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# Audience Discussion

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# AUDIENCE DISCUSSION:*

PROF. CHARLES SILVER, UNIVERSITY OF TEXAS:

There was one thing I wanted to learn from this panel which I did not learn, so I will address it as a question. There seems to be near universal agreement that the hourly rate is a villain and a grossly inefficient method of billing lawyers' time. However, the market has not weeded it out. The state of Texas bar concluded a study of lawyer's billing practices in 1992 and over eighty percent of the lawyers in the state indicated that they bill on an hourly rate basis, at least some of the time. So, the question I have is, if Mr. MacDonald and Legalgard are out there policing bills and Mr. MacDonald does not agree to pay hourly rates any more because he believes that they are a source of fraud, why is the market rewarding attorneys for using this mechanism of regulating their fees?

DUNCAN MACDONALD:

I think what has been happening is that the market is not rewarding it. By way of analogy, if you look at Detroit and the cars they sold ten years ago, everybody was saying, "What is going on here? The Japanese are stealing market share and these guys are still making those silly old cars." It takes a long time to change, but it is debate and the kinds of things that we have been doing that in fact have been causing the changes. But, as I have said before, a lot of what we are doing, and I see it more and more in the market place, is trying to take as much work as you would otherwise historically have done through lawyers and give it to other parties, because they are easier to manage and the service is better. Firms I deal with are starting to get that message. In time, I think you are going to see more and more of this; this is the debate that is taking place and the move is toward privatization. If I am not mistaken, Richard Posner just gave a speech, the Harris lecture at Indiana University, that agreed with much of what I said today: that the market place is going to force these issues. The brave new world we are going into will

* Editor's note: This is an edited version of the audience question and answer portion of the conference on Gross Profits.



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be radically different from what we know today and hourly billing probably will be a victim.

JOHN MARQUESS:

I disagree with Duncan MacDonald. Our clients are probably the Fortune 3000, for want of a better term, and most of them are not moving to these alternative billing systems for the simple reason that they do not have enough data to have a comfort level with the new dollar figure that the law firm comes to them with. Thus, if Firm A comes back and says, "I will bid for your work, it is going to be $50,000 dollars;" Firm B says, "$65,000 dollars" and Firm C says "$100,000 dollars," do I go with the low bidder? Is that what my goal is? They do not have a comfort level noted that is a fair number either. So what a lot of clients are saying is: "Let me go the education route and understand what is going on. I will continue with my hourly system, but now I want to have a well managed hourly billing system because I still understand that there are sixty minutes in an hour, even though my lawyer does not always understand it. I am going to make sure he or she does." So I think that the alternative billing systems are a fad and will disappear faster than they get here. I think that the people still have a basic understanding of how many hours are in a day, and they will continue to go with that. They want a change in the way that it is done, they want to have a better handle on it to understand how it is done, and they want some technology to help them. However, I do not see this rush to go to alternative billing systems.

PROF. LISA LERMAN:

I would like to add just a brief comment. I think that I agree with John Marquess that a lot of clients seem to still prefer hourly billing and I think, as we do with our plumbers and our car repair people, that clients want what they believe to be an objective measure of the value of the work. If there is really very little relationship between the bills and number of hours spent, or if there is a huge inflation of the number of hours spent in order to generate a bigger bill, and if clients came to understand that, then I think that would lead a lot of clients to ask to be billed a different way.

PROF. CHARLES SILVER:

I wondered if people were not over-generalizing when talking about the hourly rate, by failing to distinguish amongst the contexts

in which hourly rates are employed. For example, insurance companies are among the largest consumers of legal services. They persistently compensate defense counsel on hourly rate bases and are relentlessly economically rational, in the sense that they try to minimize their costs whenever they can. My reaction when I see this kind of practice is to ask, "What advantage does it have for insurance companies to retain defense counsel on these terms rather than to come up with alternative terms?" In other words, I do not assume the irrationality of a practice as wide-spread as that of compensating defense counsel on an hourly rate basis. There could be a number of answers to this. For example, one answer is that an insurance company may be in a better posture in litigation when its opponent knows that it retains counsel on an hourly rate basis and is willing to spend an indefinite amount of money defending a case, regardless of the stake in the size of the claim in that case. That suggests a reason that a company would stick with a particular billing practice which, if you just looked at it generally when talking about hourly rates breeding incentives for overwork, is something that you might miss. I think before we predict the demise of the hourly rate, I would want to think more seriously about the economics of it and any particular context of its employment.

PROF. MARY DALY, FORDHAM UNIVERSITY:

I would like to direct a remark to something that Mr. Marquess said. You said that we should send a message to our students. Well, I think that Lisa Lerman's speech, my own experience, and the experience of just about everybody else in this room, proves that we do not have to send a message to our students. Our students understand that many of the activities you describe are fraud and they do not want any part of it. The problem is, what happens to them when they leave our classrooms after thirteen or fourteen weeks and they go out into the profession and they are socialized? You have two groups of students, one group will go out into the profession and they will be discouraged, disgusted by what they see and they will leave those firms. The other group will not. They will accept the values of the partners and they will adopt them as their own. Now, I think the crime ought to be punished, and there is another ethical lapse here that I do not think you have addressed. Where are the general counsel when they discover the kind of fraud that you have suggested today? I am a member of the disciplinary committee in New York. I

do not see letters coming to us from general counsel saying, "Look at what is going on." I think the general counsel are [involved] in this.

The final thing that I simply say is, if you want to talk about this as an effective device in classroom teaching, many of you will remember a few years ago a scandal in New York involving a very prominent lawyer, Harvey Meyerson. Mr. Meyerson was ultimately indicted and convicted for fraudulent billing. Some of it was double billing. The great thing is how his double billing ever came to light. The way it was discovered was, he was notorious for losing documents and two associates went into his office one night, legitimately looking for a lost document and came across the fraudulent billing. He was simply taking their hours and multiplying them by two and three. They talked with some other associates and ultimately three or four of them made a resolution, "We will leave the firm and once we have all have jobs, we will then report this to the client." And that is what they did. They left and the next day they sent a letter out to the client. That is a really terrific teaching tool. My students can identify with that. You have made this horrible discovery, but you have to protect yourself, your family, pay your mortgage, and send your kids to school. What is the ethical thing to do? I simply recommend the Harvey Meyerson story and the article on it that was in the National Law Journal about a year and a half ago, if you want to begin a classroom discussion of ethics and billing.

JOHN MARQUESS:

The single biggest debate or conflict we have with our own clients is, what do you do with the data that you get from us? The answer historically has been, "We will fire the firm and ask for our money back." But as general counsel, I am embarrassed by this because it has been my job all along to be on top of it. Besides, there is a business side to this thing: "The financial people do not like it. Now I get involved. If I publicize this, because I am a public company, with the SEC, I now have a congressional hearing. So let me just get rid of the law firm and not prosecute." One of the worst examples in seven years, was a Houston, Texas law firm that had people billing 6,000 hours a year, including secretaries in the law firm. We said every attorney in this firm should be disbarred. You should all go to jail; change or perish. The clients said, "Well, we are just going to fire the firm, let it be some else's problem." We hear that all the time. We have the same question. Clients make us sign non-disclosure agreements saying that we will not disclose anything and that

we will only disclose what we need to a court of appropriate jurisdiction. This means that in the event they get into a fee dispute, we will come and testify but otherwise our hands are bound. We do not like that either, so, this is kind of an emerging issue and it is the single biggest one we face every day. "What do we do with the data? Clients are hamstringing us. Should we let them hamstring us? How about you? You are the client, you have the data. Why do you not do something with it?" So it is a big problem. I do not know how to answer it other than to say that we know it is a problem and so do our clients. They are still struggling with what to do with it.

DUNCAN MACDONALD:

I want to comment and say that, in the case of the general counsel, by and large based on their experience and what they read in the newspapers, they make a rational economic decision, that to blow the whistle on someone who has arguably lied to you, is just to invite them to lie again and to get yourself into a very expensive skirmish, which you know from reading the newspaper rarely results in anybody getting punished. So the general counsel makes the decision, an economic decision, and manages it like a good manager of a business problem. Either do not give them business any more or, perhaps you harm their reputation in the market place. That is a smart way to deal with the problem.

There is one other thought that I wanted to get in here. One of the wickednesses that comes from this hourly billing, which we did not talk about, is the physical and mental harm that it invariably causes to associates. This includes the incredible hours they work, the lost lives, harmed families, gross sexism, etc. That ought to be part of the debate. I have known young people who have suffered mental and physical breakdowns because of the relentless beating they get from working on this hourly billing system to get 2400 hours a year billed. To me that is at least the crime we have been talking about today.

PROF. W. WILLIAM HODES, UNIVERSITY OF INDIANA:

I wanted to say virtually word for word what Mary Daly said, and just add one extra point on each end of it. I object as she does to the idea that there is something wrong with our pedagogy. You do not have to teach students that these things are wrong. Also, I would add that there is nothing wrong with this aspect of the rules either. There are plenty of things wrong with other aspects of the rules, but

you do not need better rules to solve this kind of problem. With respect to the enforcement of problems, again I think it is a responsibility that goes beyond mere whistle blowing by the affected clients. However, in cases where the people with the knowledge are lawyers there is an independent duty, *Himmel*[1] and others, that should be enforced. If you have to go around the block to get enforcement then, first, discipline some of the lawyers who knew about it but did not report it. Eventually that will get back to the lawyers who are engaging in the worst practices. You have pick your spots, but find the best cases.

Further, I would say that there is more responsibility with respect to the law professors as well. I can say this to you, Lisa, because I know you can take it. You have this information. None of these people are your clients. You are not a reporter. If you were in Massachusetts, what would your excuse be for not reporting some of the things that you found in Massachusetts? More generally it is not just you, but all of us who delve into this information. We have some responsibility that goes outside the classroom as well.

PROF. LISA LERMAN:

Let me answer that in a second, but first I want to comment on the rules question. I want a specific rule that would prohibit some of the practices that we know to exist; not to generate thousands upon thousands more disciplinary cases that our poor overworked system cannot handle anyway. I want a rule that an associate can take to the managing partner and say, "Look, it says here you are not allowed to bill two clients for one period of time. We are doing that and it is not allowed." Such a rule would be a tool for our students to use to be able to keep their jobs and confront the other lawyers.

Now as to the ethical question directed to me as to why I did not report any of this conduct; my relationship with my sources was an exceedingly delicate one. I do not believe that anyone would have agreed to talk to me, much less told me the things that they told me, if I did not promise that under no circumstances would I reveal their names, the names of the law firms or the names of the people that they talked about, to anyone else. I felt very strongly that it was worthwhile to let those stories see the light of day and it seemed to me that this was the only way to do that.

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1. Editor's note, the speaker is referring to In re Himmel, 533 N.E.2d 790 (Ill. 1988) (suspending an attorney for failing to report another attorney's misconduct).

JOHN MARQUESS:

I do not agree that your students know what is right or wrong about billing when they come out of law school and let me tell you why. I interview about 20 attorneys a month, of which 5 are typically people just getting out of law school who have not worked anywhere else. We have a check list of questions that we ask them and I must say that invariably their answers do not differ significantly from someone who has been practicing for 15 years. By way of example, a typical question would be, "You are travelling on an airplane and you are billing Client 1 for the travel time. Can you do work for Client 2 at the same time? And if you do, can you bill Client 2? Is not that double billing?" Invariably an answer comes back, "Well, but if I do not do that, I am just putting off until tomorrow what I could have done today." Next follow up question. "Okay, but if you do that tomorrow do you start billing again at nine o'clock in the morning?" I do not know whether it is common sense, business sense, ethics, their parents or something else. I do not know. All I can say is that these people do not have the clear-cut direction or understanding that we all like to think they do. Furthermore, their answers really do not change much from the fifteen-year attorney who, quite frankly, has been jaded now.

PROF. ROY SIMON:

One of the reasons that clients do not care is that a lot of the clients we are talking about are corporate clients. It is not their money, it is the shareholder's money. If it were the client's money then they would care.

DUNCAN MACDONALD:

I would just add that the evidence is in the numbers. If the problem is as massive as some people have said, and I suspect that it is, why isn't the system being inundated with complaints? There are reasons for it. I leave it up to you people to say what they are, but my guess is because they do not trust the system. They do not think it will provide justice and they do not think it works. So they look for other ways to deal with it.

To get back to what I said before, if there has to be a fix here I would suggest that you start becoming the vanguards of some of things I said. There is a structural problem here that takes care of a lot of it. If you get back to the Phillip Areeda issue, if you did lump sum billing no one would care if Phillip Areeda represented 80 cli-

ents in the same day, because it would not be an issue. But here we talk about 60 hour workdays and it is because we are driven by this crazy hourly method. Even if it is not going to evolve in that direction, some of us ought to be pushing it because it is the right way to go.

PROF. ROY SIMON:

This will be the last question. Burnele Powell is the Chair of the ABA Standing Committee on Lawyer Discipline. So he is the person to speak to about the discipline system.

PROF. BURNELE POWELL, UNIVERSITY OF NORTH CAROLINA:

I am not here to speak on behalf of the ABA. I simply want to make two comments. First, I would like to indicate that I agree with what the last three speakers had to say. The kinds of issues which you have surfaced are not issues that really warrant a re-write of the standards in terms of trying to explain to people that you do not steal from the client or that you do not engage in fraud. I think that the rule that is going to come from the panel, has come out in the last couple of minutes. That is, the panel has indicated for various reasons that it has decided that the thing to do is to "go along in order to get along." And now the panel is wondering why it is that their clients have also taken the view that "it is better to go along in order to get along." My point is that it is not better to go along in order to get along. But in fact, a system does exist which says to lawyers that if you are aware of wrongdoing on behalf of other lawyers, you have a duty to report it. I would think that as a lawyer I would be very reluctant to enter into any agreement under any circumstance that would make me play as before hand. I would not reveal information that came to my attention that was non-privileged information of wrong doing on behalf of some lawyer and this lawyer is some one other than my client. I just have a little difficulty with that on a fundamental level. I do not think the answer is to go along in order to get along.

The second comment I will make is a lot shorter. I think that much of this panel reveals that we are fighting the last war up here. I heard no mention at all, for instance, that for the last three years, over the length and breath of this country, we have been engaged in a debate as to whether we ought to endorse mandatory fee arbitration. In fact, a year ago the ABA formally endorsed an amendment to the

Model Rules for Lawyer's Disciplinary Enforcement which states that the standard across this country ought to be that whenever a client has any disagreement about a bill that they ought to be able to go into a mandatory fee situation and have it arbitrated. In addition, if there is no written agreement the burden ought to shift in favor of the client, and there ought to be a presumption that the bill is, in effect, an inappropriate bill. If you just think about that in terms of what it means about a radical shift taking place in the legal profession, it suggests a whole host of things that are already going on which, quite frankly, I have not heard this panel address.