

BUSINESS & CAREERS

Don't kill billing by the hour, cap it instead

MICHAEL RAPPAPORT TORONTO

Daggers are drawn, blades pointed at the billable hour, fingered as the culprit for all the ills that afflict the legal profession by its legions of critics.

"Kill the billable hour," exhorted Evan Chesler, presiding partner at Cravath, Swaine & Moore, in *Forbes* earlier this year, while touting his white-shoe law firm for implementing flat fees for handling transactions and success fees for positive outcomes. "The billable hours system is corrupting," wrote Jeff Bleich, past president of the State Bar of California in its *Bar Journal* in 2008. He condemned hourly billing for placing an "ethical cloud" over legal work and "demoralize[ing] lawyers." "The billable hour must die," proclaimed Scott Turow, bestselling legal thriller author and practising litigator, in the *ABA* [American Bar Association] *Journal* in 2007.

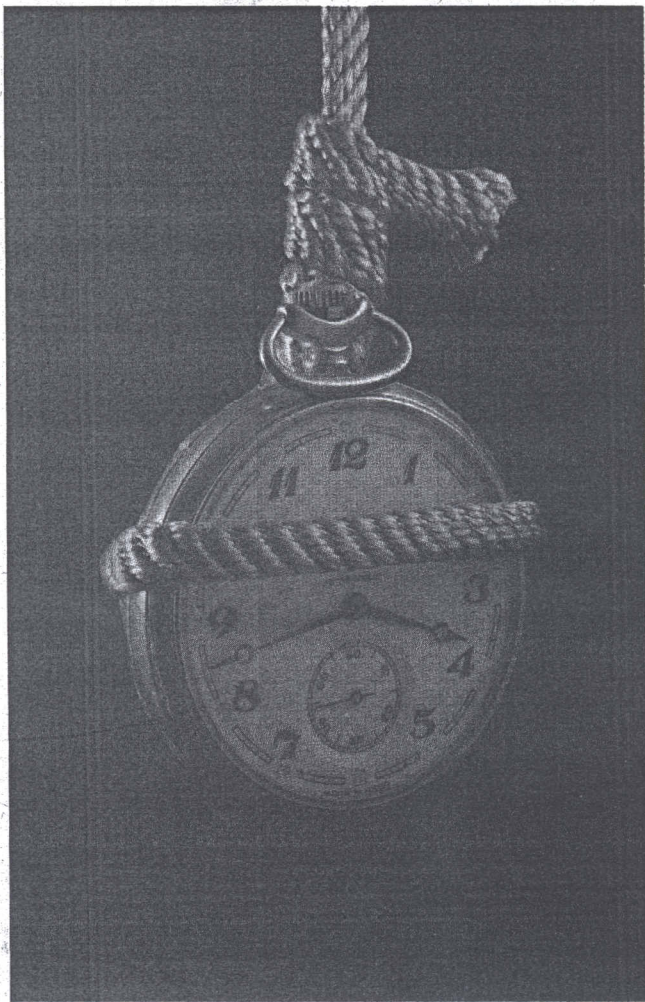
In the face of the horde of detractors who come to bury the billable hour, who will stand up to praise it?

"It's not at all obvious that any alternative methods of billing are

necessarily better," declared Alice Woolley, law professor at the University of Calgary, who has written extensively on the ethics of legal practice. In the *International Journal of the Legal Profession* in 2005, Woolley opined, "Relying on alternatives to hourly billing for reform ultimately amounts to nothing more than rearrangement of deck chairs on the Titanic; reform of unethical billing by lawyers can only happen through effective regulation."



Woolley



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Birth of the billable hour

Surely, billing by the hour is superior to the standard practices it replaced? Until the 1960s, most lawyers employed value-based billing for litigation. At the end of a matter, the lawyer would consider various factors, including the client's means, the lawyer/client relationship and the lawyer's personal evaluation of the service, and

issue a bill "for services rendered." Would such a terse explanation satisfy clients today?

Even back then, law firm consultants decried this practice for its lack of transparency and accountability and advocated for detailed time sheets that set out the work performed on the client's behalf. By the late 1960s, most mid-sized and large firms adopted the hourly

billing model. Now clients have the luxury of pouring over bills itemizing every action taken on the file down to six-minute increments.

Uses and abuses of hourly billing

That's not to suggest that all is well with the current state of affairs. "The billable hour is rife with the potential for abuse by the lawyer, who holds the upper hand in an opaque, awkward relationship," observed Jordan Furlong, the former editor of the *Canadian Bar Association's* flagship magazine on his blog, *Law21*, a fantastic resource for news and insights on the latest trends shaping the legal profession.



Furlong

The ABA's commission on billable hours issued a report in 2002, which compiled a long list of sins that it laid at the feet of hourly billing, from penalizing efficiency, to generating unpredictability, to putting the client's interest in conflict with the lawyer's interests. Most worrisome, the report warned is the potential for abuse it creates, such as double billing and inflated billing.

"All too often, the bill expands to whatever the client can afford to pay," huffed John Toothman, founder of *The Devil's Advocate*, a firm based near Washington, D.C., that is recognized for its legal fee management and litigation consulting expertise. He added, "Hourly billing provides little incentive to settle early or to litigate cost-effectively. Instead, it rewards over-staffing and goldplating cases. Even if counsel do not intentionally churn the case, their fees are open-ended and unpredictable."

Then there is the toll on the lives of associates and partners who must

toil long hours to meet ever-expanding billable hour targets.

"The profession's obsession with billable hours is like drinking water from a fire hose, the result is that many young lawyers are starting to drown," cautioned U.S. Supreme Court Justice Stephen Breyer in the foreword to the ABA report.

"The billable hour is responsible for a lack of balance in lawyers' lives, negative impacts on lawyers' families, loss of professional mentoring, decrease in lawyer service, less collegiality and a loss of focus on efficiency," bemoaned former ABA President Robert Hirshon in the ABA's report.

Despite its glaring flaws, billing by the hour has many virtues too, which is why it will most likely continue to be the dominant model for billing legal services well into the future.

As Furlong wagered on "Law21," "lawyers will be billing by the hour until shortly before the sun goes supernova."

Why? Because billing by the hour makes sense. As the ABA report noted, billing by the hour has become entrenched for several reasons: the method is simple; it provides a comfortable standard completely familiar to all sides; it serves when no one can calculate the value of a service; it lets law firms make more money; it minimizes transaction costs for both sides in engagements; it increases management tools within law firms and departments; and it works regardless of volume of work or type of service.

So how do lawyers retain the benefits of billing by the hour, while reducing the drawbacks? By capping legal fees and capping billable hour quotas.

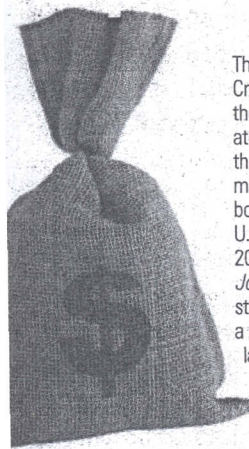
Capping legal fees

Given the unpredictable nature of litigation and transactions, how

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Lawyer bonuses slashed this year



The era of bloated law firm bonuses is over. Cravath, Swaine & Moore led the pack as the first major U.S. firm to announce associate year-end bonuses recently. In a sign of the tight economic times, bonuses were dramatically slashed. A second-year associate's bonus for 2009 will be \$7,500 (all figures in U.S. currency) compared to \$17,500 in 2008, according to the *New York Law Journal*. Senior associate bonuses remained static at \$30,000. Cravath bonuses reached a high in 2007, when junior associates regularly got \$45,000 bonuses and senior lawyers could earn bonuses in the low six-figure range.

Capped fee good alternative

Billable hour

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can a law firm be expected to estimate how much legal work will cost a client? By developing a plan and budget for each stage in litigation or in a transaction. Other professionals and tradespeople from accountants to contractors, whether performing complex audits or extensive renovations, provide firm cost assessments and bear the risk of cost overruns.

Lawyers can too. Indeed, Scholefield Associates, P.C., a construction law boutique firm based in San Diego, Calif., offers clients the assurance of a "Guaranteed Maximum Price." Its GMP program is modeled after the construction process of estimating and submitting a fixed price for a project, and then delivering a finished product at that guaranteed price. Complete with a litigation schedule with tasks and phases and a schedule of values.

A "capped fee" is a modified form of fixed fee, which gives clients protection from runaway costs and grants legal counsel a wider margin of error in estimating legal fees. "Under this arrangement, the client and the law firm agree that the fees to perform specific work will not exceed a certain dollar figure. The firm may charge its standard hourly rates; however, beyond a certain maximum limit, the client will not pay more money," explained Joel Rose, a law firm management consultant and presi-

dent of Joel A. Rose & Associates in Cherry Hill, N.J., in *The National Law Journal* in 2008.

Capping billable hour quotas

If capping legal fees sounded idealistic, then capping billable hour quotas might be dismissed as positively utopian.

In 1958 when the movement towards billing by the hour was just taking off, the ABA recommended 1,300 hours annually as a reason-

Street require 1,800 hours. Sky-high billable hour targets leave little time for life outside work.

No wonder the ABA report blamed hourly billable quotas for the high attrition rates among lawyers, noting that about 45 percent of lawyers in the U.S. leave the practice of law by their third year.

How to staunch the exodus of associates? Slash billable hour quotas. Dramatically. Say, to around 1,200 to 1,400 per year. Better yet, scrap them altogether. Before dismissing this recommendation as unrealistic, consider the business model adopted by Thackery Burgess LLP, a law firm that has recently merged with McMillan LLP. Associates at Thackery Burgess are categorized as consultants, who can decide the number of hours they want to work and charge the firm for their time accordingly. They can even work from home. Last year, Thackery Burgess was awarded the top law firm award in Alberta for its innovative business model. By e-mail, Michael Thackray, the managing partner, confirmed that this practice will continue post-merger. Surely, this is a model worthy of not only being retained, but of being expanded?

By capping legal fees, it is possible to strike a balance between the interests of lawyers and clients and by capping or scrapping billable hour targets, law firms can retain their best and brightest lawyers. Long live hourly billing! ■

“By capping legal fees, it is possible to strike a balance between the interests of lawyers and clients...”

able billable target for associates. Given that it takes about three hours spent in the office for every two hours that are billable, to meet this quota would nonetheless require working 7.5 hour days, five days a week, 52 weeks a year. In the 1970s, billable targets of 1,700 hours were not uncommon. Today, some firms in New York and Washington D.C. expect over 2,200 hours and many firms on Bay

Announcements

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son Goepel Maledy LLP is pleased to announce that Nathan M. Lazar has joined the Family Law Group, as both advocate for individual clients and as a Certified Family Law mediator.

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