



Billing Can Be So Much More Than a Necessary Evil

Alex Dimitrief

Billing Can Be So Much More Than a Necessary Evil



Alex Dimitrief*

Billing is the fulcrum of economic and business relationships between law firms and their clients. Yet few interactions about bills are positive, and disputes over fees have soured many relationships. Indeed, I once sued a client rather than accede to its demand to submit for a binding audit by a contingency fee specialist that was notorious for its bias against law firms. I learned hard but important lessons from that regrettable dispute. Having since seen things from the clients' viewpoint for over a decade, I'm convinced that it's way past time for law firms to play more offense and invest time and money in the billing process to improve relationships and distinguish themselves favorably.

It's also time for outside counsel to start playing more defense. For as long as I can remember, law firms have gladly paid for the latest technologies to track, bill, and be paid for their time. (In my mind's eye, I can still see the enormous computer that seemed to occupy most of the 54th floor of Kirkland & Ellis in the Amoco Building in Chicago in the late 1980s. It required its own dedicated cooling system!) What's changed is that law departments are countering with.

* Alex Dimitrief (dimitrief@consultzg.com) is a Partner at Zeughauser Group, where he advises legal departments and law firms on a broad variety of strategic issues. He was the President & CEO of General Electric's Global Growth Organization in 2018 and previously served as GE's General Counsel. Prior to joining GE in 2007, Dimitrief was a trial lawyer for 20 years at Kirkland & Ellis LLP. The views in this piece are strictly his own.

their own technologies to hold down legal expenses and evaluate the cost-effectiveness of outside counsel. Most companies have already been using various billing software types to identify duplicate time entries, exceptions to billing guidelines, and excessive time entries. Now more legal departments are beginning to invest in more sophisticated internal and external data analytics capabilities to optimize their outside legal spend.

As a result, law firms can no longer afford to view billing and budgeting as necessary evils or relegate them to backroom administrators. Outside counsel should seize upon the billing process as a vehicle for thoughtful discussions with clients about how assignments will be handled. Up-front exchanges about how much a matter will cost should facilitate dialogue on a client's objectives and how best to achieve them. Interim bills should serve as informative status reports and alert clients to potential issues. Final bills should stimulate candid discussions about how the law firm performed and whether the client's expectations were met. Sensitivity throughout an engagement to some of the more pronounced criticisms of hourly billing can take some of the sting out of always being "on the clock." Companies should stop settling for anything less.

Billing 101

A surprising number of lawyers routinely run afoul of basic billing principles. As a favor to managing partners who would prefer not to keep hectoring about such things, here are a few friendly reminders:



Record Time Personally at the End of Each Day. As much as outside counsel like to joke about engaging in creative writing exercises at the end of each month, clients are not amused when they read vague time entries that shed no meaningful light on the work that a lawyer did to generate fees on a particular day. Unfortunately, entries like "attention to matter" or "participate in strategy sessions" or "negotiate a deal" are as commonplace as they are uninformative. They stand out in ways that no lawyer should want.

Nor are clients who institute task-based billing pleased when the predominant category designated by a lawyer is good old L190 - "Other Case Assessment, Development, and Administration." Constant resorts to such catch-all categories are a telltale sign that a lawyer has likely delegated time entries to her assistant at the end of a billing period. Dishonoring a client's request for task-based time entries is disrespectful and defeats the client's data analytics.

Lawyers who catch up on time at the end of a billing period with vaguely-worded guesstimates are also not doing right by their colleagues. The belated recording of stock time entries often results in billing for less time than a lawyer actually worked and prevents the firm from gaining meaningful insights from its data. Vague time entries can also put an entire invoice at risk of being bounced for failing to comply with a client's billing requirements; when this happens, the vaguer the time entries, the more difficult they are for the lawyer and firm to remedy to avoid write-offs.

Many lawyers got religion about daily time recording during the pandemic's early days when anxieties were running high. Still, old habits die hard and many lawyers are already regressing to the mean. Crisis or not, it takes just a few minutes to write meaningful and properly classified time entries at the end of a day when memories of the day's work remain fresh. Exercising daily discipline reduces frustration on both sides of the attorney-client relationship.



Review Bills Before Submitting Them. Lawyers routinely delegate the preparation and submission of bills to administrators who, however talented they might be, cannot anticipate how clients will react to particular types of potential problematic bills, especially to large bills for mediocre results. I am always at a loss to understand why so many law firm partners fail to take the time necessary to review the bills for their team's work to make sure that the bills are accurate and copasetic. It's as if preparing and submitting bills to get paid for the team's work are somehow an afterthought.

Lawyers responsible for billing are also responsible for ensuring that all the lawyers working on the matter enter their time on time, accurately, and in sufficient detail. Variations in the level of detail among billers reflect poorly on lawyers who submit vague time entries and, in the end, on the firm.



Submit Bills on Time. Companies operate on strict budget cycles. It's inconvenient to receive bills weeks after they're due. It's

annoying for bills to reflect tardy entries of time by lawyers for work performed during earlier periods that a client thought had been fully paid for and closed out. Chronic tardiness is rude.

I frequently tell the story about a leading law firm that did a superb job for GE on a significant enforcement proceeding and earned over \$5 million. We paid this bill gladly. Months later, I received an invoice out of the blue for \$170.50 for a senior partner's side of six-minute internal consultation with an associate that had taken place nearly nine months earlier. Talk about needlessly tarnishing a victory! I never say the name of the firm, but no partner ever wants to occasion this type of horror story about thoughtless billing practices. It's also revealing that, when they hear this story, many lawyers suspect that I was talking about their firms.



Comply with Outside Counsel Guidelines. Companies draft their guidelines to serve as a master contract with their law firms. These "rules of the road" should be required reading for every lawyer who works on a matter for the client (and most definitely not left to a law firm's administrators to figure out). Law firms should self-execute these guidelines in their billing software because violators stick out like sore thumbs. Never assume that a particular guideline does not apply. If a law firm objects to a provision in the guidelines (and, to be sure, there are often good reasons for doing so), that objection should be raised at the outset of the representation and resolved before the first bill is submitted.



Do Not Unilaterally Increase Hourly Rates. Law firms should not presume to be able to increase hourly rates for existing matters without a client’s agreement beforehand. Many firms assume that a company will always pay a higher hourly rate for a lawyer throughout an extended matter as she advances on a law firm’s seniority scale. Some firms similarly believe that year-end pronouncements suffice for rate increases to take effect when calendars turn to January. Periodic rate increases may be justified through negotiations, but unilateral rate increases are tough to swallow from even the very best lawyers at the best law firms.



Disbursements. “Disbursements” (e.g., expert witness fees) and “expenses” (e.g., travel costs) for which reimbursements are sought should never exceed the amounts that a law firm pays out. When traveling on a client’s dime, outside counsel should adhere to a company’s travel policies and remain sensitive to appearances of presumptuousness. Spend a client’s money as if you were personally footing the bill. Few things draw more negative attention than receipts for extravagant hotels, restaurants, or bottles of wine.



Apply Common Sense. With apologies to Justice Potter Stewart, we all know problematic invoices when we see them. If a lawyer has taken too much time to complete a task, write off some of that time. When a long list of lawyers and legal/project assistants have recorded time on a large matter, shorten the list by writing off the time of those who generated less than \$1,000 in fees that month. If your

firm has botched something, ease the pain by making a significant accommodation to your client without being asked for one. These types of modest investments in client relationships quickly pay for themselves and then some. Bills that don’t pass the smell test are especially counterproductive during challenging times (like the coronavirus pandemic) when law departments are asked to deliver their fair share of cost savings.

I wish that I could say that I’d always adhered to these principles when I was in private practice, but I did not. As the old adages go, hindsight is always 20/20, and lessons learned (often the hard way) are a terrible thing to waste.

Detailed Budgets Are a Wise Investment

Detailed budgets facilitate amicable billing processes and empower both law firms and legal departments to manage matters more effectively. Yet most law firms still loathe budgets as an administrative nuisance to be dispensed with as quickly, effortlessly and uninformatively as possible. Many lawyers try to skirt budget requirements by projecting an “average run rate” over the life of a matter without any supporting detail. These lawyers are missing out on an opportunity to make sure that everyone agrees on the amount of time that should be devoted to the matter and by whom. Robust budgets also help prevent relationship-altering misunderstandings when matters end up costing significantly more than initially projected.

Budgets are most informative when they are approached as a strategic plan and propose that certain lawyers will be responsible for

performing specified tasks in a projected number of hours, as in the following example:

L320. Document Production.

ANTICIPATED WORK	BILLER	HOURS	RATE	TOTAL
<p>Search for e-mails and chat messages about plaintiff's engine design, related safety issues and communications to customers; meetings with custodians to ensure compliance with retention notice; witness interviews re documents and confidentiality issues; process production; prepare privilege log.</p> <p>Based on a preliminary review of e-mails to/from key engineers, we propose to limit privilege reviews to e-mails to/from in-house lawyers, subject to safe harbors.</p> <p>Draft/submit document requests; conferences with IT consultants re potential weaknesses in plaintiff's document retention protocols.</p>	AD	5	1350	6,750
	KH	110	1050	115,500
	TJ	130	590	76,700
	DW	125	315	39,375
	Legal Ass't	240	170	40,800

L330. Depositions of Non-Expert Witnesses.

ANTICIPATED WORK	BILLER	HOURS	RATE	TOTAL
<p>Deposition of plaintiff's CEO (AD); defend depositions of Johnson (AD), Smith (KH) and Henderson (TJ); take depositions of plaintiff's CEO (AD), CFO (KH), and CTO (DW); assume three additional depositions on both sides (KH + TJ), with preparation assistance by DW for all depositions.</p> <p>Assume 20 hours per deposition for preparation plus testimony except for Johnson, who will require an additional day of preparation because of the large number of heated e-mails he exchanged with the plaintiff's CEO.</p>	AD	90	1350	121,500
	KH	90	1050	94,500
	TJ	110	590	64,900
	DW	90	315	28,350

Providing this level of detail takes some time, effort, and thought. But the benefits are immediate:

- ❑ The client has agreed to how many lawyers will be doing how much and what type of work.
- ❑ The parameters for future bills are established (here, the number of depositions and the amount of time required to take/defend them properly) and the firm secures leeway for higher bills if additional deponents or documents surface or more time proves necessary (ideally with the client’s concurrence). Adjustments can be made if/as necessary without calling into question the legitimacy of the firm’s original projections.
- ❑ The client is afforded the (dis)comfort of a realistic projection of what a matter will cost.

Preparing a budget also substantively benefits law firms by forcing them to organize their thinking on critical legal, factual, and organizational issues at the outset of an engagement. In my experience, both as an outside lawyer and as a purchaser of outside legal services, there is considerable value in mapping out how a new matter could and should go. Even when things do not subsequently go according to budget, the exercise forces outside counsel to come to grips sooner rather than later with the potential challenges of a new engagement.

Budget worksheets (like the examples above) painlessly add up to a substantiated roadmap of what a matter can be expected to cost

and why. Here’s an example of a summary worksheet for a corporate acquisition (with each row backed up by reasonably detailed budget worksheets):

TASK	BUDGET
Transaction Administration	175,000
Due Diligence	
Corporate Review	33,350
Tax	98,000
Environmental	95,650
Property	43,050
Labor / Personnel / HR	26,800
Intellectual Property	55,500
Regulatory	125,000
Structure/Strategy/Analysis	328,000
Initial Document Preparation/Filing	221,200
Negotiations/Revision/Responses	346,550
Completion/Closing	145,600
Post-Closing Execution	265,000
Maintenance/Renewals	94,300
Disbursements	
Travel & Related Charges	185,000
Consultant/Expert Fees	175,000
Database Management	130,000
Total	2,543,000

It goes without saying that the process works only when a firm's projections are realistic (yes, Toto, there are consequences to lowballing budgets to win business) and partners promptly raise new circumstances that require changes to the predicates for a budget. A law firm's ability to formulate and then deliver on budgets has become an important criterion for many companies in selecting outside counsel. By the same token, a client's reasonableness in adapting to changed circumstances (and, in particular, to dictates from the client that more work should be done on, say, a particular witness or aspect of due diligence) should be an increasingly important criterion for law firms in deciding which clients to represent. The detail ultimately benefits both sides of the attorney-client relationship.

Budgets are most pertinent to hourly fee engagements, but law firms should not be surprised if clients also request detailed budgets to substantiate fixed fee and other alternative fee engagements. In such circumstances, budgets provide companies with comfort that the law firm will staff the case appropriately, do an appropriate amount of work, and make money without cutting corners at the expense of the matter (or the client).

The (Lost) Art of Presenting Invoices

At this juncture of the information management revolution, there is no excuse for invoices that fail to impart helpful information about the status of the matter in a way that is simple for a client to absorb

and, when necessary, to act upon. Even more to the point, bills are the most anticipated and closely read communications that clients receive from their outside counsel. So, it's a shame that so many firms whiff on a tailor-made opportunity to market their value and build their credibility with important clients.

In preparing invoices, law firms should bear in mind that their in-house counterparts view the payment process as an opportunity to review the status of a matter and determine whether outside counsel is on target to meet the company's objectives (both substantive and financial). Billing partners should submit bills in a way that makes it easy for clients to accomplish these objectives and anticipates concerns that are likely to arise as clients review their invoices. This can usually be accomplished by providing a simple overview of tasks performed and time charged and a brief cover note that flags any potential issues and outlines the steps the law firm proposes to address them.

After my unhappy experience in suing a client over a fee dispute, I began to preface my monthly billing statements with a table that specified where a matter stood vis-à-vis the overall budget and expressly addressed any potential issues that posed risks of busting our budget. Here is an excerpt illustrating how firms can anticipate and resolve concerns that might otherwise arise as an invoice is reviewed:

PRE-TRIAL PLEADINGS & MOTIONS				
Task	This Month	Case Budget	Remaining	Issues
Pleadings	0	84,500	3,000	
Court-Mandated Conferences	28,300	135,000	56,600	At this month's status conference, Judge Seeger expressed displeasure at the amount of "noise" in the discovery process and ordered bi-weekly status sessions before his Magistrate Judge. If the other side does not get religion quickly, this will require doubling our estimate for court-mandated conferences.
Dispositive Motions	0	0	0	Although we were skeptical about the value of dispositive motions, we secured admissions during depositions of plaintiff's c-suite leaders that might warrant a motion for summary judgment based on the inability to establish causation. We project that such a motion would cost approximately \$275,000 (versus \$2.25 million for a trial).
Other Motions/ Submissions	28,500	46,100	17,600	

DISCOVERY				
Task	This Month	Case Budget	Remaining	Potential Issues
Written Discovery	18,200	48,750	30,550	
Document Production	95,000	167,600	72,600	Several witnesses located additional documents after we certified that our production was complete; this required additional time to defuse the situation, but we remain on track to complete our production within the original budget.
Depositions of Non-Expert Witnesses	32,000	124,300	92,300	Our depositions of plaintiff's CIO revealed that at least 8 previously undisclosed employees possessed key documents before the lawsuit was filed. We deposed four of these employees this month and anticipate that 8 - 10 more depositions will be warranted. We propose increasing the budget by \$65,000.
Expert Depositions & Discovery	18,500	76,100	57,600	
Discovery Motions & Conferences	7,250	31,900	24,6500	Our production has withstood plaintiff's scrutiny. Thus, we are removing all but \$3,000 from the amount originally budgeted.

Investing the modest amount of time and effort to generate such client-friendly cover communications pays for itself in several important ways, including the benefit of the doubt when budgets must be increased, the ability to agree on adjustments before “excess work” is put on the books and, in the end, repeat business.

After I transitioned from private practice to GE, I circulated exemplars and instituted a requirement that our law firms provide detailed budgets and preface their monthly statements with status reports. Several firms embraced these processes without complaint and used them to their advantage. Several firms proved so adept at conveying the value they had delivered that I paid their large (and, in some cases, huge) bills happily and put them at the top of our list for future engagements. Other firms dragged their feet and delegated these tasks to administrative personnel who were unable to provide substantive insights into the type we were seeking. Believe me, we noticed the differences.

To my unpleasant surprise, GE’s subsequent transition to a new e-billing system made the billing process more impersonal and less informative. Good e-billing systems should facilitate meaningful and easy-to-follow exchanges of information (i.e., like those above) about how much a law firm is charging and why. Fortunately, the savvier firms overcame our clunky e-billing platform through e-mails and other more traditional means of direct communication.

Extra Credit

Despite having precious few fans, the hourly rate has persevered because lawyers sell human capital. Therefore, it continues to make sense for law firms to charge based principally on the amount of time required to achieve a client’s objectives. But time-based fees often give rise to doubts that cannot be fully allayed by perspicacious budgets and informative invoices alone. So it behooves even the most principled timekeepers to consider taking simple but concrete steps to address some of the perceived shortcomings of hourly billing:

- **Reduce hourly rates for new associates.** It’s not that clients dislike junior associates. On the contrary, the best ones throw themselves into their matters and are eager to impress by doing excellent work. It’s that clients dislike paying high rates for inexperienced lawyers. More law firms should start charging significantly less for first- and second-year associates to do things for the first time and be quicker to write off time devoted to tasks that more experienced lawyers could have done more quickly. I also applaud law firms that offer steep discounts (i.e., 50 percent or more) in return for allowing junior associates to take their first depositions, put on their first witnesses or negotiate their first transactions.
- **Decompress billing scales.** Clients are onto the once-secret weapon of highly profitable law firms: the “non-equity” or “junior

partner.” At most big law firms, the hourly rates for lawyers increase disproportionately beginning four to five years out of law school and continue to rise steeply until cresting at about 10 percent below the hourly rates charged for the firm’s senior partners, whose rates grow more slowly out of concern for appearances. (Most general counsel long for the days when law firms were hesitant to break the \$1,000 per hour barrier.) The resulting compression of rates for lawyers whose experience ranges from ten to forty years makes little economic or business sense.

Clients would prefer to see more gradualism at all experience levels, even if that means relinquishing artificial ceilings on the rates for attorneys with the most experience. Most companies would gladly pay more for great lawyers whose support teams are priced at smaller fractions of the experienced lawyers’ hourly rates (i.e., they would rather pay \$1,400 and \$800 per hour than \$1175 and \$1025 per hour).

- **Take some calculated risks.** Detailed budgets are a perfect vehicle by which lawyers can offer their clients choices about how much risk to take on a matter – by, say, not deposing tangential witnesses, skipping unimportant aspects of due diligence, forgoing obligatory dispositive motions with little chance of success or capitalizing on the safe harbors available for productions of large volumes of electronically- stored information. (And by the way,

shame on any in-house lawyers who second-guess outside counsel for forgoing certain tasks after agreeing to embrace the attendant risks as cost-saving opportunities.)

Lawyers with a more entrepreneurial bent should also be more aggressive about pursuing alternative fee arrangements that align their economic interests with those of their clients. Business leaders react positively when a law firm proposes to risk a portion of the fees for work that a law firm recommends in return for a premium upon securing a favorable outcome. Talk need not always be cheap.

Don’t Always Make It All About the Numbers

To this day, I remain surprised at how few law firms reached out during my 13 years at GE to ask whether we were satisfied with how the firm was performing. (Just two. I’m not exaggerating.) Firms should assign senior partners who were not involved in a matter (or hire professional intermediaries) to meet with in-house counsel during protracted matters and after the completion of major engagements to solicit client feedback, including honest evaluations of the performances of a firm’s lawyers and frank discussions about whether the client believes a firm’s bills comport with the value that its lawyers are delivering.

Modest efforts such as these will go a long way toward reassuring clients that they’ve chosen the right law firm.