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Time to stop the clock?

A backlash against the billable hour has some firms charging flat fees

JOHN INTINI | Feb 20, 2008

When news broke last fall that a few New York City lawyers had reached the US\$1,000-an-hour mark (that's US\$16.67 a minute), a partner at a major firm in the city warned that the profession may have hit the "vomit point" with clients.

He was right: although the skyrocketing rates lawyers charge have been something of a joke for decades, several large U.S. corporations are no longer laughing. Some clients, it seems, are less willing to accept "open-ended, indefinite and unknowable liabilities when they walk into litigation," says Lorne Sossin, a law professor at the University of Toronto. Now, to cash in on this discontent, a handful of boutique firms are beginning to offer alternatives to the billable hour, the industry standard since the '60s.

Charging by the hour—or in six-minute blocks—was originally meant to improve transparency. The problem, says Hugh Totten, a member with Valorem (latin for "value"), a new Chicago-based law firm that offers clients contingency fees (payable only if the result is favourable) and fixed fees, is that the billable hour "creates an incentive for endless litigation and for a complete lack of efficiency."

This critical refrain isn't new. In a 2002 report, the American Bar Association's commission on billable hours blamed hourly quotas for driving young lawyers from the profession (an estimated 45 per cent of lawyers quit law by their third year), and for leaving little time for pro bono work. The commission identified several alternatives. While many private law firms provide options to favoured clients, most lawyers still work on the clock (91 per cent of legal work in Canada is based on billable hours). When asked how quickly firms are shifting from that model, Richard Stock, founding partner of Vancouver-based legal strategist Catalyst Consulting, laughs: "Global warming is faster."

With little incentive for large firms to change this highly lucrative business model, experts say the push will need to come from clients. Some companies in the U.S. are answering the call. Cisco and Pitney Bowes are two on a short list of corporate giants demanding alternatives, including flat fees. Some companies are refusing to let high-priced junior suits do work that paralegals can do just as well and cheaper. And in November, Wal-Mart circulated a memo to external counsel calling for a freeze on the rate increases of associates—the average entry-level lawyer at a big city firm in the U.S. is making US\$160,000 (in Canada it's closer to \$100,000).

Experts anticipate that the current economic downturn will lead to further belt-tightening and could force more companies to reassess deals with their lawyers. "The days of just writing cheques are coming to an end," says Jay Shepherd, whose Boston firm, Shepherd Law Group, banned billable hours last year and doubled its 2006 revenue. "There is no other business that we don't know the price of something before we buy it. Imagine getting on an airplane and being told they're going to charge you by the minute. It's crazy. Nobody would do it."

Shepherd, who describes the billable hour as "anti-client," says the savings his six-lawyer outfit provide is the result of team efficiencies, not cut rates. In addition to flat-fee pricing, his firm offers unlimited advice plans: for a fixed price a client can call the office as often as needed without worrying about a big surprise at month's end. "It's almost as if we're in-house lawyers for them," he says.

Valorem is also using its small size to its advantage. Instead of having the traditional pyramid model (a stable of junior lawyers working under—and making money for—partners), lawyers at Valorem work together on cases. There isn't a "bloated associate level," says Totten. Outsourcing is used to cut costs. And monthly bills in-

clude a value-adjustment line, allowing clients to have the final say on price. “We’re not going to argue,” says Totten. A writedown, he says, serves as an early warning sign “that we’re not serving the client well and need to focus on that immediately.” Law, says Totten, “is supposed to be an intimate profession of people giving advice to clients. That’s what we’re trying to get back to.”

Shepherd—who predicts the billable hour will last another decade—doesn’t even track his staff’s hours for internal purposes. This has prompted many competitors to ask how he knows if associates are doing their work? “I manage them,” he says. “That’s my job.” And late nights or weekends holed up at the office don’t impress him. “The firm,” he says, “doesn’t get anything more if it takes longer and the client wants the work done as fast as possible.”

It is, of course, much easier to change the culture of a boutique firm with half a dozen lawyers. At a large Canadian firm that bills \$500 million a year, says Stock, “the business model is entrenched across hundreds, if not thousands of people in the corporation. It’s not an especially nimble ship.”

One of the factors driving this movement, say experts, is a young cohort less interested in working the hours logged by previous generations. Currently, billable hour targets for young lawyers at a big Bay Street firm are about 1,800 a year. At many major U.S. firms, that number has crept above the 2,000-hour mark. And yet, surveys show that most fresh-faced lawyers will sacrifice bulging bank accounts for a better work-life balance.

Some are even taking action. Last year, students at Stanford started Law Students Building a Better Legal Profession, which lobbies private law firms to reform their workplace policies (the group now has chapters at several big U.S. schools, including Yale). A few smaller U.S. firms—in an effort to stop the brain drain—have slashed billable hour quotas in recent months. Alice Woolley, a law professor at the University of Calgary, doesn’t expect a similar student movement in Canada. No school here, she says, has the market power to pull off a Stanford-like stunt. “If U of T students decide to do that, the law firms would quite happily hire from Western or Windsor or Queen’s,” she says.

In defence of the billable hour, Woolley says, “it’s very clear, you know what you’re getting.” And there’s no guesswork required to determine how much future work a complicated case will need. There is also no guarantee a different model will improve things. “It’s not difficult to abuse people with any billing method,” she argues. A flat fee, say critics, may not motivate a lawyer to work hard. Value billing, depending how it’s calculated, can lack

transparency and accountability. And contingency fees can cause lawyers to only accept cases they can settle—and cash in on—quickly. “The really complex important cases will get short shrift,” says U of T’s Sossin. “Or you’ll have trouble finding competent counsel to take it on.”

The billing method, however, is far less a concern for Woolley than is the need for better internal controls. “I’m less interested in firms moving away from hourly billing as I am in them assessing what is a realistic amount for a person to bill,” she says. “And for being vigilant in ensuring that lawyers are not acting in a way that is abusive.”