

BILLABLE AND NON-BILLABLE WORK



THE LONG VIEW OF PRICING, PAYMENTS AND PROFIT

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Wouldn't it be great if every single hour a lawyer spent in the office or by remote work was a billable hour? Not only do lawyers, on average, work more than 40 hours per week, but at Big Law firms, the work week can even stretch up to 80 hours a week. But alas, not all of that time is billable, and rules apply as to how many of those hours can be properly—and ethically—billed to the client. We will examine what type of activity can be legitimately billed to the client versus what tasks must be chalked up to the lawyer's or firm's own time.

Which is Which?

Simply put, billable hours are the hours actually spent working on your client's projects. This includes such items as all activity related to the client after signing the contract, translation services, and communications with the client—both telephone calls and emails—directly connected to the client's case.

Non-billable hours are those spent on just about all other matters, including administrative tasks, pre-retainer meeting preparation, drafting the retainer letter, invoicing, continuing legal education (even if it assists you in representing the client's particular legal issue), time spent on compliance issues, and similar expenditures of time not directly related to legal services provided to your client. While it may be tempting to add on some amount of lunchtime or coffee break time when you were thinking about your client's case or perhaps even jotting down a note or two, such billing would be inappropriate. However, if you arrange a business lunch with your client and the client knows upfront that it is to discuss matters pertaining to the case, then that time may be billed accordingly.

Tracking Both

The above description may lead the practitioner to believe that, therefore, only billable hours need to be accounted for (tracked) and that non-billable hours are irrelevant in terms of your hours tracking system. However, that presumption would be incorrect. While the need to accurately track billable hours for revenue purposes is obvious, your firm will also want you to track your hours worked versus hours billed in order to evaluate your productivity and billable hours ratio. Also, should a question arise in the future regarding your attention to firm matters—be they client-billable, administrative, or otherwise—your tracking of all hours worked will be of immense value to you.

Interestingly, experts caution that non-billable time should not be viewed as wasted, unproductive time to be eliminated as much as possible but rather as productive time that is valuable in terms of the growth of your practice, planning essential marketing, updating a website, and time expended to seize unexpected opportunities.

“WE ARE THE ONLY BRANCH OF THE REGULATED LEGAL PROFESSIONS THAT HAVE A DETAILED KNOWLEDGE OF AND EXPERTISE IN THE FIELD OF LEGAL COSTS. WHILST OUR SERVICES ARE PREDOMINANTLY SOUGHT BY FIRMS OF SOLICITORS, WE ARE ALSO REGULARLY INSTRUCTED BY MEMBERS OF THE PUBLIC INCLUDING BUSINESSES.”

— Association of Costs Lawyers, UK



Time Analytics

Most firms have in place systems to gauge how much time is spent on a case regardless of how much of that time can actually be billed to the client. Internal time analytics need to be accounted for in order to determine the total cost of a case, as well as for reimbursement for such things as commute time (where that is a perk with the firm) and for calculating time-based bonuses. Another consideration in recording all time worked is in order to utilize that data as a factor in promoting yourself from associate to partner when partnership evaluation season begins.

Some Red Flags for Non-billables

Certain billing items can raise red flags either in your accounting department, from your partner-mentor, or in the worst-case scenario, from your client. Here are some billing practices to watch out for:

- ▶ **Research:** Research that is conducted solely in pursuit of benefitting the client, and is case-focused, should be well documented with supporting information and materials.

Documentation will distinguish client research from routine research work that does not specifically contribute to the development of a case. No one wants the billing department to come knocking on your office door asking you to justify an excessive amount of time spent on research for a case, and neither do you want the client to object over sticker shock with allegations of time padding. Today, most office time tracking systems can be integrated with research tools to establish the nexus between the research and the client.

- ▶ **How many attorneys:** If an attorney appearance, such as at a court hearing, witness deposition, real estate closing, etcetera, customarily requires the presence of one attorney, yet two or more appear and subsequently bill for the time of multiple attorneys, unless the firm can prove the necessity of more than one attorney appearing, the non-validated time will be non-billable, or, at the very least, reduced.
- ▶ **Travel time:** Short, local travel distances may very well be considered an office expense rather than a time expenditure that can be billed to the client, but

if the client agrees to local travel expenses, the same should be billed at a rate significantly below the attorney's hourly rate. However, in all cases, travel time that will be charged to the client should be set out upfront in the client retainer letter. In particular, extraordinary expenses such as airfare and hotel stays should be approved in advance by the client.

- ▶ **Intra-firm communications:** Communication conducted within the firm should not be charged to the client unless consultation with a colleague is essential to the case and the communications of this type have been cleared with the client. Many times, clients agree to intra-office communication time as conducted by senior partners.



Excessive Costs Experts

In the U.K., there exists a specialty law practice known as Costs Lawyers, whose job it is to draft schedules of legal costs, identify points of dispute and draft replies to claims for costs, assist in the preparation of costs budgets and advise on costs budgets presented by an opposing party, and to advise on retainers and fee arrangements between clients and their legal advisors. While no such specialty exists before the U.S. bar, legal fee disputes obviously arise and are most often brought before the court in the settlement of major cases, while smaller private client complaints are typically arbitrated by the state bar.

One such case involving a legal fee dispute arose in the course of settling the largest consumer case in Michigan history. A group of objectors to a \$626 million fee awarded in partial settlement of lawsuits over the contamination of drinking water in Flint, Michigan, lost in their attempt to reopen discovery on billing and costs related to the litigation. The U.S. Court of Appeals for the Sixth Circuit ruled that objectors to the billing were not entitled to detailed discovery of billing and cost records and assertions that those records would have shown excessive billing or revealed the inclusion of time not performed for the common benefit were entirely speculative.

In sum, both billable and non-billable hours are both investments for the lawyer, the former realizing immediate financial gain, and the latter—when properly utilized—an investment in the future of the firm and the practice.

Executive Summary

1. The Issue

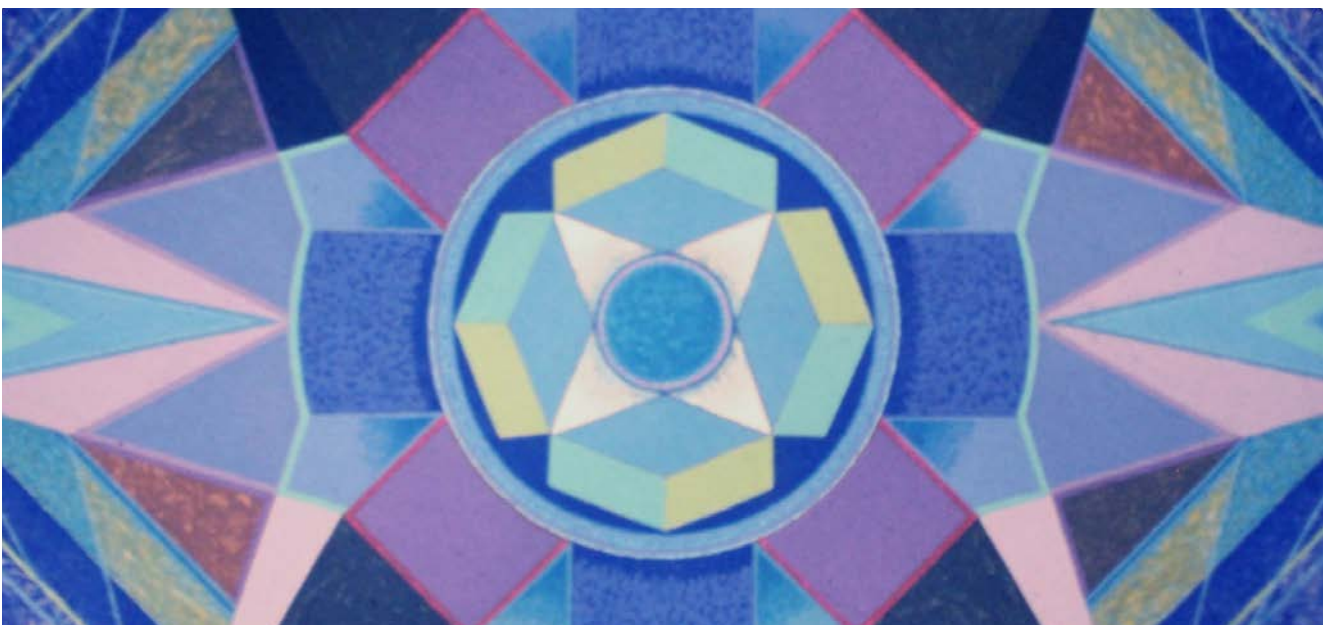
Distinguishing between billable versus non-billable time.

2. The Gravamen

Non-billable time should also be viewed as productive time due to its importance to firm administration, marketing, and overall growth.

3. The Path Forward

Proper billable hours invoicing to the client in accordance with pre-agreed terms will save unpleasantness down the road.



Action Items:

1 Retainer Agreement:

Your retainer (or engagement) letter to your client should spell out clearly not only what your hourly rate will be but also what activities will be considered as billable time.

2 Travel and Expenses:

If the client's case is expected to require travel, then such time should be identified as billable along with associated travel expenses.

3 Tracking Non-billable Time:

Regard even non-billable time as productive time and use it productively while tracking it for both case-cost analysis as well as for lawyer development and advancement purposes.

4 Bring On Technology:

There is no getting around the fact that lawyers are hostages to timesheets, but by employing the proper technology, that unpleasant task of time tracking—both billable and non-billable—can be made much easier and more profitable.

Further Readings

1. <https://www.altfeeco.com/resources/billable-hours-law-firm>
2. <https://timeanalyticssoftware.com/billable-vs-non-billable-hours/>
3. <https://tipsforlawyers.com/no-time-like-billable-time>
4. <https://www.linkedin.com/pulse/5-reasons-track-non-billable-time-your-law-firm-larry-bebb/>
5. <https://www.practicepanther.com/blog/the-comprehensive-guide-to-legal-billing/>



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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions. Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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