

IN DEFENSE OF THE BILLABLE HOUR

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I enjoyed reading the recent exchange here (“What’s Your Client Mix,” April 9, 2013) triggered by reports of the lawsuit accusing DLA Piper of overbilling. As expected the comments included a few laments about lawyers’ strange practice of charging clients for *inputs* in the form of billable hours – strange in the sense that when we buy a quart of milk we expect to pay for milk, not bushels of livestock feed and hours of dairy workers’ time. Like you, I’ve heard and read that the profession falls short in failing to invent and adopt different charging models. What I notice in these discussions is how the critics of the billable hour often fail to grasp the bigger part of the story – what it is that clients expect in exchange for what they pay.

Assuming the role of the clients, we may say: We know exactly what we want from our suppliers of outside legal services – we want high-quality *outputs*:

- We clients want excellent and efficient performance of legal services whether delivered as advice, management of legal affairs or “wins” in adjudicated controversies

But it doesn’t end there. That’s not all that clients demand of their law firms. That’s just item one on the list. Here’s the rest:

- We clients want the capacity to commit legal resources to a problem or project with hardly any investment on our part
- We clients want our suppliers of legal services to bear the full risk of building capacity but we don’t want to agree to long-term contracts or exclusivity arrangements in support of the associated long-term costs.
- In fact, we want to be able costlessly and instantly to stop work for any reason and to drop one supplier and employ another at will
- We want our legal suppliers to be able to provide, on demand, teams of varying size and experience to match the scale and scope of different problems as they arise, typically with very little predictability

- We want suppliers to compete with one another and we want to rely on multiple suppliers, sometimes even within the scope of a single project
- We want the ability to supervise, insofar as possible, the level of activity and expense associated with a given project
- However crucial success in legal affairs is to the value of our enterprise, we want to keep legal expertise outside the realm of our core competences – what investors buy when they acquire our shares. We don't want to be evaluated by markets as creatures of the legal system

On top of all that is the fact that we can't define legal services outputs as we can quarts of milk. In litigation for example, the output isn't just wins, it's also settlements, reductions in the cost of losses and enhancements to the client's reputation for not knuckling under to legal threats.

My point is that when legal-market pundits complain about the standard billable hour charging model and its defects but fail to notice that there's a lot more to the bargain than what shows up on the invoice, they just don't get it.

I like cars and when I think about this subject, I can't help but imagine myself as a kind of auto-racing impresario. You're the client but if you have ordinary needs, then get ordinary solutions – you don't need me. You need a fleet of Ford Tauruses, so get Ford to lease them to you, hire a fleet manager and that's that. If you have more exotic requirements, then I'm your man. You want to hire an auto racing operation? You need me to get you the whole apparatus – drivers, mechanics, cars, pit crews, transportation – several times over? OK. But you don't want to invest; you want to rent the whole deal? It isn't just a hobby though, right? Winning is very important to you. You get to decide when to press for a checkered flag and when to drop out of a race. The racing calendar (contrary to fact) is unpredictable so you and I never know in advance just how many teams will be working at any moment or how long any race or any series will last. If you don't like the results or just on a whim, you can tell some or all of my teams to pack up and go away and you can go and hire someone else.

How do I charge you for this? Given the variables involved, I can't risk charging you just for wins. We might arrange for a bonus scheme as a

reward for winning but I can't pay my expenses on that basis. With all the uncertainty and all the moving parts I can't charge you an annual or even monthly lump sum. What if we need an extra car?

The answer is that, given the idiosyncratic nature of the deal, I charge you the cost of the inputs with a mark-up to cover my investment cost, to pay my management fee and to compensate me for the risks I bear that are inherent in the relationship. I can tinker at the edges of this model – bonuses, penalties and other risk-sharing arrangements in a small way – but I can't come up with a better model for remuneration in these circumstances.

Admittedly the deal is not without risks for you, apart from the risk of losing races. I may be overstaffing to inflate my earnings or the staff I've hired for you may be shirking which costs you in expense and performance. As a check on this, your own experience tells you approximately what most tasks and projects ought to cost and you can engage in a certain amount of oversight and monitoring. My competitors are hanging around your door telling you stories about how they will get better results for less money. In the meantime, our interests are closely aligned. I want to keep you as a client and I want our teams to win races for both our sakes.

Let's leave the race track and get back to lawyers and their clients. What is clear is that the standard billing model has been remarkably robust both over time and across different degrees of clients' reliance on their legal service providers. That is because billing is just one part of a more extensive arrangement that is full of benefits for the clients and risks for the law firms – a deal that balances the interests of both.

Not by any means a Euclidean proof of the necessity of the billable hour but you see the point.

—Richard Rapp