing for litigation.

So, basically a short list of pre-analysis tools would include:

- firm financial statements
- existing accounts receivable reports
- existing budgets and forecasts
- current bank statements
- firm compensation plans and reports
- written fee agreement samples and existing forms
- engagement letter samples and existing letters
- client feedback and survey reports

Recording/Activity Logging Tools

If a firm's pre-bill analysis indicates that it will be viable for the firm to move forward with alternative billing, the next step would be for the firm to conduct an itemization of its existing recording and logging tools. This would be done to see if the firm can simply begin to move forward with the arrangements or to see if they need to make some additional purchases, staff changes, and/or procedural changes to do alternative billing. To start the process, the firm should determine how staff currently tracks their time.

While it may be argued that time would no longer need to be kept in firm that works strictly from flat or fixed fees, the reality is this is probably the phase where it is most important to track time – at least in the beginning it is. Alternative billing does not take away the need to describe or show in some results-based way the detail of the work being done for the client. To this end, it is important that the firm continues to track the work being done in meaningful terms in ways that make the overall process for billing easier. A bill showing “breach of contract litigation - \$20,000” or “for legal services rendered - \$15,000” is not likely to be as acceptable to clients based purely on face value. It might be with more accepted by the client if the billing includes descriptive and itemized services outlined in a way the shows both the effort and value of the services.

Common tools for logging time and recording work performed by firms might include any of the following:

- an automated time and billing application
- pop up or other stop-watch type timers
- general paper timesheets or slips
- mobile apps or built in features for billing on smartphones and PDAs
- online entry screens/portal applications

Bill Generation and Delivery Tools

Bill generation and delivery tools for alternative billing may include various methods of creating and sending out bills to accommodate arrangements outside of traditional hourly billing. Affected like every other area of law by technology, bill generation and delivery over the past 15-20 years has gone through some phases of advancement. The changes have been brought about to deal with client demands, as well as to carry out internal control mechanisms for the billing process.

A prime example of changes to the way bills have been generated and delivered is billing via e-mail or “e-bills.” Most vendor products now have a way for bills to be generated in formats other than those that are fed or merged into word processing software, and will now most often include .pdf (portable document format) and .rtf (rich text format) bills which can easily be attached to e-mails. There has even been a shift in e-billing styles to include the ability for clients to pay off their bills from the e-mailed invoice via credit or debit card with some new invoicing on online bill payment services.

As with regular bills, there should be a method by which firms can bill on demand. In fact, one of the benefits of alternative billing arrangements is that they allow for one-time billing, which can ease the amount of overall tracking that must be done as far as invoices go. If one looks further at the way bills are generated, in alternative arrangement scenarios there may be fewer places for itemized descriptions of activity, and/or more instances of the lumping of expense charges. Following the example of UTBMS (Uniform Task-based Management System) and some systems set up for special corporate bills, i.e. Legalgard and LEDES, many of the codes and descriptions have been abbreviated for easier processing and standardization on bills. These newer delivery models seem to stay in line with current consumer methods of using technology to pay for services, and seem to be only slowed in implementation by the need for firms to take a closer look at any service’s effect on ethical obligations by the firm or risks that could cause any breach of client confidentiality.

Post-Billing Analysis Tools

Information gathered after the bills have gone out can play an extremely important role in alternative billing arrangements. Accepting the premise that firms must continue to track time, or at least keep a log of work that is being performed, firms can analyze both profitability and productivity in ways to help the firm determine whether alternative billing arrangements will be feasible. For instance, they can look at a particular practice area and analyze how much time has been spent in producing certain types of work within that area, and the amount of income that has been realized from that work. This basic analysis can reveal whether or not a particular fee, especially if set at a flat or fixed fee, will be adequate to continue making money for the firm, while at the same time balancing out the value needs of the consumer client.

Post-billing analysis tools found in most time billing programs might include:

- Accounts Receivable reports
- Profitability reports
- Productivity reports (by firm and by user/timekeeper)
- Realization Reports
- User Contribution Reports

Information found in these reports may lead a firm to understand that it is more profitable and productive for the firm to use alternative billing arrangements. This information may also lead the firm to see that the value of work performed actually has a “price,” and that this “price” may be appropriately applied and used either all of the time or in specific instances in billing for delivery of legal services.

Leading Programs for Alternative Billing

Luckily, most programs that fall into the category of time keeping and billing have built-in flexibility that allows them to be easily used in alternative billing situations. Some products are chosen to include more functionality to address the specifics of certain arrangements. For example, one of the more flexible products, Timeslips, provides a number of different options, as it relates to fixed or flat fees, and how that billing would actually be managed. It has 5 five different flat fee settings!

Here are some quick views of several leading applications (legal-specific and most suitable for solo and smaller firms) showing where to set up alternative billing arrangements:

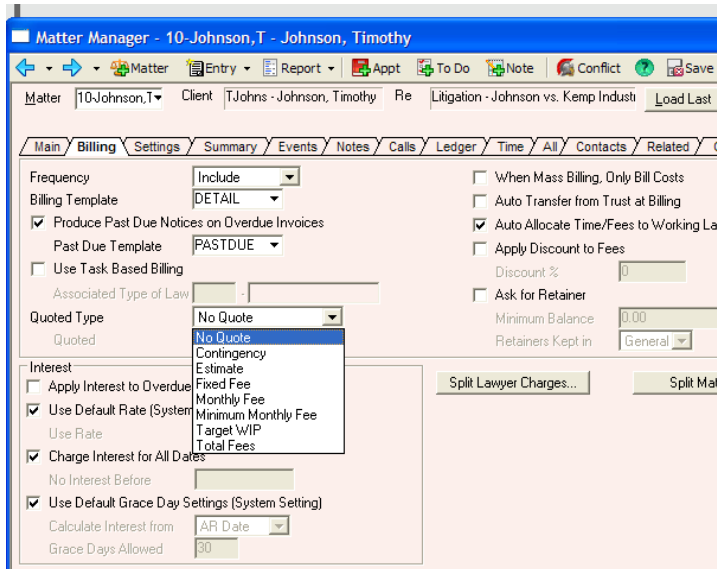
Timeslips (www.timeslips.com) – Priced at \$499.99 for a single user (without support maintenance plan)

With over 5 different types of flat fee options in its billing arrangements for fees, Timeslips is a leader in billing in multiple formats. This program is very flexible as it allows overall billing by either client/matter (client rate for a monthly retainer, i.e. \$5000 per quarter for general representation on contract issues), task being performed (flat rate, i.e.\$500 for court appearances or a discounted amount for work in certain practice areas or a particular phase of a matter), or by a specific user/timekeeper (staff billing, i.e. partners bill at 30% of matter values).

The screenshot displays the 'Client Information' window in Timeslips. The client name is 'ABC' and the classification is '02-1001'. The 'Billing Arrangements' section is selected, showing 'Time and Expense Arrangements' as the active option. Under 'Fees: Charges for Time', the 'Bill Arrangement' dropdown is open, showing options: 'Slips', 'Adjust total charges', 'Adjust by timekeeper', 'Adjust by task', and 'Absolute flat fee'. The 'Costs: Charges for Expense' section is also visible, with options: 'Minimum flat fee', 'Maximum flat fee', 'Flat fee plus charges', and 'Contingency flat fee'. The 'Hold information' section at the bottom has dropdowns for 'Hold time charges', 'Hold expense charges', 'Hold the full bill', and 'Hold A/R transactions', each with a value field and 'hours' unit.

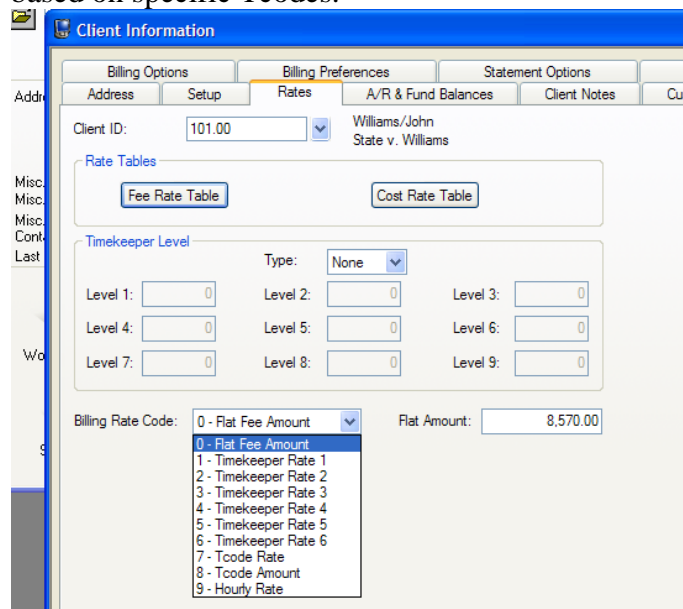
PCLaw – Priced at \$600 (without support plan) for 1st user

Nexis Lexis PCLaw's billing options are set as a "Quoted Type" that can be manipulated in the actual generation step of billing. Discounts (by percentage only in the setup area, but with an option of dealing with dollar amount discounts via time slip entries or via bill adjustments) can also be applied for alternative arrangements.



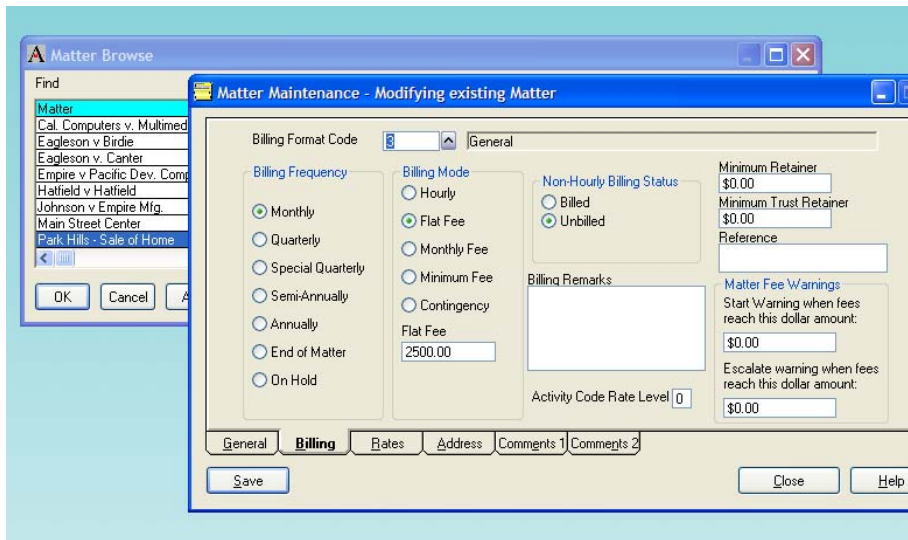
Tab3 - priced at \$405 for a single user (with support plan)

Flat fee rate codes are used by Tab3 to set up fixed fees for clients. At the time of billing, users simply choose the appropriate code to generate statements with the fixed fee. Users can select the "0" rate for the flat fee or use TCode (transaction codes) Rates that generate flat rates for items based on specific Tcodes.



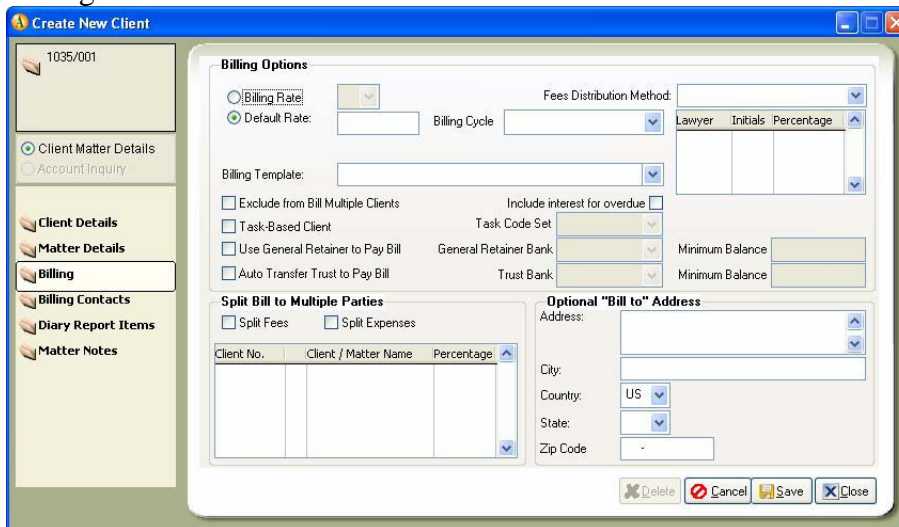
ABACUS Accounting - contact www.abacuslaw.com for software price quote

ABACUS Accounting's Billing Modes are paired with options for Frequency for each matter to deliver alternatives to hourly billing. There are also options to bill at Activity Code Rate Levels.



Amicus Accounting – Priced at \$399 for the first license

When setting up client matters in this program, users can set a Quote amount and then use the Billing Rate to set a fixed amount for bills. Other billing options can also be set under the Billing section of Client Matter Details.



Most other legal-specific products will have similar set up screens and options. The only difference typically will be how the applications approach adjustments and discounts. Sometimes this functionality is dealt with at the level of the actual billing codes. For instance, programs that do not have drop-down options as the ones illustrated above do, will have the ability for end-users to simply create a “timeslip” or entry for the overall matter description and then apply a “flat” or “fixed” rate for that slip. This shortcut will allow the bill to show one item at one price. Also, as shown above Codes are sometimes set to accommodate the one-time bill for a particular activity that covers the complete matter. In this situation, the time entry or slip will have the code assigned to it.

These are simple ways of billing for a flat fee. However, as has been mentioned already, it is probably a better practice to “show your work” with your billing statements. So, the tracking of time does not really go away. Furthermore, as the process of alternative billing moves to the level of post-bill analysis, it will be important for the firm to have tracked time on matters to determine the effectiveness of using any alternative arrangements for its clients.

A good look at how a program handles the entry of time items while billing at a flat rate is shown in this example where a client with a past due balance and other charges receives a \$7,500 flat rate for work during a current WIP (work in progress) period:

Willis & Henderson, P. C.
 133 S. Main Street
 Suite 1402
 Essex, MA 0192

Invoice submitted to:
 ABC Corporation
 17 North Thunder Way
 Suite 1001
 Boston MA 02114

January 18, 2010

In Reference To: General counsel
 Invoice # 10007

	<u>Hours</u>	<u>Amount</u>
For professional services rendered	23.25	\$7,500.00
Total additional charges		\$302.32
Interest on overdue balance		\$1,531.68
Total amount of this bill		<u>\$9,334.00</u>
Previous balance		\$2,100.00
Balance due		<u><u>\$11,434.00</u></u>

Three additional hours of work is performed for the same client matter in the same period as shown in this time entry screen. :

Slip Entry

ID 51 Viewing Selected Slips WIP

Type Time Expense Value 525.00

Timekeeper D. Brickley DavidB

Task Review/analyze A104

Client ABC 02-1001

Reference <None>

Extra

B / Reviewing and analyzing post-hearing items.

Start date 1/18/2010 Time estimated 0:00:00

End date 1/18/2010 Time spent 3:00:00

On Off

Billing Status and Rate Settings

Billing status Billable Hold Recurring

Rate Timekeeper 2 175.00 Hourly

Markup, Adjustment, and Do Not Bill Time

Markup(+/-) default 0.00 %

Adjustment default 0.00 Do Not Bill time 0:00:00

A newly generated bill will only show an increase in total hours, but the flat fee amount remains, as shown here:

Willis & Henderson, P. C.
 133 S. Main Street
 Suite 1402
 Essex, MA 0192

Invoice submitted to:
 ABC Corporation
 17 North Thunder Way
 Suite 1001
 Boston MA 02114

January 18, 2010

In Reference To: General counsel
 Invoice # 10007

	Hours	Amount
For professional services rendered	26.25	\$7,500.00
Total additional charges		\$302.32
Interest on overdue balance		\$1,531.68
Total amount of this bill		\$9,334.00
Previous balance		\$2,100.00
Balance due		\$11,434.00

A simple bill format change can show the same example of having an increase in hours, but no change in the flat fee amount being charged. Here's the same bill with the details showing:

In Reference To: General counsel
 Invoice # 10007

Professional Services

	<u>Hrs/Rate</u>	
6/14/2007 Preparation of review of Patent License Agreements from Mr. Whitley at ABC to Tim Roberts; modifications for exclusive and non-exclusive provisions; termination and default provision and various other material provisions.	1.00 160.00/hr	
10/1/2007 Review fax from Longley and then responded with proposed settlement documents; phone calls to the office of Mr. Howard; Follow-up correspondence to Mr. Howard with requested clarification; Draft Release; Correspondence to Mr. Black.	3.75 160.00/hr	
2/18/2008 Met with Mr. Whitley to review details not discussed in the original meeting.	4.00 175.00/hr	
2/19/2008 Court appearance with Mr. Whitley.	7.00 175.00/hr	
2/22/2008 Drafted letter to DEQP.	1.50 175.00/hr	
2/26/2008 Travel to/from archived document site to review court of appeals action; analysis of file material, including correspondences, memos, briefs, rulings, and court orders. Analysis of file documents to determine what will need to be copied. Analysis of additional motions filed at county court to prepare for appeal.	6.00 175.00/hr	
1/18/2010 Reviewing and analyzing post-hearing items.	3.00 175.00/hr	
	<hr/>	<u>Amount</u>
For professional services rendered	26.25	\$7,500.00

In this sample, the hourly rate is showing, and the calculation of hours x rate here clearly does not equal the \$7,500 that is being charged as the flat fee amount. By adding in additional options for capping fees, charging adjusted amounts, discounting matter totals and the like, a firm can easily manage its alternative billing arrangements with most current time and billing applications.

Alternative Billing and Billing Staff

The billing staff needs to be involved in the process of the overall setup for billing schemes. These individuals will look closely at the end result, and can also be involved in pre-analysis, and most likely post-analysis of the firm's billing. Just as they are critical in the actual billing

phases, be sure to include these individuals when selecting a product. Have staff look for products that can handle bills which deal with some of the firm's worst-case scenarios for billing. Make sure the billing staff is adequately trained on how to properly manage alternative arrangements, and any of the flexibility that will be needed in generating bills and collecting for fees that are not strictly based on hourly bills.

Ensure that your billing staff understands the nuances of billing so that there are fewer rejections of billing entries when work is being done by a particular level of legal staff or if billing must be coded in a set format. Having a staff person who understands that the client or bill reviewer on the other side may see some items as "administrative" and some as "lawyer/associate level" bill items. While generic flat amounts may not come into play with this type of analysis, it can be very common in corporate billing situations where alternative billing is really coming of age.

Comparing Alternative Billing Tools

When selecting a product for alternative billing arrangements, firms have to look no further than its existing time billing and accounting system. That said, it is important to understand exactly how flexible the billing product is in terms of being able to switch from an hourly arrangement to a fixed or flat fee arrangement, or any other arrangement that might be needed.

With all bases covered and the inclusion of specialty billing models like UTBMS (Uniform Task-based Management System) which are often pre-loaded into programs, and multiple transaction or activity code options, most accounting applications should have everything needed to do alternative billing.

Consider these factors when implementing alternative billing arrangements or shopping for solutions, and look for products that provide:

- ease of integration with current billing procedures
- ability to apply arrangements at any given time during the billing cycle
- multiple arrangements that can be mixed or used separately
- little need for customization, as it relates to arrangement set up and bill drafting

Some of the products listed as leaders earlier in this paper will make great candidates for your alternative billing needs. You can also investigate some of the newer online and more automated billing tools, and ones that may be used in larger firms.

Here is a short list to also consider:

- RTG Bills (www.rtgsoftware.com)
- Bill4time (www.bill4time.com)
- BSA Pro (www.seabill.com)
- Juris (www.juris.com)
- Omega (www.omegalegal.com)

The expanding software solution searching service, Capterra (<http://www.capterra.com/legal-billing-software>), lists over 40 products for legal time and billing software including the ones outlined above as being most popular and suitable for smaller law practices.

For practices with Mac setups, don't forget that Mac billing software applications will need to have the same flexibility of their PC counterparts in order to be effective. The products found for the Mac that might fit the bill, according to Capterra (www.capterra.com) are:

- Rocket Matter (www.rocketmatter.com)
- TimeSolv (www.timesolv.com)
- Powerlaw (www.powerlaw.com)
- Mdansby.com (www.mdansby.com)

Conclusion

Alternative billing is a very doable process. With an update in financial management planning and procedures, and with appropriate buy-in from the firm and clients, law offices can be on the way to realizing more productivity, as well as profitability with alternative arrangements that work effectively both internally and for clients externally. Often the technology needed for making the switch to alternative billing is already in place.

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Alternative Billing: aka Billing Strategies in a Changing Economy



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Discussions about “Alternative Billing” have sometimes fit the cliché that everyone talks about it, but no one does much about it. Even with years of examination of the topic, the primary alternatives that were in widespread use as an alternative to the billable hour were those that had traditionally existed for quite a long time. These included statutory fees, contingency fees and flat fees. Flat fees paid in advance were particularly popular in situations where hourly billing and collection was problematic, such as consumer bankruptcy and criminal defense.

The problems with hourly billing have been well-documented:

- a) The ultimate cost was unknown and unknowable to the client until the matter was concluded;
- b) Technology advances allowed everyone to do their work more quickly. Use of electronic forms, macros, document assembly and other techniques would ultimately result in a lawyer delivering the same valuable service for less of an attorney fee, unless the billing rate was increased or a charge made for the technology.
- c) The one who decided (or recommended *strongly*) what needed to be done was the same person as the person who benefits from the additional work.
- d) Efficiency, which reduced the time spent on tasks, was financially penalized, while slowness of working seemed to be rewarded. This led to a tendency of law firms to be slow in adopting new technology and generally to have inefficient operations in many cases.

But recently, interest in alternative billing, as you will read below, has been kickstarted by the recession.

As the world changes, so sometimes does the terminology. In the last half of 2009, many began referring to Alternative Billing as Alternative Fee Arrangements. This is probably a more accurate term to reflect what is going on in the legal marketplace today. It also has a nice acronym: AFA. So it is likely the use of this term will become more commonplace. Since the

assigned title of this presentation is “Alternative Billing,” we will continue to use the traditional term in this paper and presentation. My guess is that AFA will catch on.

So let’s talk about the last year’s events.

Certainly the year 2009 saw a lot of high profile discussion about alternative billing for law firms. An opinion piece by Evan Chesler in *Forbes* magazine, January 12, 2009 edition, was titled “Kill the Billable Hour” <http://www.forbes.com/forbes/2009/0112/026.html>

This was particularly noteworthy because Chesler is a Presiding Partner at Cravath, Swaine & Moore, one of the most elite of the mega-law firms. He says lawyers should bill like Joe the Contractor does.

He writes:

“Clients have long hated the billable hour, and I understand why. The hours seem to pile up to fill the available space. The clients feel they have no control, that there is no correlation between cost and quality....

“The billable hour makes no sense, not even for lawyers. If you are successful and win a case early on, you put yourself out of work. If you get bogged down in a land war in Asia, you make more money. That is frankly nuts....

“Contractors bill a lot, too. Last year my wife and I decided to put in a new kitchen. We called in a contractor (let's call him Joe). Joe arrived with a clipboard, measuring tape and calculator. We told him what cabinets and appliances we wanted. He measured and calculated. A few days later he came back with a price. We thought the price was fair and agreed to it. We didn't care how many hours Joe, or his electrician or his plumber, would be running their meters. That was Joe's problem; we had our price.” *Id.*

As the economic downturn worsened in 2009, in-house counsel found that their budgets were being slashed and they had to either cut back on outside legal fees or find a way to make them more predictable. The pressure for more predictable fees went from an interesting theory or long-term goal to a mandate from corporate clients.

On Monday, August 24, 2009, the debate about alternatives to the billable hour in the legal industry became even more high profile as articles appeared about the topic in both the *Wall Street Journal* and *Corporate Counsel*.

The *Wall Street Journal* piece was titled “Billable Hour Under Attack” and began:

“With the recession crimping legal budgets, some big companies are fighting back against law firms' longstanding practice of billing them by the hour.

“The companies are ditching the hourly structure -- which critics complain offers law firms an incentive to rack up bigger bills -- in favor of flat-fee

contracts. One survey found an increase of more than 50% this year in corporate spending on alternatives to the traditional hourly-fee model. “The shift could further squeeze earnings at top law firms. The past 18 months have been brutal for some big law firms...”

<http://online.wsj.com/article/SB125106954159552335.html> (Content now available to WSJ subscribers only.)

The article in *Corporate Counsel* was titled, “Two Veteran Lawyers Say Now Is the Time for Fixed Fees” and tracked much of the discussion in the WSJ article. The authors stated:

“In these troubled economic times, fixed fees for particular legal matters have appeal both for law firms and their corporate clients. We -- a former general counsel of a major company and a current co-managing partner of a major firm -- strongly believe that this is an idea whose time has come. For in-house counsel facing tremendous budgetary pressures, the fixed fee addresses the problems caused by the hourly rate, such as unpredictability, high costs divorced from actual value and, most importantly, the maddening law firm definition of ‘productivity’ -- defined as more lawyers and more hours per matter.

“For law firms facing reduced demand and cash flow problems (if not crises), the fixed fee addresses the issues of increasing overhead devoted to the billing process, clients flyspecking bills and demanding after-the-fact discounts, and delays in payments and falling realization rates.”

(Complete article available online at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202433261281>)

Bruce MacEwen on his well-regarded *Adam Smith, Esq.* blog responded with a great analysis of this discussion in his post *The Billable Hour Debate Is Not About the Billable Hour*. I would encourage you to read his thoughts online at <http://www.adamsmithesq.com/archives/2009/08/the-billable-hour-debate-is-not-about-the-billable-hour.html>.

Bruce MacEwen writes:

“What's wrong with the billable hour?

“From my fundamental economic perspective, all you need to know is that it starts and ends the pricing determination based on ‘cost of production’ rather than ‘value to client.’ In my book, that's *per se* irrational.

“It can be difficult for those of us who've spent our careers in this industry to get perspective on this, so let's step outside for a moment. What if cars were priced in linear proportion to cost of production? We can imagine a few



Is Hourly billing the great divide between lawyers and clients?

things would occur, but what would not occur is a car marketplace looking anything remotely like the one we have which, for all its self-inflicted troubles of late, is clearly providing incredibly valuable services to a fast-growing worldwide customer base. But in the car "cost of production" world, we would see these irrational conditions:

- There would be almost no such thing as premium luxury brands. Perhaps Ferrari, Rolls Royce, and few other "bespoke," one-by-one handcrafted brands would truly have costs of production so astronomical as to justify astronomical prices, but any cost accountant worth their salt would tell you the difference in cost basis between a top-of-the-line Lexus and a Toyota Yaris is not on the order of 10 or more to 1.
- Conversely, manufacturers might lose any incentives towards efficiency. Who cares whether it takes 22 or 44 or 88 hours of labor to assemble a car if the customer picks up the passed-through costs? Factory managers might even be measured and favorably rewarded based on how many hours of labor they require to get a finished car out the door. (Sounding familiar?) "Cost plus" pricing tends to create such results.
- At the very least, one could imagine manufacturers losing all interest whatsoever in producing rock-bottom, purely utilitarian, econo-boxes—regardless of whether a small cohort of customers would actually prefer them.

"I don't need to pursue this for you to get my drift. It's just plain a weird way to price products or services, because it fundamentally disconnects price from perceived value in the eyes of clients." *id*

Read the rest of his post at the link above to determine what he *really* thinks is wrong with the billable hour debate. It is an interesting perspective.

But this debate is not new. The cover story of the August, 2007 ABA Journal was *The Billable Hour Must Die* by famed lawyer-novelist Scott Turow.

http://www.abajournal.com/magazine/the_billable_hour_must_die or <http://tinyurl.com/e5hu>

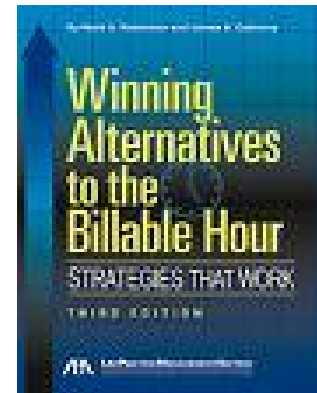
No one who has read any of Mr. Turow's books would be surprised that it is a well written and persuasive piece. He repeats a phrase that I find very significant: "dollars times hours."

Turow writes:

"Dollars times hours sounds like a formula for fairness. What could be more equitable than basing a fee on how long and hard a litigator worked to resolve a matter? But as a system, it's a prison. When you are selling your time, there are only three ways to make more money—higher rates, longer hours and more leverage. As the years have gone on, the push has continued on all three fronts." *Id.*

This may sound like it applies to large firm lawyers, but the math applies equally to lawyers in every size of practice who bill only by the hour. This issue may represent one of the greatest future challenges to our profession.

Mark Robertson and I published *Winning Alternatives to the Billable Hour: Strategies That Work, Second Edition* through the American Bar Association in 2002. *Winning Alternatives to the Billable Hour: Strategies That Work, Third Edition* was published in the summer of 2008.



The Third Edition of *Winning Alternatives* is available for sale at the ABA Bookstore. <http://www.abanet.org/abastore/productpage/5110660> You can also find at that web address, a sample chapter of the book available for free download as is one of the case studies from the book: *Alternative Billing in Estate Planning*.

How much have we thought about this dollar times hours aspect? Is a mechanical formula really the best and most fair method to determine a legal fee? Is it the best for the law firm? It is the best for the client? The case against hourly billing is pretty easy to make; it can reward inefficiency and the total cost is unknown to the client until a matter is concluded. While I might not state the ethical challenges as strongly as Turow, there is the inescapable fact that, for the most part, the one who makes the decision as to whether those eight depositions are needed is the same person who makes more money from those eight depositions than if only three were taken.

But the ethical challenges would not disappear by changing to all flat fee arrangements for legal services. If an hourly payment arrangement presents an ethical challenge to do too much, then surely a flat fee for an entire matter presents the opposite challenge to do too little. Public perceptions notwithstanding, all but a very few lawyers take their ethical responsibilities very seriously in all circumstances. The idea of not doing a complete job of preparation goes against our nature.

We are living in a time of great change.

If it were easy, all the smart lawyers would have already done it. But there are smart lawyers and smart clients who are using alternative billing methods. How do you start? Let me suggest modest steps. You recall the old saying "How do you eat an elephant? Answer: One Bite at a time."

So litigators, are there some routine tasks that should be billed on a task completed basis rather than an hourly basis? What about filing documents with government clerks? Hourly or fixed? Consider this and revise your policies accordingly.

It's All About Risk

One of the business principals at work in the consideration of billing methods other than strictly hourly basis is the allocation of risk. In hourly work, the client assumes all of the risk of a project taking more time than anticipated. In a personal injury contingency fee situation, the attorney assumes the risk of not being paid if there is no recovery.



Just as much as the lawyer does not wish to work for free, the modern client does not wish an open-ended unlimited commitment either. The traditional hourly model shifts all of the risk of unanticipated demands or complications to the client, with the lawyer being in the position to bill and collect more in that event, subject only to the risk of client nonpayment. Any alternative billing strategy will entail the law firm assuming some degree of risk of complications. But if implemented correctly, fixed fees can combine with improvements in delegation and use of technology to free up the lawyer's time to do the more complex and interesting legal work while increasing firm revenues.

Tips for Implementing Alternative Billing

- 1. Take your time, using “bite-sized” steps**
- 2. Mine your closed files for objective data. Your recollection may be a bit biased.**
- 3. Start with things that make sense to you and the client. e.g. a flat fee for courthouse filing, no matter who does it.**
- 4. Written agreements and documentation are keys.**
- 5. Pay special attention to areas where you can delegate and automate better.**
- 6. Look at the goals from client's viewpoint: predictability is at least as important as cost.**
- 7. Do other aspects of firm management need to change to reflect this reality?**
- 8. If your firm rewards based on billable hours, change the focus to dollars billed and received. (We should have done this all along.)**
- 9. Could one aspect of your practice be transformed? e.g. Corporate formation, minute book and first year's minutes, up to 2 hours of phone questions answered, running your new business advise letter, all bundled together. Client gets predictability and “free” calls to lawyer. You get a year to prove how valuable you are.**
- 10. Keep reviewing and improving the process**

Fixed Fees Need Not Mean Working More for Free

(This portion of this paper was printed in my column in *Lawyers USA* near the end of 2009 in a slightly different and shortened version.)

“I agreed to do the work for a flat fee. Now the client calls every single day. I’ve already invested more hours than I thought the entire matter would take. What can I do?”

This issue has been discussed recently in online forums and in law offices across the country. It gives an example of the kind of thing that lawyers fear when they think of converting from an hourly-only business model to some sort of alternative fee arrangement. Every “old school” managing partner who was ever approached with the idea of billing by fixed fees probably responded with, “We don’t know how many hours it will take and so we take the risk of working for free.”

How can we avoid the trap of working for free?

While you can never avoid all risks in life, you can minimize your risk in this area with these four simple strategies: task-based billing, preemptive communication strikes, employing “change orders” and improving your fee agreement as you learn from experience.

Task-based billing as opposed to flat fees – Some lawyers think of a flat fee for an entire matter as the only option to hourly billing. But the more fair and workable plan is likely some hybrid arrangement that includes flat fees for certain tasks and perhaps even some limited hourly charges. Most lawyers would be unlikely to agree to an unlimited number of depositions for a fixed fee at the beginning of an uncertain matter, for example, and some might argue that such an arrangement has the potential to create a conflict of interest between lawyer and client. It could be agreed, however, that preparation for and taking of each deposition would be charged at a “per deposition” fee, with one rate for in-state and another for out-of-state.

Preemptive communication strikes – Often a “time-wasting” call, particularly from a consumer client, is just to check on the status of a matter. This is understandable, particularly if the client has never been involved with this kind of legal matter before and has not heard from the lawyer for a while. But dealing with these calls is a drain on the lawyer’s limited time, while failing to return calls may undermine the attorney-client relationship or even result in a complaint to disciplinary authorities.

This is an issue that should be handled as proactively as possible in the formation of the attorney-client relationship. Periods of inactivity should be discussed. A staff person assigned to the particular client file may have a standing assignment to note when there has been no communication for a time and prepare a brief client status report.

Some people require more reassurance and “hand-holding.” To guard against the client who calls too often, it may make sense to have a general contract provision that states “Excessive telephone calls from the client to the lawyer may be billed at the lawyer’s normal billing rate.”

This could be a potential problem in application, but it opens the door for the lawyer to have a conversation with the client, making certain that the client is aware their actions are moving them into a “premium services” mode. Some will modify their behavior in response, while others may willingly pay for greater access.

Employing change orders

Suppose a lawyer was building a home and, in early construction, the lawyer (or spouse) decided granite countertops were needed in the kitchen instead of the material specified in the contract. What would the builder do? The builder could say “No, too late. You signed the contract” or the builder could say “well, that’s a lot more trouble and expense for me, but I’ll do it. No charge.” But only a soft-hearted lawyer would agree to do extra work for no charge.

In reality, the builder would figure out the costs of the modification and some additional profit and give the customer a form called a “change order” that specified additional charges and/or delays and required the customer’s signature.

Lawyers who enter into alternative billing arrangements would be well served to follow the builder’s example. First, the original agreement should specify in detail everything that the lawyer is obligated to do under the fixed fee or task-based billing arrangement. Then when the client decides something else is needed or there is a change in plans, the lawyer provides a change order for the client to sign, specifying the additional steps and additional attorney fees. Not all clients will willingly and immediately sign the change order, but as we lawyers like to say, we have framed the issues for discussion.



Your fee agreement should evolve over time as you learn from experience

Unknown contingencies can increase the cost of legal representation. The lawyer with experience in the type of matter is often in a better situation to anticipate these contingencies and provide for them in a task-based attorney client agreement. Sometimes a corporate client or insurance company may have a better understanding of the possibilities than the lawyer. But there is always the possibility of unusual events that were not anticipated. In that case, one will turn to the language of the original attorney-client agreement. Sometimes the client will be obligated to pay more and sometimes a fair reading of the contract will require the attorney to handle the complication for no additional payment.

Rather than rail about the unfairness of working for free, the lawyer is well served to just do the work and inform the client that there will be no additional charge. Hopefully the client will be impressed with the lawyer’s integrity.

But the lawyer should take this opportunity, if needed, to modify the template for the attorney-client agreement for future matters and provide for how this situation will be handled next time.

Hopefully, over the years, the contract will evolve so that unforeseen complications will be much less likely to occur.

I will conclude with the following piece directed to the small firm Main Street lawyer, which is an excerpt from *Winning Alternatives to the Billable Hour: Strategies That Work, Second Edition*, by James A. Calloway and Mark A. Robertson, published October 2002, and is reprinted with permission.

This article is online at <http://www.abanet.org/lpm/lpt/articles/fin09044.html> Feel free to share the link with your friends. Even though this portion of this paper was written some time ago, it appears to this observer that little has changed regarding solo and small firm lawyers and much of their clientele.

Alternative Billing for the “Main Street Lawyer”

The majority of lawyers in the United States practice in a solo or small firm setting. These lawyers often face different challenges concerning pricing for their services. Yet, in many ways, a smaller-size practice—with its lack of bureaucracy and certain institutional traditions—allows lawyers to move more nimbly in adopting changes.

Solo and small-firm lawyers are not homogeneous. Many small firms operate in the same manner as larger law firms and serve similar clients. This is particularly true for small firms that originally existed as practice groups of larger firms. When lawyers who spent their early years practicing in large-firm settings move to smaller-firm settings, they tend to continue practicing in the same way they always did.

But for many solo and small-firm lawyers, there is a significant difference between their practices and those of their large-firm brethren. This difference relates to who or what might be a typical client. Generally speaking, larger law firms spend most of their efforts representing businesses, and the bigger the business clients are, the better. This is not to say that law firms of all sizes do not represent individuals. But generally, corporate clients constitute the bedrock of a larger firm’s clientele.

There are significant differences between these typical small-firm clients and major corporate clients. The smaller-business owner often has more in common with a consumer when making any type of purchasing decision than a large corporate client engaging in business-to-business negotiations with a large law firm. Small-town lawyers, suburban lawyers, and those in other practice settings who represent mainly consumers have some history of the use of flat fees, contingent fees and various methods other than the billable hour. For easy reference and lack of a better term, we shall refer to these lawyers collectively as Main Street lawyers.

Hourly billing is an objective method of determining the cost of delivery of legal services and for many years has served as the benchmark for determining the price, or value, of the legal services as well. But for the clients, or potential clients, of the Main Street lawyer, the billable hour may

seem more like a blank check payable to the law firm than a reliable method of determining a fee.

In consumer-oriented practices, lawyers deal with a greater percentage of relatively unsophisticated clients; clients who are often inexperienced in dealing with lawyers. Whether a matter concerns an adoption or an arrest, a will or a workers' compensation claim, the simple fact is that a consumer client may have no prior experience with the legal subject matter and had no prior need for a lawyer.

Therefore, some of the techniques used in negotiating a fee with a client with experience in purchasing legal services like an insurance company or a bank do not apply to the average consumer client. There is no give-and-take discussion about various alternative billing methods when the client has little or no understanding of the process.

For consumer legal services, fees are often based upon market forces and lawyer experience, rather than negotiation with prospective clients. But these unsophisticated clients are also those who might most appreciate the simplicity and clarity of many alternative fee arrangements.

What Will It Cost?

Suppose a potential client makes an appointment with the lawyer about a relatively straightforward probate proceeding. The Main Street lawyer discusses handling the matter and discloses his or her billing rate. For many consumer clients, a statement of the lawyer's hourly rate—the cost per hour—is not sufficient information. Almost immediately, the next question is, “How many hours will it take?” or, “What will the total cost be?” This is when lawyers often give a most unsatisfactory answer: “It depends.”

It is not surprising that this can be a source of frustration for the potential client. After all, most consumer purchasing experiences do not proceed like this. Throughout retail stores, price tags and signs abound. There, the price is stated in advance. Imagine buying a refrigerator after being told that the final price will be set only after you agree to make the purchase! Even a car dealer will make a firm offer. In fact, the Main Street lawyer has a fairly accurate mental understanding of what an average fee for this matter will total. But the estimate communicated to the client is often couched in broad terms, with many disclaimers. The lawyer cannot give an exact quote when the number of total hours to be expended is unknown to the lawyer, as well as the client.

Although some may view this reluctance as an attempt to conceal something from the consumer, in reality, the lawyer is exercising time-tested judgment. The experienced lawyer knows that if an average fee is mentioned, the client will focus on that number as “the fee.” If the lawyer quotes an estimate of \$2,000, the lawyer will view a final total billing of \$2,165 to be right on target. But too many clients would respond with, “No, wait, you said \$2,000.” So the lawyer learns to express the estimate as a range, with plenty of room at the top end of the range to ensure that the total fee will almost certainly be less than the highest number mentioned. In this



example, the lawyer, if pressed, would quote a range from a low of \$2,000 to a high of \$4,000 or \$5,000.

Imagine how much more consumer-friendly and non-threatening this transaction would be if the lawyer simply said, “This probate case can all be yours for the low price of \$2,450.” We are all consumers. We understand the attraction of simplicity. We understand the value of limiting the risk of a charge being much higher than anticipated. It is disingenuous to deny that we would prefer the certainty of the fixed fee if we were the client.

“Wait,” many lawyers would cry, “there are many variables, and many contingencies.” These are often outside the lawyer’s control. The lawyer understands that an unreasonable opposing counsel, a procrastinating opposing party, or a recalcitrant judge can increase the workload by several orders of magnitude. The lawyer does not want to bear that risk, and the hourly rate serves that purpose very well. If the matter becomes more burdensome, the lawyer invests more time and the lawyer should be paid more.

But the lawyer does know the variables—far better than the client. Lawyers know they will treat a client fairly, but they also want to make sure they are not treated unfairly by working many extra hours without additional compensation.

In fact, though, in a matter involving contingencies that might dramatically change the work involved, the fee arrangement need not be based upon only one flat fee. The fee agreement may cover numerous contingencies: if event A happens, one fee will be charged; if B happens, then another fee. The most important thing is for the unsophisticated client to understand and comprehend fees quoted in this manner, without referring to an hourly billing rate. The client no longer must ask, “How many hours will it take?” Where the sophisticated and experienced business client may need a jointly developed plan based upon the experiences of both the client and the lawyer, the consumer client often needs information, explanation, and less uncertainty about the future. Written materials for the client to take home and review are extremely useful in these situations.

For many consumer cases, so-called alternative pricing can be quite naturally incorporated as a part of the overall case plan. Consumer clients desire certainty and as much information as possible about the uncharted waters ahead. Hourly billing may be simple for the lawyer, but a consumer will appreciate the clarity and certainty of a fixed fee—even if that certainty is embodied in a road map with a dozen possible total fees, depending upon future variables.

Pricing Structure Can Be The Basic Structure of The Office Legal Services System

The pricing structure, when properly communicated to the client, can provide the basis of the attorney-client agreement and the case plan. The less familiarity the client has with the situation, the more detailed the disclosure should be.

In the probate case example, the consumer may indicate she will likely hire the Main Street lawyer. She then asks about the fees. In response, the lawyer produces not an intimidating

document entitled “Attorney-Client Fee Agreement,” but one called “Case Plan.” This document appears in the form of a timeline, and may be more graphically designed than the standard legal document. The lawyer explains the anticipated chain of events—drafting and filing documents, sending notices, and so on. The document clearly notes the fees at each stage of the proceeding. The document or set of documents may also include many typical provisions and disclaimers. Much of this form can be preprinted, but because the matter may determine certain variables (such as sales of property within the probate), the form has blanks that are completed during the interview.

Of course, there may be unknowns and unknowables, in which case the lawyer makes a good-faith estimate in writing. Yet, the end result is a complete document detailing the entire course of the legal matter, the anticipated timing of events, a likely date of conclusion, an estimated fee, and the probable maximum fee.

Some lawyers object to attaching any estimate to an unpredictable fee. They may also disagree with giving clients time lines for completion of tasks, no matter how general. After all, probate cases sometimes drag on. But the message to the client should be that they do not “drag on” in this lawyer’s office. The beauty of a case plan is that it is constructed to interlock with the lawyer’s office procedures. The case plan provides a road map for the lawyer’s staff, detailing tasks and anticipated timelines. The law firm’s system provides not only for the drafting of required documents, but for important standardized client communications. Instead of receiving two-sentence transmittal letters, the client receives detailed status reports accompanying file-stamped copies, which refer to events outlined in the case plan. If contingencies occur and trigger a fee increase, the system generates a thoughtful explanation and discussion of what has transpired, to accompany the request for additional fees. The client has a reference guide throughout the matter to judge the lawyer’s performance against predictions.

With this approach, the Main Street lawyer is highly motivated to improve, embellish, and streamline the system. Compared with other clients, the Main Street lawyer’s clients may receive superior, regular, and more detailed communications, because the lawyer has judged that a few “extra” letters are less expensive to the firm than receiving numerous “extra” telephone calls from the client.

And what of the estimate of the unknowable fee, when the fee was underestimated due to an event that has now improbably occurred? Will the lawyer be judged by his or her own candor? (“Yes, I stated probably no more \$2,000, and the charges are now \$3,500. But, ...”)

This is yet another aspect of the system that the lawyer should design and prepare in advance. When it becomes evident that an estimated charge may be exceeded, a letter of explanation can be sent to the client immediately, not when the final fees are requested. (“Please be advised that A and B have occurred, and the costs are exceeding our original estimate. You may contact me at no additional charge if you wish to discuss this.”) This is not to say there will never be a time when a consumer manages to use a fee estimate against a lawyer, even if only for bargaining position to compromise the final fee. But the system functions to create understanding,

predictability, and trust. A client is then predisposed to view a contingency as something that happened in his or her particular case, and not as the lawyer simply deciding to charge more.

The benefit for the Main Street lawyer is that the system encourages and rewards efficiency. Exploring advanced document assembly methods holds no downside. If the lawyer notes he or she typically receives a number of calls at a particular stage in the representation, for which the lawyer receives no additional compensation, then the lawyer is motivated to improve communications in that area proactively, perhaps by covering the area better in the initial interview or perhaps by adding to the language contained in a standard client communication during this time frame. The Main Street lawyer constantly hones and improves the system, while the clients benefit from an ever-evolving model of client service, explanation, and communication.

As the system improves, it is possible that fees charged could decrease while profitability and client satisfaction increases. But the converse is true as well. An in-depth examination of office procedures and the tasks to be accomplished on behalf of clients compared with the local market rate for certain routine services may drive a lawyer to conclude that certain practice areas are unprofitable and should be dropped. It may also be true that to be a full-service law firm for consumer clients, a small firm in a small community may need to handle some matters that are only marginally profitable.

But a Main Street lawyer cannot “wish away” market forces, the impact of technology on the practice, or consumer attitudes. The simple fact is that many law offices have not arranged their operations for maximum efficiency. A lawyer may believe that a certain matter requires at least ten hours of lawyer time. But by fine-tuning and improving the system, the amount of lawyer time may be drastically reduced. The lawyer can use technology-based systems and/or support staff to move into a more profitable position.

Conclusion

For the Main Street lawyer representing mainly consumer clients, the decision to embrace alternative billing is not as simple as changing from hourly fees to flat or fixed fees. Rather, it involves a potentially painful examination of office procedures, use of staff, and use of technology. It involves an understanding of consumer attitudes, even when the lawyer believes such attitudes are incorrect and unjustified. It often involves changing the lawyer’s mind-set from a case-by-case approach to a system of processes focused on efficiency. It involves presenting the client with a road map or case plan in advance of representation.

The result should not be a “cookie-cutter” or “assembly line” style of practice, but rather a system where delegation and the creative use of technology free the lawyer from as much routine work as possible, leaving the lawyer with more time available for sophisticated legal problems and face-to-face client consultation and counseling.

In many ways, the search for the completely efficient, productive office system is like the quest for the Holy Grail. Improvements and refinements can— and should—continue. But the promise

is not illusory. This quest can lead to an office where the clients are more informed and more certain about the fees they will pay, where more information about the progress of a matter flows regularly to the client, where the client is given realistic goals and expectations by which to measure the lawyer's delivery of services, where the lawyer is more confident that matters are being handled efficiently, and where the lawyer is rewarded for efficiency by increased profitability.