

VIRGINIA BAR ASSOCIATION
LAW PRACTICE MANAGEMENT DIVISION
BILLABLE HOUR TASK FORCE
PRESENTS:



“I see 2400 billable hours next year with high A/R, but with low collectibles...”

BEST PRACTICES FOR
ATTORNEYS FEES AND BILLING POLICIES
FOR CORPORATE COUNSEL

This Guide identifies some of the salient issues that should be considered when an attorney is engaged to represent a corporate client. From pre-engagement to the end of representation, the Billable Hour Task Force explored billing practices from both sides of the table. This document is not intended to be a how-to book on establishing billing policies and guidelines. Rather, these “Best Practices” are intended to assist outside attorneys and the companies that hire them in developing billing practices that best represent the interests of both parties. These Best Practices are divided into four sections: the Initial Engagement; Billing Policies and Guidelines; Billing Methods; and the End of the Engagement.

I. The Initial Engagement

In many respects, the initial engagement is the most critical stage in the development of the attorney-client relationship. It is a time when the parties communicate their expectations and establish the parameters of the legal representation that will follow. Effective communication is the key to a successful working relationship between the parties. This communication begins at the initial stage of engagement and should continue throughout the representation. The following recommendations are best practices that promote transparency, clarify expectations, and establish the business relationship.

- **Point of Contact:** The attorney and the client should each identify an individual who will be the primary point of contact (POC) throughout the representation. In most instances, the assumption is that the supervising or lead attorney is the POC. Where someone other than the supervising attorney is identified, the parties should discuss the POC's role and the extent of their authority and participation in the case. In addition to identifying the POC, the parties should provide a list of all attorneys and staff working on the case and include their degree of specialization, experience and expertise.
- **Communication:** The parties should discuss their expectations as to the frequency and method of communication throughout the engagement. The initial engagement is the best time for the parties to decide how the outside attorney will present case reports and status updates and whether in-house counsel prefers written reports, email messages or conference call check-ins.
- **Rates/Fees:** Managing legal costs within the client's budget is critical to the success of the business relationship. There are several factors to consider when determining and estimating the cost of representation. One factor is the billing method. Whether the attorney will bill at an hourly rate, a flat fee or use an alternative fee arrangement is a major consideration. See Section III on Billing Methods. Another factor is to identify billable versus non-billable work. In some instances, the client's billing policies and guidelines will identify the type of work for which it will and will not pay. The parties should reach a consensus on what constitutes billable work. Section II contains a non-exhaustive list of activities to consider during this discussion. Where practicable, the attorney should provide a written estimate of the legal fees and costs, preferably in the initial engagement letter or within the first thirty (30) days of engagement, and promptly follow up with the client when there are changes or updates to the budgeted costs.

- **Engagement Letter:** The parties should use an engagement letter to memorialize the terms and conditions for representation. The issues discussed during the initial engagement should be included in the letter. Additionally, the engagement letter should address the following:
 - Scope of Representation: Whether representation will be ongoing or only for a single matter, the letter should outline the scope of legal services to be provided. Engagement letters that limit the scope of representation must accord with the Rules of Professional Conduct.¹ In the case of an ongoing representation, the parties should supplement the initial engagement letter to address subsequent cases and other legal matters as they arise during the course of representation.
 - Identifying the Client: For organizational clients, such as corporations and hospitals, who operate through their officers, directors, and other authorized constituents, the potential for conflict of interest and the issue of dual representation are bound to arise. The engagement letter should clearly identify the organization as the client to avoid any ambiguity as to who the lawyer represents when conflict arises between the entity and its constituents.²
 - Common Representation: In instances where the lawyer for an organizational client is asked to also represent one of its constituents, or an existing client asks its lawyer to represent a party in privity on a common matter, the attorney should be mindful of the ethical rules relating to common representation before accepting the engagement.³

Before accepting a case involving common representation, the attorney should have both the current and prospective clients execute separate supplemental agreements addressing the potential for conflict of interest, the effect of common representation on confidentiality, and the proper recourse if actual conflict arises.

Similarly, in highly-specialized or industry-specific engagements, such as energy or financial services, where a lawyer is permitted to represent other industry players on issues impacting, but not directly adverse to the

¹ See Rules of Supreme Court of Virginia, Part Six, Rule 1.2, cmt. 7.

² See Rules of Supreme Court of Virginia, Part Six, Rule 1.13(d).

³ See Va. State Bar Standing Comm. on Legal Ethics, Ops. 1796 (2004) and 1223 (1989); see *also* Rules of Supreme Court of Virginia, Part Six, Rule 1.7(b) and Rule 1.7, cmts. 29-34 (Special Considerations in Common Representation).

client, the lawyer should consider including a prospective waiver clause in the engagement letter consistent with ethical rules on common representation.⁴

- Rates/Fees: The engagement letter should include legal fees and billing practices, including billing frequency and format, payment terms, the administration of late fees and collection charges, and how records will be maintained. It should also list the attorneys and staff who will work on the matter and their hourly rates. If a lawyer or client has written billing policies and billing guidelines, they should be referenced in the engagement letter and attached as an addendum.
- Confidentiality: The engagement letter is a principal tool for clearly communicating an attorney's ethical obligations to protect the client's confidential information.⁵ The engagement letter should address the importance of confidentiality in attorney-client communications and the measures employed to ensure that the client's confidential information is protected.
- Terminating Representation: The engagement letter is not only critical in the development of the attorney-client relationship, it is also critical in ending the engagement. The letter should state the specific reasons that would ethically require or permit withdrawal and/or termination of the engagement.⁶ Acceptance of the engagement letter can also serve as a client's advance agreement to allow withdrawal for certain reasons, such as the non-payment of fees.
- Binding Agreement: The engagement letter should contain a provision that states the client agrees to the terms and conditions of the representation and a signature line for the client. The executed document will serve as a binding agreement between the parties.

II. Billing Policies and Guidelines

Whether or not the client has a pre-existing set of written policies and guidelines, the parties should discuss and memorialize billing practices before representation is undertaken and as part of the ongoing communication. Organizational clients customarily have written detailed instructions on billing. The contents and

⁴ See Rules of Supreme Court of Virginia, Part Six, Rule 1.7(b).

⁵ See Rules of Supreme Court of Virginia, Part Six, Rule 1.6.

⁶ See Rules of Supreme Court of Virginia, Part Six, Rule 1.16.

provisions of billing guidelines vary depending upon the client and the type of legal matter. Below are some common issues that the parties should discuss before initiating representation.

- **Formal Billing Guidelines:** To begin, corporate clients who are frequently in need of legal representation should have a formal set of billing guidelines that will generally be given to outside counsel.
- **Work Allocation and Supervision:** The billing guidelines usually designate the lead or supervising attorney as the person who will serve as the principal contact with the client. The guidelines also request that outside counsel provide the client with the names and qualifications of the other lawyers and staff on the legal team and notify the client if someone other than the lead attorney is handling the matter or a change of assignment to the legal team occurs.
- **Case Reporting:** Keeping the client informed on the case development and progress is critical to the success of the business relationship. The type and frequency of case reporting is often included in billing policies. In litigation, outside counsel should provide the client with an initial case evaluation report on litigation strategy and plan, periodic interim reports, and pre- and post-trial reports. If the details and formats of the reports and the regularity of their issuance are not included in the billing guidelines, they should be discussed by the parties during the initial engagement stage.
- **Billable Work:** Not all legal services, expenses, costs, and travel will necessarily be compensable. The billing guidelines should cover what the client will and will not pay. While not intended to be exhaustive, the following items should be included in the discussion of what constitutes billable work and in the resulting billing guidelines.
 - Invoicing the client for multiple attorneys participating in the same activity, such as an inter-office conference or attending a deposition or a court hearing, is a billing practice that the parties should discuss. Some clients will not agree to pay for such multiple entries but will only pay for the services of one attorney. The billing guidelines should identify circumstances in which billing for more than one attorney may be justifiable. The guidelines should also address whether the client will pay for the most senior or junior attorney when the firm is billing for only one of the attorney's hours.
 - A "Fee Cap" is usually a cap on the number of dollars or hours the client will pay for legal services in a single matter. A cap may also apply to specific activities or services. For example, clients may limit the number of billable hours for legal research or limit charges for legal research performed by associates and newer attorneys because they expect their attorneys to have subject matter expertise. The billing guidelines should also address whether the cost of online research tools, such as Lexis® and

Westlaw[®], should be absorbed by the law firm as overhead or whether outside attorneys can bill for these legal expenses.

- Email and Telephone Communications: with the client may be properly billable where the parties discuss substantive issues relating to the case. If the communication involves a request for information in response to an inquiry or a strategy session to determine next steps in litigation or the resolution of a matter, it should constitute billable work. However, clients often do not expect to be billed for calls not related to the substance of their case, especially calls relating to the bills themselves. The billing guidelines should address what is a compensable attorney-client communication. Two clients should not be billed for the same hours.⁷
- Travel: The billing guidelines should address who pays for airfare, car rentals, gas mileage, hotel and meals when outside counsel travels out of town for a deposition, to interview witnesses, etc. The billing guidelines may also establish travel budgets and per diem rates, set price limits on travel time and mileage and procedures for reimbursement. The guidelines should specifically address how the attorney should bill for work performed during travel time when it is on the client's matter or when it is for another client.
- Other Expenses: Billing policies should address potential charges such as long distance calls, faxes, copying, online legal research, payment of experts and court reporters, etc.
- **Billing Format**: The presentation of the bill, including the content and format, should clearly communicate the services rendered in such a way that the client understands the value of the attorney's work. If the bill vaguely describes the work performed, contains block billing entries, or is otherwise hard to follow, the client is likely to make billing inquiries and even challenge certain entries. The following items are considerations when addressing the issue of billing format and client invoices.
 - No Charge Entries: The attorney should decide whether to include all activities related to the case file on the bill even **no charge entries**. No charge entries show the client work performed on the matter for which the attorney did not bill.
 - Block Billing Entries: combine multiple activities into one entry on the bill. When the services are provided for a flat fee or the entry is for a routine or repetitive task, block billing may be an efficient way of presenting the work. However, when the work is billed at an hourly rate, block billing may not be an appropriate way to record or present activities.

⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993).

- **Vague entries:** may unnecessarily raise red flags and trigger inquiries regarding the work performed and the fees demanded. When legal activities are included on the bill, they should be described with enough detail to warrant payment for the service rendered; the entry should explain the “what” and the “why” of the work.
- **Exceptions:** Exceptions to billing guidelines should be approved in writing in advance of the requested activities.

III. Billing Methods

While the billable hour may be the standard by which attorneys are usually compensated for their services, new ways of measuring the value of legal services have recently emerged. Attorneys should consider whether to utilize traditional or alternative billing methods, and whether incentives will be incorporated in determining compensation.

Origins of Billable Hour: It was in 1914 that legal aid attorney Reginald Heber Smith first desired to track hours worked to ensure that services were being provided efficiently.⁸ The billable hour method, however, was not embraced on a larger scale until years later. For many years, the methodology commonly used was the “eyeballing” of a file.⁹ Clients became dissatisfied with the eyeballing method and began demanding an hourly accounting.¹⁰

The billable hour method, also commonly referred to as the “lodestar” method, is rooted in accounting practices and was more widely practiced beginning in the 1940s.¹¹ The lodestar is the number of hours worked multiplied by the prevailing hourly rates.¹² By the late 1970s, hourly billing became the standard method of billing clients.¹³

The billable hour requires that an attorney keep track of his or her time and that a rate has been agreed upon as fair compensation for that time. The basic premise of the billable hour methodology is that the attorney’s time spent (so long as it is reasonable) should be billed at an established rate. Although imperfect, the billable hour method has several important virtues. This traditional method is readily administrable, objective, and produces reasonably predictable results.¹⁴ Nevertheless, common concerns include vague billing entries and excessive hours claimed.

⁸ Tim Batdorf, *The Billable Hour and Lawyer Wellness*, 90 MICH. B. J. 48, 48 (2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Gisbrecht v. Barnhart*, 535 U.S. 789, 800-801 (2002).

¹² See *Perdue v. Kenny A.*, 130 S.Ct. 1662, 1669 (2010).

¹³ See *Gisbrecht*, 535 U.S. at 801; see also Batdorf, 90 MICH. B. J at 48.

¹⁴ See *Perdue*, 130 S.Ct. at 1672.

Under a billable hour methodology, the client and counsel should come to an agreement as to compensable work and a fair hourly rate.

Alternative Billing Methods

Recently, several alternative billing methods have emerged as organizational clients are being impacted by the economic downturn. Alternative billing, also known as value-based billing, provides incentives for efficiency and successful results. Value-based billing requires either the product or result to somehow relate to the amount the client pays for the service. Alternative billing can also have other benefits, such as more predictability of legal fees for clients, more predictability for firm budgets, and increased freedom to train newer attorneys.¹⁵ Some of the more common alternative billing methods are explained below.

- **Flat Fee:** A flat fee denotes “a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation.”¹⁶ A flat fee is usually offered if a case is relatively simple or routine such as a will or an uncontested divorce.¹⁷ Often, immigration matters are also handled for a flat fee arrangement.
- **Contingency Fee:** In a contingency fee arrangement, the lawyer's fee is based on a percentage of the amount awarded in the case.¹⁸ The fee is only awarded if the lawyer wins the case. In the event that the lawyer loses the case, the fee is not awarded but the client typically remains responsible for expenses.¹⁹ Contingency fee percentages vary. In some instances, courts may set a limit on the amount of a contingency fee that a lawyer can receive. This type of fee arrangement is most typically charged in personal injury cases, property damage cases, or other cases where a large amount of money is involved.²⁰ In Virginia, contingency fee arrangements are not permitted in criminal and certain domestic relations matters.²¹
- **Blended Rate:** A blended rate results when the hourly rate is the combination of the partners’ time, associates’ time and paralegal’s time. This method has been used effectively when clients are intimidated by rates charged by a senior partner. In those instances, invoices showing blended rates are more palatable than assist clients in digesting the bill more easily than individual attorney rates.

¹⁵ Katherine L. Brown & Kristin A. Mendoza, *Ending the Tyranny of the Billable Hour: A Mandate for Change for the 21st Century Law Firm*, 51 N.H. B.J. 66, 68 (2010)

¹⁶ *Topics of Interest to Lawyers* WIS. CT. SYSTEM, (Jul. 25, 2007), <http://www.wicourts.gov/services/attorney/docs/trustlegalfees.pdf>.

¹⁷ THOMSON REUTERS, *Types of Legal Fees*, FINDLAW, <http://public.findlaw.com/library/hiring-lawyer/fee-types.html> (last visited Jan. 26, 2012).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Rules of Supreme Court of Virginia, Part Six, Rule 1.5(d).

- Results-Based Billing: is similar to the contingency fee method, except the attorney gets paid either way. With this method, the client also pays based on results. For example, if attorney wins the case the client may pay additional or if attorney loses the case then client may receive a discount based on actual work performed.
- Advanced Fees and Retainer Agreements: are often misconstrued. A true retainer fee is a fee paid to a lawyer solely for the purpose of ensuring the availability of the lawyer for the client's matter or for a specific period of time and is not tied to the performance of any specific legal service.²² The retainer is usually nonrefundable.²³ Advanced fees, on the other hand, can be thought of as a "down payment" against which future costs are billed. The unearned portion is usually refundable. The engagement letter should make clear whether the advance fees will be kept in a trust account and applied to the final invoice, drawn down to pay invoices as costs are incurred and replenished when the fees fall below a certain amount, or some combination thereof. Large, institutional clients may be unaccustomed to paying any such deposit because they typically have a group of stable, long-term outside firms.
- Barter Arrangements: Parties may agree to barter for services as payment of attorney's fees. This method typically occurs with solo practitioners. This method is also common in information technology or marketing/professional areas. For example, an attorney has his taxes computed by a CPA, in exchange the attorney drafts a will for the CPA. Attorneys should be mindful of ethical responsibilities when bartering for services because certain exchanges, such as testamentary gifts, literary rights, and proprietary interests in litigation for legal services may raise ethical issues.²⁴
- Hybrid Arrangement: Parties may also choose a hybrid between the traditional and alternative approach. Parties may choose to utilize the billable hour method but require a monthly maximum cap. This method encourages the attorney to be efficient. This method also compensates the attorney fairly while providing a cap on the bill to the satisfaction of the client.

²² David M.M. Bell, *Simplifying Legal Fees*, CAL. B.J. (Nov. 1999), <http://archive.calbar.ca.gov/calbar/2cbj/99nov/mclestdy.htm>.

²³ *Id.*

²⁴ Rules of Supreme Court of Virginia, Part Six, Rule 1.8.

IV. Evaluating and Ending the Engagement

While the initial engagement is arguably the most critical stage in the development of the attorney-client relationship, assessing the relationship throughout the representation can help prolong the life of the engagement. Formally bringing closure to the relationship can leave the door open for future engagements.

Audits, Adjustments and Assessments: The billing guidelines should discuss how clients and outside counsel will handle audits, assessments and adjustments. Audits and assessments concerning client billing are best utilized in a routine manner rather than sporadically. Some parties engage a third party to conduct the audit or assessment. Unexpectedly large bills could trigger an audit and should be preceded by a telephone communication with the client to explain the bill and any unusually high charges.

Disengagement Letter: When a case is concluded, the attorney should send correspondence to the client to bring closure to the representation. This can usually occur in the context of a final bill or a separate letter which states that this matter has concluded. The attorney should provide finality with regard to a specific matter or case. However, in the context of large clients who have numerous ongoing matters, disengagement letters may not be necessary.

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