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Legal Bill Review In An Era Of Subtle Overbilling

By Daniel L. Abrams

In a 1999 survey by Texas Tech law professor Susan Saab Fortney, associates of large and medium-sized Texas law firms were asked if they agree with the statement: "My income and advancement within the firm are principally based on the number of hours I bill and collect." The results were striking – over three quarters of the associates indicated some level of agreement, with 32 percent agreeing strongly. Not coincidentally, Professor Fortney also found that 52 percent of surveyed attorneys had "concerns about the billing practices of other attorneys."¹

Professor Fortney's survey confirms what many corporate counsel already know: the pressure to bill has become so intense that many lawyers put billing ahead of their clients' interests. Some lawyers purposely inflate their time, having both the motive and opportunity to do so. Other causes of overbilling include unnecessary overlawyering and pervasive inefficiency. Unfortunately, most of this overbilling is subtle and therefore difficult to detect. The net result is that many companies are spending far more on legal services than necessary.

In response to this problem, many corporate counsel are using outside consultants to assist in legal bill review. This has led to the emergence of self-proclaimed "legal auditors." Unfortunately, there are no generally

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accepted methods for conducting a legal bill review, a problem that is compounded by the fact that most of these "legal auditors" have never practiced law. While all professionals tend to resent being audited by third parties, this is particularly so when the third party has no relevant background, and no authoritative basis for making subjective judgments. The conclusions of such "audits" are suspect – sometimes an efficient law firm will be undermined by arbitrary rules, thereby souring a valued attorney-client relationship, while at other times attorney waste will go undetected.

Another recent trend is to apply technology to the problem. There are commercial software packages tailored specifically for legal bill review. Such software is helpful for detecting clear-cut violations of corporate billing guidelines, but is unable to identify

subtle overbilling. For example, even the most elaborate software cannot determine whether (1) the time billed to preparing a motion corresponded to the length and complexity of the motion, (2) preparation of a six-hundred page privilege log was justified under the circumstances of the case, or (3) research was reasonably related to the objectives of the representation. There is no magic software – legal analysis is a critical element of any bill review.

Conducting An Effective Review

The goal of every bill review is to ensure that the company is receiving appropriate value for its expenditures on outside legal counsel.

Bill reviewers should apply a standard of "reasonableness" to the bill as a whole as well as its various components. Admittedly, "reasonableness" is a somewhat subjective concept. There are no hard and fast rules restricting the number of lawyers on a case, or the number of hours a lawyer can bill researching a particular issue. Even the best lawyers will differ on appropriate strategy for cases and transactions of any complexity, and second-guessing legal strategy is not the purpose of a bill review.

On the other hand, there are objective metrics. A legion of cases, ethical rules, and other authorities delineate the scope of reasonable attorneys' fees under varying circumstances. This body of authority enables a bill reviewer to provide his or her client with an objective report. A well-documented bill review will necessarily include many citations to relevant legal and ethical authorities. Such citations differentiate an authoritative review from a hindsight-laden critique of outside counsel's bills.

In order to conduct a comprehensive bill review, the reviewer must digest far more

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information than is contained in the bill itself. The reviewer should interview the client and examine all available work product, all agreements and correspondence between the client and counsel, and any other documents which may provide relevant context.² As a result, the reviewer should acquire a basic understanding of the various facts, circumstances and issues faced by outside counsel.³ As the reviewer examines the bill, he or she should refer back to the case file as necessary to consider the reasonableness of individual entries and/or discrete portions of the bill.

The following is a list of some relatively common problems that may be uncovered during a bill review.

A. Unreasonable Fees Reflected In Individual Time Entries

- Vague billing entries (e.g., “memo to file,” “review letter,” “legal research re: case,” “phone call with VB”);
- Unauthorized lumped billing (i.e., more than one task included in a single billing entry, making it difficult to judge the reasonableness of the time spent on any one task);
- Inconsistent records (e.g., one timekeeper bills for “meeting with Lawyer X,” but the meeting is not reflected in Lawyer X’s time sheet; a phone call shows up on an attorney bill but is absent from the corresponding telephone log); and
- Unannounced hourly rate increases.

B. Unreasonable Fees Related To Inefficient Staffing

- Excessive staffing of a case or transaction. How many lawyers are too many? The answer is not always clear, but bill reviewers should flag instances where a battalion of attorneys descend upon a routine legal problem;
- “Musical lawyers,” or the practice of continually rotating lawyers on and off matters, leading to increased billable hours as the new lawyers bill time learning about the matter;
- Not enough delegation. Partners or other senior lawyers should not be paid their normal hourly rates for doing junior associate work. Associates should not bill at normal rates for paralegal work, and nobody should be billing for secretarial work;
- Time spent on training new lawyers, or lawyers unfamiliar with a certain field of law; and
- “Cameo” appearances on the bill by lawyers who have no defined role in the case.

C. Unreasonable Fees Related To Unnecessary Work

- Excessive time to complete a task (e.g., one hundred hours to brief a single-issue motion; thirty minutes to read a half-page

deposition notice);

- Performance of work that was not reasonably related to the goals of the representation (e.g., an attorney prepares a motion to compel discovery of documents already in the client’s possession);
- Unnecessary legal research, or research that is so basic that the law firm should have had pre-existing research on point (e.g., a law firm markets itself as the “most experienced patent firm in town,” then bills one hundred hours to researching the elements of a basic defense to a claim of patent infringement); and
- Duplication of work and/or excessive “drafting” of the same document, especially when there is reason to suspect that a form of the document was already on the firm’s computer system.

D. Fees Deemed Unreasonable Based Upon The Parties’ Contractual Relationship

- Violation of the retainer agreement;
- Failure to comply with billing guidelines;
- Exceeding budget;
- Undisclosed mark-ups on “contract” or “temp” lawyers hired by the law firm; and
- Unauthorized billing for overhead, administrative charges, and clerical services.

E. Questionable Billing Practices Warranting Closer Scrutiny

- A timekeeper who adds little apparent value but bills a lot of time to intellectual exercises (e.g., most entries start with “review,” “analyze,” “consider,” “evaluate,” or, my favorite, “attention to”);
- Excessive internal conferencing (e.g., an all-day meeting with five lawyers, two paralegals, and a computer specialist discussing a moderately active case);
- Large bills that are sent to the client without any evidence that the billing partner reviewed the bill and wrote off time that was spent on inefficient projects; and
- Continuous long days. Granted, lawyers work very hard. There are some supermen/superwomen out there, but not nearly as many as law firm bills would have you believe. Even when time is recorded properly, clients may wonder whether they are getting \$400 an hour value from sleep-deprived counsel.

The Final Report And The Reviewer’s Post-Report Responsibilities

At the conclusion of the engagement, the bill reviewer should send a detailed final report to his or her client. The final report should contain (1) a concise summary of conclusions, (2) recommended fee reductions with appropriate citations, and (3) a list

of billing entries in which the reviewer does not have sufficient facts to make an informed recommendation. The more detail and citation to applicable authority in the final report, the more leverage the client will have in seeking legitimate reductions from their counsel.

A reviewer’s responsibilities will often end upon production of the final report. However, the client may ask the reviewer to speak directly with outside counsel in order to obtain additional information and/or negotiate reductions.

The Results Of A Diligent Bill Review

Companies benefit from periodic reviews of their outside legal bills. The most immediate benefit is correcting the overcharges in past bills. This benefit alone usually justifies the review, as the cost (approximately 3-5 percent of the face value of the underlying bill) often produces significant savings (which ordinarily range from 20-40 percent). An informative bill review should also have more lasting benefits. Bill reviews increase the performance and cost-effectiveness of outside counsel going forward by (1) enabling the client to make informed judgments about their current representation, and (2) highlighting problems which can be fixed through creation of appropriate billing guidelines (e.g., if the review reveals unnecessary overstaffing, the company may instruct all outside counsel to seek written permission before adding new staff to a case or transaction).

Of course, these benefits will only accrue if the bill review is based on rigorous analysis of facts and relevant authority. Let the buyer beware – the bill review industry is unregulated and there is a wide variation in both the qualifications of the reviewers and the quality of the reviews.

¹ Soul for Sale: An Empirical Study on Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements, 69 *UMKC L. Rev.* 239 (2000). The survey is based on an empirical study of 487 associates at Texas law firms with 11 or more attorneys.

² The amount of work product and other documentation reviewed will vary depending on, inter alia, the goals of the review, the contents of the client’s case file, and whether or not the outside counsel is aware of the review.

³ On rare occasions, the reviewer’s examination of the case file will uncover a serious breach of professional responsibility (e.g., a breach of fiduciary duty, conflict of interest, lack of professional competence, failure to follow lawful client instructions). The final report should reflect this finding and opine as to whether or not the breach is substantial enough to warrant a total or partial forfeiture of fees.