LARGE TIME BILLING LAW FIRMS

Scourge of the American Economy

by

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At the heart of all the law firm billing excesses reported in the media over the last decade is the patently absurd idea that the value of legal services is **directly** proportional to the length of time it takes to perform them. Rather, the true value of legal services is **inversely** proportional to the length of time it takes to perform them.

The very concept of time billing provides an incentive to waste and profligacy that is totally inconsistent with the American Free Enterprise System. The business clients of large law firms may be very concerned with return on invested capital or from common labor, however they never apply the same kind of analysis to the return on their investment in legal services.

The measure of value for legal services is not the length of time it takes to perform them, but rather the effect of those services in advancing the interests of the client in a manner consistent with the needs of society.

The idea of any corporate steward—CEO, CFO, Comptroller, or house counsel handing a blank check to a group of self-evaluating scriveners is exceeded in its foolishness only by the arrogance of the lawyers who seem to believe that the leaders of the American Free Enterprise System will continue to accept this state of affairs.

The Legal Profession. . .

The relationship between attorneys and their clients has been known for centuries as a "professional" relationship. A professional relationship is a fiduciary relationship—a relationship of trust. Professionals are trustees legally obligated to protect the interests of their clients with even more care and concern than they would their own personal interests.

A professional acquires and applies arcane knowledge and special skills for the benefit of society. In turn, the individuals who must avail themselves of professional services support professionals by paying fees. In addition, society confers honor, respect and prestige upon professionals in the measure that the professional services are perceived to benefit society.

Leadership in the legal profession carries with its exalted status and high income, the responsibility to promote the interests of society and advance the cause of civilization. While many large law firms maintain "conflict" checking computer systems, they often overlook conflicts with the interest of society. The moment an individual attorney, much less an entire law firm takes the position that the interests of society are not as important as providing services for a fee, those attorneys and their firms are no different than the *consigliori* that serve organized crime.

Law Firm Economics. . .

Partners in large time-billing law firms today have one single bottom-line responsibility: they must leverage the time of the firm's associates. What that means to any business which retains a large time-billing law firm is that the corporation and its problems provide on-the-job training (OJT) for overpaid, underskilled, and inexperienced recent law school graduates. Watching large enterprises writing blank checks to law firms is a source of endless amusement for those who understand the reality of "Law Firm Economics."

Large time billing law firms hire entrance level trade school graduates, but then pay them outrageous salaries far in excess of those paid their contemporaries in science, engineering, agriculture or manufacturing. Law firms recover these economically unrealistic salaries by billing their clients even more outrageous hourly fees for the services of these inexperienced young men and women who soon learn that the most important element of legal practice is billing time to a client and carefully recording the time billed. It should be just a bit disconcerting for the CEOs of American Business to admit that their companies are being charged the cost of tuition for the continuing education of recent law school graduates.

The economic *raison d'etre* for large time billing law firms is to "earn fees by leveraging associates." The success of the equity partners in those firms, particularly the "rainmakers," is measured in terms of the amount of work that they can generate for their salaried associates to bill.

So long as attorneys are paid on a time basis and may multiply the time spent by their colleagues and employees in the firm without limit, litigation will continue without end and essentially expand without limit until it consumes all the resources available to the parties and eventually destroys the American civil judicial system.

Economic Efficiency in the Legal Marketplace. . .

There is no real incentive for efficiency in large time-billing law firms because such firms meet every demand on their firm resources by simply hiring more people who can be billed to the client at hourly rates far in excess of the real value of the services performed by these essentially supernumerary employees.

Secure in the knowledge that the hourly fee is the ultimate sacred cow in American law, it has not been difficult to promote practices which encouraged the billing of time without regard to the value of the services represented by that time. The large time billing American law firm is rewarded for its inefficiency. The more inefficient and inexperienced a law firm is, the greater its profit per partner.

Some firms now boast that they have a new class of associates who are hired only to "staff" major litigation with the understanding that as soon as the litigation is completed their services will be terminated. These expendable associates, however, are billed at the full "going rate" and in some cases billed at a premium rate because

they are specifically involved in just that particular litigation and are therefore, by definition, "specially qualified" and "committed to the client."

So long as business leaders are willing to permit the profit motives of large time-billing law firms to dominate the business interests of the company, we will continue to see lawsuits that seem to take on an life of their own regardless of the best interests of the parties. The asbestos litigation is a classic example.

Johns Mansville, a *Fortune 500* company was forced to seek protection under Chapter 11 of the *Bankruptcy Act*. Other asbestos manufacturers have been forced to seek similar protection, yet the asbestos victims have yet to recover benefits sufficient to assure them adequate medical care and keep them from becoming public charges after a lifetime of hard work. All the while the law firms keep billing for every minute the lawsuits continue unresolved.

Contingent Fees. . .

The American Legal System has accommodated a standard against which the value of legal services can easily be measured and has been measured for many years, in spite of the considered efforts of large time billing firms to eradicate the system.

The contingent fee system takes a portion of a positive recovery as a measure of the value of the services rendered. No recovery, no fee! As a result, contingent fee lawyers exercise a kind of prior restraint on the proliferation of litigation. Cases are not accepted that will not produce a substantial recovery for the benefit of the client and a commensurate return on investment for the attorney.

The contingent fee system has its own excesses fueled again by the greed that has been sanctified by the self-serving legal press as good management.

If the personal injury/product liability defense bar were driven in house at the major insurance carriers and *Fortune 500* target defendants, and counsel became subject to the same standards of accountability as business management, there would be less litigation, more socially responsible, economically rational settlements, and an overall improvement in safety and health throughout the industrial world. There would also be a more sensible world trade policy as American business leaders began to insist that their government impose American environmental and occupational safety and health standards on the industries of those countries that wish to sell their products to United States consumers.

When legal work is performed on a fixed fee basis, then the incentive is even greater for the attorney to dispose of the matter as quickly and successfully as possible. Quickly because it increases the attorneys earnings per unit time, and effectively because success leads to higher earnings and a greater value for similar services in the future.

Fixed fee and contingent fee litigation creates a "win-win" situation in which both the client and counsel benefit. Gone is the inherent conflict of interest that exists when law firm income increases directly, and often exponentially, with the length of time it takes to resolve a controversy and terminate litigation.

Litigation. . .

Litigation is the civilized alternative to war. When a business becomes involved in "major litigation" it is betting the company on the skill of its attorneys. Business litigation was originally meant to bring commercial controversy to a summary conclusion and resolve disputes so that the parties could go forward and pursue their principle line of business. Now, it seems, the purpose of business litigation is the care and feeding of large time billing law firms.

The litigation conducted by large time billing law firms today has brought American business only endless delay and loss of international competitive position. Large, time billing law firms see litigation not as a way a resolving disputes and permitting clients to go about their business, but as sources of profit for the "partners." Litigiousness today is not limited to medical malpractice and product liability claims brought by personal injury lawyers who share in the victim's recovery through contingent fees.

When litigation is conducted by two time billing firms, the effect on American industrial competitiveness in the world suffers immediate and dramatic decline. As long as all the law firms involved on both sides of the litigation are billing time, there is no incentive to reduce the amount of time the litigation takes nor any incentive to settle the issues at the earliest stage of litigation. Exhausting, debilitating discovery, much of it little more than thinly disguised industrial espionage eagerly observed by competitors throughout the world, dominates such litigation.

Much like modern surgery where the patients are merely the objects upon which the surgeons exercise their skill or manifest its lack, litigation has become an exercise for lawyers in which the clients merely provide the economic resources necessary to support time billing law firms. The client seems to have no place in modern litigation other than as a deep pocket into which the hands of the equity partners at time billing law firms can find a home.

Unless the business and industrial corporations upon which the whole American economy depends, take command of the litigation which involves them, American industrial competitiveness will continue to be compromised and the American Economy will continue to decline.

Chief executive officers of major corporations stand in much the same position as Abraham Lincoln did during the first years of the War Between the States when he confronted the shambles that had become the Union military effort under inept generals who lacked both the strategic sense and tactical skills to preserve the Union.

Today's CEOs are looking at a similar debacle, but they do not yet realize that they are engaged in total economic war throughout the world and that both the survival of the American Free Enterprise System and the Anglo-American system of jurisprudence are at stake. It is time for America's CEOs to do as Lincoln did—adopt a new strategy, regroup their forces, and fire the generals.

Staffing Modern Litigation. . .

Recently, a number of large, time-billing law firms have sought to market their services in terms of "staffing" major litigation. Staffing a major law suit to one of these large time-billing law firms means large numbers of associates shuffling papers that have been indexed laboriously by legions of paralegals and then photocopied countless times by endless lines of clerks, and then billing all these services to the client at a variety of hourly rates, all of which include a profit margin of 30% or more.

Staffing for litigation is something that can and should be estimated at the time the agreement to retain counsel is forged. If the law firm cannot identify the partner in charge and estimate its own cost of staffing the litigation, there is no reason to retain that law firm. They have too little understanding of the legal work they are about to perform to engender confidence that they will perform it well.

Counsel should associate a dollar cost with each aspect of litigation. These costs estimates should include the amount which the partner wishes to earn for the services performed, and the cost to firm of supporting the partner to the extent that the partner wishes or needs support.

A litigant has the right to assume that if a deposition is important, counsel trying the case should be conducting it. If it is not important, well crafted interrogatories or requests to produce documents should suffice. If the party being deposed is to be a witness in the litigation, only the attorneys responsible for trying the case should be conducting the deposition. If that attorney requires a "bag carrier" or the firm feels that a junior partner or associate should attend the deposition with trial counsel or the partner in charge of the matter, then the cost of that educational effort is part of the overhead of the firm and should be born by the firm not the client.

While this means that some firms will lose money in developing new business, this should be a part of the law firm learning curve. Litigation partners should be held accountable by their partners in other profit centers for engaging in unprofitable work. That is a cost of doing business which will soon weed out the inefficient and the inept.

The *Agent Orange* Litigation: Paradigm and Model. . .

The *Agent Orange* litigation clearly established that a skilled and competent trial attorney should be capable of dealing with a document database of over a million pages and conducting over 100 days of depositions in a year.

The *Agent Orange* litigation established a new standard for indexing and classifying the documents essential to conducting modern litigation. The attorney representing the veterans was forced to examine, review, index, and annotate thousands of frames of microfilm and hard copy in less than one year. Indexing had to proceed on an *ad hoc*, random, yet dynamic, basis. Synonym dictionaries and an appropriate thesaurus had to be generated "on-the-fly."

The attorney managing the *Agent Orange* litigation as the advocate for the Viet Nam combat veterans and their families, had to have access to all the important documents and files as well as medical records associated with the individual claims of veterans and their children in real time in the courtroom, at depositions, and on the telephone.

The technological miracle of the Agent Orange litigation is that it was managed from January 8, 1979 when the initial class action complaint was filed, through October 21, 1983 when it was declared ready for trial by only two full time lawyers, a computer scientist, and a claims examiner with the occasional assistance of two summer law student associates, a paralegal, several part time attorneys, some temporary clerks and a few word processing operators.

It appears from the limited published information available that the five major war contractors who were the defendants in the *Agent Orange* litigation paid in excess of $50,000,000 to defend the case. It is widely rumored within the insurance industry, however, that the war contractors and their insurance companies paid almost as much or more to their lawyers than the $180,000,000 they paid to the veterans!

Litigators. . .

Just how many cases should a seasoned litigator handle at any given time. Rules restricting barristers to one case at a time may be a bit extreme, but there is a limit to the number of lawsuits that any attorney should be permitted to manage at any given time. No attorney should be permitted to promote delay or continuance of an action involving one client in order to accommodate the litigation demands of another.

For that reason, the cost of obtaining total commitment of experienced trial counsel should be quite high, perhaps approaching that of obtaining the services of a skilled athlete. Nevertheless, recognizing that the client has the complete attention of counsel who is limited in obtaining other work during that period provides a sure incentive toward speedy resolution of the case.

Barristers and Solicitors . . .

The division of the legal profession into two classes—barristers and solicitors—is unique to England and some of its Commonwealth nations.

At the foundation of English law practice are the solicitors, the business lawyers who look after the day-to-day legal affairs of their clients. Their offices are very much like those of any conventional corporate law firm in the United States. In England, solicitors may practice alone or in partnership, however, if a matter requires litigation, the solicitor had to "instruct" a barrister to conduct the litigation and assume responsibility for its conduct.

Barristers are advocates, trial lawyers, and litigators who argue matters before judges and conduct trials before juries. Barristers can appear in any court and they may furnish written opinions on the law relating to a particular matter. They cannot enter into partnerships and they have no right to sue for their fees should a client neglect payment. In England, barristers are not supposed to accept work directly from a client. A barrister must be "instructed" by a solicitor.

A Barrister is, of necessity, a "Solo" Practitioner—a true professional—who serves only a single client at a time. Conflicts of interest can never arise out of contemporaneous representation of clients that might have adverse interests.

In England, solicitors can call upon the talents of any barrister who may have the necessary skills and experience to handle specific litigation. As a business person, the English solicitor rests easy in the knowledge that the barrister cannot tempt a valued client away from the firm, and the client knows that their barrister will not be representing a competitor or potential competitor at the same time.

Limitations on the practice of lawyers before the Courts in England and restrictions on the right of audience before the trial courts were imposed in the public interest, not in the interest of lawyers. Unfortunately, there are no such restrictions on American lawyers.

The American Barrister . . .

Barristers are like the pilots of modern high performance jet fighters. They fly the plane, aim and fire the weapons, and exercise command judgment during combat. The litigation manager that supports a modern American barrister is like the weapons systems officer—the GIB (guy-in-back) of a military jet who is responsible for maintaining the weapons systems and operating the electronic countermeasures during combat. Together they are an indivisible fighting team.

Pilot, weapons systems manager, and aircraft form a complex bionic organism uniquely adapted to their mission—combat. To American business and industry, litigation has taken on the aspects of all out war. Litigation is the principle alternative

to armed conflict now available to civilization. The barrister and litigation manager represent the most efficient and effective weapon system available to an embattled CEO.

In even the largest lawsuit, the only highly skilled technical support a barrister requires is from a litigation manager who need not even be an attorney. The litigation manager is responsible for maintaining the operating efficiency of the systems upon which the barrister relies, and executing the orders and instructions of the barrister relating to specific aspects of the case. The client and its own in house legal staff or other professional staff generally provide the remaining support.

Discovery . . .

Discovery under the Federal Rules is often little more than a fishing expedition hoping to net admissible evidence for use on trial. Discovery during litigation has now become a sophisticated tool of industrial espionage and has been likened to a terrorist "car bomb" in its devastating and indiscriminate effects on a business.

With the rather liberal Rules of Evidence applicable to litigation in the federal courts, many companies are faced with discovery requests for "all" the documents, books, and records relating to any aspect of the subject matter of the litigation. Implicit in these kinds of discovery demands is the belief that there will be legions of paralegals and associates billing at an exorbitant hourly rate for logging, indexing, coding and annotating all these documents, then eventually abstracting and summarizing them so that some equally overpriced group of senior associates and junior partners can review the documents and decide which ones they will present to the partners who will bill the client for reading them again.

Large, time-billing law firms see their litigation departments as profit centers and welcome omnibus discovery requests as an opportunity for substantial growth and profit. However, experience clearly establishes that in any lawsuit, no matter how large or complex, there are rarely more than a few thousand pages of key documents and only a dozen or so key witnesses.

One of the efficiencies barristers would bring to litigation in America is the need to conserve their own limited resources and time. A single barrister, not an overstaffed litigation department, would be responsible for the trial of an action. Since barristers must conduct the depositions of key witnesses and represent their clients at depositions, they would vigorously oppose the wholesale discovery waves brought on by attorneys seeking only to proliferate associate hours and increase billings.

Because of the need to conserve their most precious resource—personal professional time—barristers can be expected to insist that parties seeking discovery establish that the evidence sought to be discovered is relevant and material to the litigation, and that the witnesses sought to be produced are competent (in the legal sense) to give

evidence and testify. To this extent the interests of the Company, its management, and its barrister are identical; while the interests of a large time-billing law firm seeking to profit from delaying resolution of the litigation create an inherent conflict-of-interest with any client.

Litigation Support . . .

Litigation support demands a variety of clerical operations and different costs are associated with each operation. Finished document production includes typesetting, proofreading, and preparation of masters suitable for printing. Document production used to be done by printers who had spent many years as apprentices. Not only does it require keyboard skills and a proofreaders understanding of the English language, it requires a sensitivity to the quality of the finished document as representing both the law firm and the client.

Senior document production word processors earn $20.00 to $25.00 per hour as base pay. With the addition of fringe benefits and the cost of the equipment to support them, and the rental charges for the space in which they work is added, $40.00 to $50.00 per hour is not an unreasonable billing rate.

On the other hand, conventional production typing from dictation by a word processing pool can be obtained from commercial services at $20.00 to $30.00 per hour. Again allowing premium overhead charges because legal word processing operations are more demanding than general business typing, performing such services in house and billing at more than $35.00 an hour is unreasonable.

For other clerical chores even though they might be performed by clerks, the rate charged should be commensurate with that of basic word processing operators, because a litigation team has no place for any but skilled and experienced players. Those learning the work may be employed in an ancillary support capacity but the overhead associated with their training must be absorbed by the firm not paid for by the client. For this reason, the basic minimum clerical service hourly rate will be somewhere between $30.00 and $40.00 per hour.

The Arithmetic of Litigation Support . . .

For the most complicated litigation the services of a skilled document preparation specialist can be provided 24 hours a day, 7 days a week, 365 days a year, a total of 8,760 hours at a maximum cost of $438,000 assuming a $50.00 hourly rate. Considering the 50 page limit for briefs imposed by most appellate courts and many trial courts as well, and a 4 page per hour production rate for these specialists, any brief, no matter how complex can be prepared for any court in less than one 24 hour day and you can expect 35,040 high quality typeset pages “ready for camera” each year—a stack over five feet tall.

As far as word processing is concerned, again consider the nature of modern litigation. How many pages of keyboard input are going to be produced in a year in even the most complex litigation? Staff the word processing center for 24 hours a day, 7 days a week, 365 days a year, a total of 8,760 hours, and charge $40.00 per hour. Assuming average productivity of 10 pages per hour, that provides 87,600 pages of fresh new typewritten material (a stack over twelve feet tall) for a total cost of $350,400.00. Adding document clerk services for an additional 8,760 hours and allowing $30.00 per hour adds $262,800.

Grade school arithmetic belies the costs associated with modern litigation. For only $1,051,200.00 more than 87,000 pages of original input and more than 35,000 pages of finished high quality printed output can be produced. Any attempt to bill more than $1,051,200.00 a year for document production and word processing during any lawsuit, no matter how complex, is so unreasonable as to represent some new kind of fraud.

Computer Services . . .

The cost of computer services should be a basic element of any major litigation. It would be wise in litigation involving large numbers of documents to include the total cost of a dedicated in-house document management system. For major litigation, it is reasonable to budget the entire start up cost of a document management computer center located at the clients facility and accessible to counsel only subject to appropriate security precautions.

Litigation document management centers should be established running on dedicated computer systems. Company management must have full knowledge of who is accessing their documents, which documents are being accessed, and under what circumstances. Document scanning and data conversion should be provided by the Company in the way that is most cost effective for the Company not most profitable for the lawyers.

Law firms have no business becoming involved in document scanning and data production. Lawyers add work product to the document data base by annotating and consolidating the documents into meaningful information—meaningful to the client, counsel, and the courts.

Under no circumstances should any business allow documents to leave Company premises and be housed at a law firm. To pay a law firm for the cost of providing a secure depository for documents is ill-advised. Law firms are not in the business of providing security and have no expertise in this area.

The annual cost of LEXIS/NEXIS/WESTLAW or any other electronic database should also be budgeted and fixed at the start of any litigation.

Litigation as a Profit Center . . .

There is nothing inherently evil in establishing the litigation department of a large firm as a "profit center" provided the profit is earned as a result of efficiently providing effective legal services, and measured by the value of those services not merely the length of time it takes to provide them.

Unfortunately, so long as attorneys can make money and turn profits by losing major litigation and therefore providing a less than valuable service to their clients—often turning around to profit from the bankruptcy of their clients—the entire reward/compensation system for lawyers will remain skewed against American Business.

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