The New York Times

March 28, 2013

The Tyranny of the Billable Hour

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WILMETTE, Ill.

"THAT bill shall know no limits," wrote one DLA Piper lawyer to another in 2010 in what the firm is now calling "unfortunate banter" between associates about work for a client. But what is truly unfortunate is the underlying billable-hour regime and the law-firm culture it has spawned.

Lost in the furor surrounding one large firm's current public relations headache are deeper problems that go to the heart of the prevailing big law-firm business model itself. Regrettably, as with previous episodes that have produced high-profile scandals, the present outcry will probably pass and the billable hour will endure.

It shouldn't. The billable-hour system is the way most lawyers in big firms charge clients, but it serves no one. Well, almost no one. It brings most equity partners in those firms great wealth. Law firm leaders call it a leveraged pyramid. Most associates call it a living hell.

In a typical large firm, associates earn far less than the client revenues they generate. For example, a client receives an invoice totaling the number of hours each lawyer spends on the client's matters, multiplied by the lawyer's hourly rate, say $400 for a junior associate. Most big firms require associates to bill at least 1,900 hours a year, according to a survey last year by NALP, the Association for Legal Career Professionals.

In 2009, DLA Piper announced that it had eliminated associates' billable-hour requirements in favor of a performance-based reward system. However, the firm's submission for the association's current NALP Directory of Legal Employers reports that it has a "minimum billable hour expectation." In 2011, DLA Piper's "average annual associate hours worked" (both billable and nonbillable) was 2,462; the billable average was 1,831.

At $400 an hour, a hypothetical 2,000-hour-a-year associate generates $800,000 a year for the firm. But the firm typically pays the salaried lawyer one-fourth of that amount or less.

For associates, the goal is simple: meet the required (or expected) minimum number of billable hours to qualify for annual bonuses and salary increases. Billing 2,000 hours a year isn't easy. It typically takes at least 50 hours a week to bill an honest 40 hours to a client. Add commuting time, bathroom breaks, lunch, holidays, an annual vacation and a little socializing, and most associates find themselves working evenings and weekends to "make their hours."

Most firms increase financial rewards as an associate's billables move beyond the stated threshold.

For partners, billable hours are a key measure of associate and partner productivity. More is better. The resulting culture pushes everyone harder. Meanwhile, each partner strives to maximize individual client billings that he or she controls. Those billings in most cases determine a partner's annual share of the firm's profits. Their clients also become tickets to other firms. That makes partners reluctant to share too many important client responsibilities with their associates and fellow partners.

For clients, the consequences of the billable-hour system can be absurd. Fatigue through overwork can produce negative returns — the critical document missed during a late-night marathon review; the error in the draft of a corporate filing that goes unnoticed.

Why do clients tolerate this perverse system? Periodically they rebel, especially during economic downturns, but those revolutions have been short-lived and unsuccessful. A 2011 survey by ALM Legal Intelligence, an online data service, found that alternative fee arrangements accounted for only 16 percent of revenues at the nation's largest law firms in 2010. Despite outcries for reform, the billable hour remains entrenched and the barriers to change are formidable. In many practice areas, including large and lucrative bankruptcy cases, prior court rulings (including the United States Supreme Court's 2010 opinion in Perdue v. Kenny A.) essentially require lawyers to use the billable-hour approach if they want to assure approval of their fee petitions.

There's a way out of the mess. But it requires clients to press harder for alternative fee arrangements, courts to back away from policies that embed the billable hour, law firm leaders to stop rewarding excessive associate hours and senior partners to consider the deleterious consequences of their myopic focus on short-term profit-maximizing behavior.

However it comes out, DLA Piper isn't the first law firm to endure a client billing controversy. While at a big firm, Webster Hubbell, a former Arkansas Supreme Court justice and associate attorney general for President Bill Clinton, was caught billing clients for time that he never worked. He went to prison. A partner in a prominent Chicago law firm got into trouble when someone wondered how he could bill almost 6,000 hours annually over four consecutive years. He couldn't.

In fact, a cottage industry has now developed in auditing outside law firm invoices to clients. Even so, as the deceit associated with the billable hour continues undetected, equally insidious consequences of the entire system endure. The episodes of public embarrassment will remain infrequent, and the triggers producing them will be idiosyncratic. DLA Piper's current notoriety began when a former client refused to pay his roughly $675,000 bill. The firm sued him last year, and its internal e-mails about the matter became subject to discovery.

Before long, they landed on the front page of The New York Times.

DLA Piper said that the comments of its lawyers were “an inexcusable effort at humor.” What’s really not funny is the toll that the flawed system is taking on a vital profession.

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