

Clock watching

The impact of billing for time

By Elizabeth Broderick

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Lawyers are governed by six minute excursions of a giant clock called 'billable hours'.

Two hundred years ago we were paid by the length of our written opinions. This encouraged us to be prolix and inefficient. For the last 50 years the concept of billable hours has rewarded us for being harassed and inefficient.

We are now at a crossroads, where time billing is quickly becoming unsustainable for both the client and the individual lawyer. The concept of 'last man standing' continues to underpin law firm culture. It is intertwined with a time billing mentality which says the 'last man standing' is the one who remains in the office late at night, bills the most hours and, therefore, creates the most value for the law firm. Increasingly, this concept is irrelevant as it ignores the impact of globalisation and technology on work practices.

It is hard to find lawyers who will say a good word for time billing. Yet, it provides predictability in covering costs and achieving a given profit margin on each transaction. It removes the difficulty and risk of estimating the real value of sometimes complex legal tasks and the impact of legal service outcomes on the client's business. This mimics, on a smaller scale, the problems big engineering and construction companies may face in tendering for large projects—for example, Multiplex's work on Wembley Stadium.

Why then is time billing seen to be so damaging to the profession, particularly in terms of social interaction, health issues, work/life balance and, ultimately, the reputation of our calling?

Problems with selling time can be grouped into two main areas—the aberrant behaviour that time billing rewards and the unsustainable working climate that time billing creates.

The Yale Law School Career Development Office¹ has recently given two examples of a lawyer's day—one based on 1,800 target billable hours (a commonly used target here in Australia), the other based on a 2,200 billable hours target (a common target in the United States). It points out that these billable hours targets can be achieved in a variety of ways.

In the 1,800 hours a year example, you could work from 8am to 6pm Monday to Friday plus one Saturday a month from 10am to 5pm. Add your travelling time to this and your work will keep you away from home for 11–12 hours daily and at least one to two Saturdays per month.

In the 2,200 billable hours scenario you could work 8am to 8pm weekdays and do two to three Saturdays a month from 10am to 5pm. With travelling time, this translates to a door-to-door 13–14 hours away from home on weekdays, together with 8–9 hours on two, and for a large part of the year three, Saturdays per month.

These figures do not take into account any personal calls at work, talking and mentoring co-workers, a family funeral, any pro bono or practice development work. So it's hardly surprising that law firms do not include these facts in their recruitment brochures!

Are these extreme examples? Not really. In the aftermath of the demise of Brobeck, Phleger and Harrison, which collapsed in late 2002, it was widely speculated that the 2,200 billable hours target set by the firm led to a practice of burnout and bill padding. This was part of the firm's undoing says Edward Lazarus, lawyer, author and noted commentator in his article published that same year.²

'The enormous press of work has any number of doleful effects. First, it deadens associates to the craft of lawyering. People

living on the edge of burnout rarely do their best work—both because they lack the reflective time necessary to learn and grow as a lawyer, and because it's so difficult to take pleasure in work when there is so darn much of it to do.'

So it's not easy.

Nor is it difficult to visualize the havoc such a timetable produces for young lawyers and indeed lawyers of all ages. Such a regime is increasingly difficult for those trying to balance work and family responsibilities.

Before looking at alternatives to time charging, it is worthwhile thinking about some of the motivators that keep people in law. Interest in the activity and the drama of law are important, together with advancement of knowledge through collaboration and, on a more commercial level, income and recognition. There is also an increasing desire to have a life outside the law—a life that includes family and friends, community involvement, sports, and special interests.

The financial expectations of young lawyers are largely market driven. And yet do they need more money than comparable professionals such as doctors, engineers or architects? For older lawyers, financial needs are mainly governed by lifestyle and sometimes increased by unfortunate matrimonial or investment decisions.

Recognition, at least in the early years, comes mostly from within the firm while later on it comes from being more actively involved in issues common to the profession.

How do we reconcile these motivators with the increasing desire to have a life outside the law? This challenge, of course, is not restricted to lawyers. In the law and other time billing professions, a major obstacle is the concept of billable hours, particularly when it is used as a *sine qua non* for progression within the firm. We must find sustainable alternatives or face an exodus of lawyers—particularly young lawyers, female lawyers, and older workers looking for a less rigid workplace structure—from the profession.

One alternative may be to create business models that break the nexus between time billing and profitability. This is quite a daunting task although, here in Australia, with the commoditisation of legal services there are many excellent examples of fixed fee, milestone and value-based billing.

For many years now, my small team, The Legal Technology Group, has experimented with using technology to innovatively wrap legal content and to go to market with a different offering—one based on an annuity stream rather than selling time. This methodology has allowed us to move beyond time billing, to innovate around work practice and to retain the excellent legal and non-legal staff that form part of our team.

But this approach will not work in all areas of practice. It's up to each of us to ask the question 'Is there a better way' and set about finding solutions to this world wide problem.

Critics will say 'just drop lawyers' expectations of take-home pay and with it the billable hours target'. This will not solve the influence of markedly increasing non-lawyer costs on charges—such as inner city rents, parking, law firm infrastructure, particularly technology, and the myriad of other charges associated with a complex business structure.

Nor will it solve the problem for many firms of attracting the best-fit talent. Market salaries are well known across the industry. To attract talent you need to offer remuneration within market. Australian based law firms are not just competing with salaries offered in their market but also with the lure of overseas markets with substantially higher remuneration.

These are some of the issues the profession must consider. A rigorous examination of the problem, hopefully in conjunction with our professional bodies, is a task we can no longer defer.

Endnotes

1. Yale Law School Career Development Office, *The Truth about the Billable Hour*, <www.law.yale.edu> at 23 March 2006.
2. E. Lazarus, *The Not So Sad Story of San Francisco's Brobeck, Phleger and Harrison, and What It May Mean for the Future of the Practice of Law* (2002), FindLaw.com <www.writ.findlaw.com/lazarus/20020613.html> at 23 March 2006.

△ ...it's so difficult to take pleasure in work when there is so darn much of it to do. △