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In This Brave New World of Alternative Fee Arrangements, What Role Does Hourly Timekeeping Play?

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*A Lawyer's **time** and advice are his stock in trade*
Abraham Lincoln

In the revolutionary world of AFA's is there a role and reason for recording time devoted to a matter?

I've received a surprising number of inquiries from law firm clients who are now working on Alternative Fee Arrangements whether they should continue to require lawyers in the firm to record time. The short answer is a resounding "absolutely." Some clients have put it to me rather simply: What's the point, [after all hourly billing is virtually dead](#)? Others postulated that eliminating time keeping would result in the elimination of some costs.

Tracking lawyers' times in AFA engagements is absolutely essential. It provides a number of vital tools. I assume that you have by now obtained some greater familiarity with the essence of AFA's from some of [our literature](#), the growing body of literature generally available, and from clients and professional peers.

But, too often, when speaking of Alternative Fee Arrangements, law firms simply erroneously equate the arrangement as simply doing work on a fixed fee basis or, simply a flat percentage discount. Wrong. Most AFA's do take in to

account and utilize for billing purposes, a component of time actually and accurately recorded. Thus, actual time expended and such time is an essential ingredient in calculating the ultimate fee. But it is only one of the ingredients.

First, accurate time keeping and analysis of the time records provides legal [project managers](#) with a tool to measure timeliness and compliance with the project's timeline. Second, it provides law firm management with a means by which to measure productivity, in connection with (a) any particular matter, (b) identifying individual lawyer's demonstrated efficiency when assembling a team for a subsequent matter and (c) annual associate and partner reviews. Third, astute and well informed clients are more frequently requiring their outside counsel to provide real time access to the firm's time accounting system and monitoring since it provides clients with a method to timely monitor and check on both efficiency and timely compliance with the timeline presumably incorporated within the terms of the scope of the engagement agreement. Clients of some degree of sophistication, advised by their own inside corporate counsel, project managers and contract compliance officers are more routinely including this provision in their retainer agreements.

The well managed AFA engagement also requires regular discussions between client and the firm's client relations manager regarding the progress of the matter. Maintenance of accurately reported timekeeping provides client and law firm to have well informed discussions on the progress of the matter. Recall, if you will, that the [ACC value index](#) reports on the fact that the area in which law firms uniformly score poorly is in connection with budgeting, not merely with respect to matters billed on an hourly basis but also in a firm's projections regarding the duration of a matter. These, incidentally are among the matters I cover in my book, ["Navigating the Perfect Storm: Recruiting, Training and Retaining Lawyers in the Coming Decade"](#) (Ark Press, 2010) and in my [blog](#) Surprisingly (at least to me), I have not received many invitations from late night talk shows, Oprah and the like to plug the book -- which is selling nicely, thank you, thus, I am relegated to using this medium to add a plug.

It certainly hasn't escaped me that the irony is that in the former model of hourly billing, lawyers were incentivized to keep their pedals to the metal and bill large amounts of time. In the new AFA paradigm, lawyers will be incentivized to go light on the pedal to demonstrate efficiency. The issue of accuracy in reported time exists in large measure because the overwhelming number of lawyers reconstruct time at the end of a day, week, month, or whenever a supervising

lawyer demands submission of time records or when a payroll department tells a lawyer that it has been instructed not to issue the next paycheck or partner draw until the time is put in to the system. The use of the equivalent of an abacus in time recording when a variety of computer based real time and accurate programs (even an I-Phone App) are available is just one of those enigmas of the profession. Using the reconstruction method (the abacus), has created much well recognized diverted time n analyzing time when billing and inevitably creating write downs, affecting the former metric of “realization.”

Tracking of time in AFA’s should also require some radical re-thinking by law firms of the metrics used for measurements of profitability. In the hourly billing model, profitability was measured by an equation under which time recorded was multiplied by a firm’s standard hourly rates, less write downs and write offs (or in some instances, plus a premium added to a bill) yielding a realization rate. The fact is that under generally accepted accounting principles as well as under well established, long standing principle used by service providers in other industries, this metric does not provide an accurate measurement of profitability. AFA’s permit law firms to measure profitability of an engagement using more conventional metrics: That is, the calculation of the actual cost of labor, namely the compensation of the time keeper, together with an allocated portion of G&A, measured against the fee received. Nonetheless, recording of time is still of the essence of both an AFA and a conventional hourly billing model.

A separate question has also recently arisen: Whether a client not contractually requiring real time or other access to time records in connection with an AFA engagement should be entitled to review time records is simply not susceptible to an easy answer. Certainly, the law firm might take the view that time actually expended in the engagement should be a matter of indifference to the client. After all, why would you need to know how long your home building contractor spent on working on your house, provided it was completed on time and the price paid was in accordance with your initial flat price arrangement? However, a client may make the request, or perhaps should even require, disclosure of these records so that it is afforded the opportunity to have some measure of the firm’s actual costs and profits (realizing that the client would be unaware of the actual cost of labor and G&A) in order to negotiate the next AFA on a more informed basis, compare efficiency with other providers of legal services and provide its input in to the selection of professional personnel in subsequent AFA engagements based on a particular lawyer’s proven efficiency. Law firms’ responses to such requests, in the absence of a prior agreement on the subject, will be driven by issues of maintenance of quality client relationships and of course the knowledge

that such disclosure, may provide the client with an advantage in negotiating your next AFA, assuming, of course, the AFA was well managed and thus handsomely profitable.

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