

No time for a bad lawyer

Even judges are now fingering lawyers for mercantilism and the tyranny of billable hours.

Story Marcus Priest

Wagga Wagga accountant Andrew Robertson has just celebrated a very important anniversary. On July 1, he and his firm, Easdown & Partners, marked their first year of working without time sheets and six-minute units. Initial doubts that it could be done were replaced by a sense of total liberation: freedom from the six-minute unit and being judged by numbers on the time sheet. "It has been brilliant," says Robertson. "It has unleashed the potential that we and our staff have. Staff are not now responsible or reportable to us, only to the client."

Robertson's firm of 20 accountants has done what many in the legal profession are under pressure to do. But while accountants also have traditionally charged on a time basis, they are embracing alternative billing methods much more than their colleagues in the legal profession. "Most lawyers are not trained as business people so they don't know what their cost of production is," says Harris Cost Lawyers principal Elizabeth Harris. "They are risk averse and always see the worst-case scenario or work blowing out."

But soon lawyers may have no choice. The NSW government is about to make changes to the state's legal profession act requiring lawyers to give clients much clearer upfront estimates of legal costs and associated expenses after state cabinet approved recommendations by the two-year Legal Fees Review Panel. The report was referred to the Standing Committee of Attorneys-General this week, with the recommendation by NSW Attorney-General Bob Debus that other states and territories consider adopting the same changes.

It drew an immediate backlash from legal professional organisations, which say changes in new national model laws already have extensive fee disclosure requirements.

"Many clients will find it impossible to understand, adding to the stress of recourse to the law," ACT Law Society president Greg Walker says. "The new law is also likely to add to the cost of running a legal matter."

The problem for lawyers is that it is not only clients and governments which want an end to time-based billing. There is also pressure from senior members of the judiciary.

The review in NSW by the Legal Fees Panel came after state Chief Justice Jim Spigelman called in

2004 for an end to the "tyranny of the billable hour".

And earlier this year Chief Justice Murray Gleeson said there was "a concern about the pressure of mercantilism in the law". Former High Court Judge Michael McHugh said last year that the "cost of justice had now put the court out of the reach of the bulk of Australians. There are a number of reasons for it. One of them is time charging by lawyers."

The central problem with time billing is that it rewards inefficiency. The quicker work is done, the less a person is paid.

"There is a temptation to concentrate on the attainment of the targets, rather than the attainment of the success of the litigation in the shortest possible time, for the maximum benefit for the client," former WA chief justice David Malcolm said earlier this year.

Senior lawyers say time billing provides a simple and transparent method of calculating a client's fees. It provides an audit trail at the end of each month for a client to know exactly what work has been done.

But time billing is a relatively recent phenomenon in the legal profession. American lawyers started using it in the 1950s on the advice of management consultants. In 1958, the American Bar Association published *The 1958 Lawyer and His 1938 Dollar*, advising lawyers to become more business-like in their work practices by keeping time records.

However, it wasn't until the 1980s that time billing really took off in Australian firms. Before that a mix of complicated court scales fixing the amount to be charged for certain types of work and a lawyer's own judgement had determined a client's bill.

Older lawyers say they would determine the bill by the weight of the client's manilla folder.

"I managed to weigh files until I retired despite all the pressure on me to time cost," says David Scutts, who retired as chairman of Sydney firm Truman Hoyle at the end of June.

'The profession has convinced itself that what we sell is time, when in fact what we sell is skill.'

"Often, at the end of a matter, I would say to the client if we got a particularly good result: 'Well, I would normally charge you 10 grand, but you got a particularly good result. What about 15,000?'"

"It comes down to a relationship between the solicitor and the client; they are not going to use you again if you overcharge."

In this context, time billing provided a more transparent and concrete way of valuing work done. The problem is it has become more of a management tool to measure solicitors' productivity and a way of pricing legal services.

"The costing mechanism has now effectively become the



Changes in NSW will compel lawyers to give clients upfront estimates of legal costs.

Photo Louie Douvis

product," the report by the NSW Legal Fees Panel says.

"Anecdotal evidence suggests that most firms determine their hourly rates simply by comparing the rates charged by peers and pitching their own at a level seen to be competitive with them but consistent with the partners' desired image and income levels."

In one celebrated case, a lawyer reportedly billed 27 hours in one day. Last year, a survey by Sydney law firm consultancy Julian Midwinter and Associates concluded that there had been a huge increase in the number of billable hours expected by firms. In some firms, lawyers were required to bill 7½ hours a day.

"Seven-and-a-half chargeable

overall quality of the profession," the report says.

As a result, the pendulum is now beginning to swing back.

Despite this, few senior practitioners are willing to commit themselves publicly to alternative billing methods.

"Time billing makes it easy because they don't have to think about talking to their clients about price, whereas if you go to value billing they have actually to sit down with clients and discuss value," says professional services consultant David Smith, of Smithink.

Lawyers say that while fixed-fee billing is relatively straightforward for routine and commoditised work, such as conveyancing and wills, litigation is harder to value because it is uncertain in its scope and duration.

"I wish there was a better system," says Scutts.

Michael Bradley, the managing partner of law firm Gadens, is one of a few who will embrace the alternatives. More than half of the firm's work is billed through fixed-fee and success-based remuneration - including, increasingly, litigation.

Bradley says the rest of the profession is "sticking their head in the sand" if it believes time billing can be sustained.

"The writing is definitely on the wall," he says. "It has assisted the profession in convincing itself that what we sell is time, when in fact what we sell is skill."

The NSW Legal Fees Panel concludes that the key to facilitating a move away from time billing is improving communication between lawyers and their clients

to enable more transparency in pricing. That recommendation comes as no surprise to Harris.

For the past 17 years her firm has been at the pointy end of cost disputes between lawyers and their clients.

"Ninety per cent of the time the disputes have arisen because of a lack of communication," Harris says. "The hallmark is that there has not been any discussion along the way of what the costs are likely to be, and then when the bill goes out without any explanation from the lawyer."

Added Value Corporation consultant Thea Foster advises firms in the legal and accounting industry that they need to discuss and agree on a price before agreeing to take on a client or a particular matter.

"We are just not trained to talk about money in the first meeting and we go straight into problem-solving mode," says Foster.

"But you have to be able to look at people and say, 'for a job like that, this is what we charge'."

The key to doing that is being able to determine the value of work properly - and accepting that in some cases a lawyer or accountant will be up on the transaction and in other cases they will be down.

"It seems to be inevitable that the legal profession is going to have to move to value-based billing," says Bradley.

"It is still going to take some time to work its way through, and I think that is going to involve lawyers sharing risk with clients."

"That is difficult for the profession to swallow, but it will also be hard for the client as well."