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VALUE-BASED BILLING: WHO SAYS LAWYERS AREN'T CREATIVE?

Inertia Screams: The Proliferation of Hourly Billing

A famous proverb, sometimes called Parkinson's Law, notes that "work expands to fill the time available for its completion." A corollary of this proverb is that time spent on a task has little bearing on the skill, creativity, or ingenuity brought to it. In other words, time and value have about as much in common as third cousins, twice removed.

The link between time and value is especially suspect when we are dealing with something as intangible as an attorney's output. Despite this fact, nearly all attorneys insist on billing clients based on time spent working on a matter.

While time-based billing (often called hourly billing) curiously persists, it offers few tangible advantages to either attorneys or clients. I would like to make the case for attorneys to embrace alternative approaches to billing. We should work together with clients to develop more creative ways to structure attorney compensation; ways that reflect the ingenuity that we bring to solving a legal problem.

How to Think About Value-based Billing

OK, so there is one obvious advantage to hourly billing; administrative simplicity. I realize that hours are easy to track and justify as a simple proxy for effort.

But do we really get paid for effort?

Clients don't care about effort, they care about value! What is value? Well, that depends on the client (though more expeditious work product, cost predictability and innovative solutions to their legal problems are three examples of what many clients want). Perhaps I can do a better job of nailing down the definition of value-based billing than the definition of value.

So What Is Value-based Billing?

OK, I lied. Value-based billing has kind of an amorphous definition, from my point of view. It is essentially just a catch-all term for alternatives to time-based billing that do a better job of serving the client's interest.

What value-based billings ISN'T is merely a mechanism for charging flat fees for discrete projects. While this can be an improvement...c'mon...do we have to limit ourselves to the occasional flat fee model? Can we attorneys get a bit more creative? How about offering

satisfaction guarantees? What about taking a percentage of money saved? What about pay conditional upon certain milestones? How about receiving a share of revenues, or profits?

Now, I realize that the ethics rules that we must abide by do not offer us complete liberty to be as creative as we might otherwise want to be (if we weren't attorneys, who by definition seem to have common sense creativity sucked out of us) in our billing paradigms, but my experience is that attorneys hide behind ethics rules to avoid thinking outside the box.

Regardless, the important idea is to embrace a value-based and client-centric philosophy.

I advocate an approach that would encourage attorneys to utilize their considerable skills more resourcefully. Imagine our profession actually rewarding creativity, innovation, efficiency and other aspects of performance less tangible than effort (tabulated 10 minutes at a time). This approach might actually restore a sliver of dignity and job satisfaction to many of those in our profession who are on the fast track to intellectual burnout.

Hourly Billing and Its Shortcomings

One way to foster a better billing worldview is to discuss some of the shortcomings of the time-based billing approach. Bear with me, folks, because this might sound a little bit academic, but these points need to be made.

Hourly billing hurts our profession because it misaligns interests between attorneys and clients, encourages ethical violations, discourages innovation and efficiency, and ultimately...hourly billing leads to unhappy (and therefore less productive) attorneys. Let's take 'em and break 'em down one by one.

Hourly Billing Misaligns Interests between Attorneys and Clients

Hourly billing results in misaligned interests between attorney and client. Kind of obvious, isn't it? At least it is to law firm insiders.

Professional rewards earned by attorneys, including raises, choice work and the all-important brass ring of firm partnership, are primarily a function of the ability of an attorney to bill more hours. This is particularly true in large law firms, where the "up or out" mentality is strongest. An institutional focus on billable hours exacerbates an inherent conflict of interest between attorneys and clients; as we've discussed, clients want more expeditious work product, cost predictability and innovative solutions to their legal problems, among other things. Meanwhile, attorneys simply want to bill as much time as possible and then treat their fried brains to a heaping of reality television before repeating the same thing the next day for at least six days a week. This isn't just a theoretical problem, as it has real consequences for both attorneys and clients, including ethical consequences.

Misaligned Interests Lead to Ethical Abuses

Hourly billing may also create a work environment for attorneys in which ethical abuses are subtly encouraged. Billable hours have three important characteristics: they are easy to fudge because they are self-reported, they are imprecise by nature, and they are the basis for most rewards in the legal profession. These factors combine to create a dangerous level of temptation for attorneys, made worse (I'm trying not to write the word "exacerbated" again) by the fact that attorneys are typically competitive people vying for scarce professional rewards in a profession where survival is becoming increasingly difficult. To be sure, economic scarcity exists in the modern law firm, where partnership prospects are often slim, and much more unreachable than even a decade ago. The bottom line is that it is pretty easy to see how low risk (due to the aforementioned self-reporting and imprecise nature) and high reward (increased status and income) create an environment ripe for ethical abuses that cheat the client.

Hourly Billing Penalizes Efficiency, Innovation and Technological Advances

Hourly billing hurts clients and the profession in other ways too. Most modern industries continually invest in technology in order to deliver a product or service ever more efficiently. However, when you view your product as billable hours, as lawyers are trained to do, embracing technology is counter-productive, because technology cuts down on the time required to perform a task.

In fact, hourly billing discourages investment in other areas besides technology because it fosters a "production" mentality to legal work. It imposes a mechanical approach that is simply not appropriate for an industry comprised of some of the best minds in society. Attorneys are rarely rewarded by firms for developing an elegant legal theory, for figuring out a novel solution to a client problem, or for thinking beyond one particular client's problem toward developing a system that provides value for all future clients. Since the profession is comprised of many bright and creative people who are unable to channel these talents, many attorneys are unhappy and leave the profession; many others simply burn out and work without passion.

A Plea for Change

Nearly all industries adapt and grow by rewarding entrepreneurial thinking, risk taking and innovation, which ultimately lead to better products and services. The legal profession has institutionally resisted all of these approaches, and the main culprit is its continued reliance on time-based billing. This antiquated method contributes to a myopic production mentality that stifles innovation and drives creative, forward-thinking people out of the legal profession.

This issue is essentially a tragedy of the commons. If you are an attorney, you might remember this concept from the first year of law school (insert groan here); the gist is that what is rational and beneficial for the individual is harmful to the group. Attorneys are often

individually rewarded for billing more hours, but collective consequence of this individual approach cheats the attorney and client collective.

Everybody knows that attorneys work hard already (that is one of the few things society can't fault us for), and that we cannot guarantee specific outcomes for much of our work product. Nevertheless, these factors should not serve as a deterrent to working smarter, and focusing on value. The key to a more fulfilling career for us as attorneys is to realize that "effort" is not all that matters. We need to fashion a more client-centric approach to our work that also rewards us for using more of our skills and using them wisely and creatively. If we can do this collectively, everyone wins.

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