



## SHOVELING SMOKE: LITIGATION HOURLY BILLING



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In this column on professional issues, legal department management, and relations between in-house and outside counsel, Mr. Pol discusses elements of managing lawyers, sometimes likened to herding wild cats, or as he prefers, shoveling smoke. Here, he addresses the vexed issue of value billing and litigation.

Arguments against hourly billing are legion. They include:

- Hourly billing penalizes efficient and productive lawyers; it rewards quantity over quality and repetitive drudgery over creativity.
- The billable hour is an excuse for lawyers not properly planning transactions nor focusing much on what the client's objectives really are; they'd rather not ask clients what they really want from the relationship. Many lawyers accept some of these arguments, and the corollary—that there's often a gap between the value added by lawyers and legal fees generated. Yet litigators sometimes suggest that they're different.

For example:

- Nothing but time billing works in litigation. Unexpected things happen, and we just need to deal with them as they arise.
- Lawyers can't be expected to indemnify clients for costs imposed by the conduct of the opposing party, the courts, or both.

Such comments may not be incorrect, yet perhaps they're *right* only from the mindset of lawyers in whom hourly billing is so ingrained as to be part of their DNA.

After all, the unpredictability of legal services is hardly unique. Engineers deal with the vagaries of vociferous opponents to large-scale infrastructure projects. Some deal with unknown conditions hundreds of feet underground, and of inhospitable terrain and weather. Yet they still manage to factor all manner of potentialities within sophisticated yet often simple project management tools.

I was privileged to implement a value-billing program within a reasonably large corporate.<sup>1</sup> I was also privileged (actually, surprised) to have been appointed by the American Bar Association as the only non-U.S. panellist to its speaking bureau after the ABA's comprehensive study and report on the future of hourly rate billing.<sup>2</sup> Yet I don't profess to have any "silver bullet"—it is genuinely difficult to identify and implement consistently dependable alternatives to hourly billing.

Although large project-based transactions lend themselves to innovative pricing models that outweigh the effort involved in developing and implementing alternatives, that's no reason for just



giving up when told that litigation is somehow "different." Put simply, it ain't. Its purported uniqueness often rests somewhat more heavily on eloquent assertion than demonstrable fact.

Indeed, such assertions—oft-repeated—have helped render the practice of law, and litigation in particular, as one of the few areas in which value-billing is regarded as radical, even heretical—even by clients from whom it exacts a heavy toll.

Yet in essence, value-billing simply sets a price (or a pricing formula) based on value to the client, and agreed from the outset, before work is done. It's a bit like, well, just about every other purchase everybody on the rest of the planet makes most every day.

Put another way, how many things would even a lawyer buy if he or she didn't know the price up front? Do

you care how much time was spent building your latest luxury car purchase? Or on a commuter train would you pay 50¢ a minute to get to work—including delays? Or an airline, say \$3 a minute, including check-in time, stopovers, delays, and any untoward events? Plus maybe \$1 a minute for the extra few weeks the airline might need to track down your luggage?

On the other hand, we accept a form of hourly billing from taxi-drivers. On that basis, if litigators cling to their claimed uniqueness whilst other lawyers learn to identify, deliver, demonstrate (and bill for) value, it should at least prove an easy transition for them to continue the practice of charging as soon as clients step in off the pavement.

In any event, continuing debate about hourly billing and its alternatives might spark more innovative lawyers, whether in-house or outside counsel, genuinely to try alternatives that work for organizational clients and their law firms. Without such innovation, we're stuck with the ease—and dis-ease—of hourly billing.

### NOTES

1. Noted in *Get More Value from Outside Counsel: Show Them the Flipside*, ACCA Docket, April 2003. Refer "Value Billing" sidebar at p. 32. (The full article footnoted in that sidebar is available from the author.)
2. Available at <http://www.abanet.org/careercounsel/billable.html>.