

Jordan, Gretzky, Ruth and the Billable Hour

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Sports analogies always reverberate quite well in the legal industry, but when I started to consider the last few years of discussion around the “death of the billable hour” I didn’t think that I would arrive at a sports analogy. But the analogy is simply too easy to ignore.

A Google search on the phrase “billable hour” reveals two points: (1) that many top instances of that term (at least in Google’s index) relate to the “death” (or curse, downfall, etc.) of the practice, as opposed to explaining what the billable hour is or a similar academic discussion, and (2) the “death” of the billable hour has been a point of discussion for at least 10 years. See <http://bit.ly/MnjGnp>.

Both points are interesting, but it’s the latter point that is of primary relevance. The fact is that a wide variety of reporters, practitioners, scholars, legal vendors, clients, and consultants have chosen to write and comment on, and often advocate for, the demise of the billable hour for at least a decade, to very little effect. Why is this? Is the dialog on the billable hour’s health simply off-base or poorly articulated?

I would argue that the premise of the billable hour disappearing or falling out of favor ignores a particular aspect of economic theory: all roads always have and always will lead back to the cost required to produce a good or service as a key measure of its value. Many economists refer to this concept as the Labor Theory of Value (or “LTV”), which has roots that date back to Aristotle and later, Benjamin Franklin.

For professional services such as lawyering, the production cost is the cost of the lawyer(s) involved in providing the services, and all lawyers, whether employed by a law firm, in-house or otherwise, are paid based on the number of hours they work. It may not be immediately obvious to any lawyer who earns a straight annual salary (e.g., in-house), but stop and take a look at your paycheck. It very likely breaks down your working life into the number of hours you worked (or were assumed to have worked) in each pay period. The hourly rate derived from those hours represents what your employer believes to be an appropriate measure of payment to you for your time, or, in other words, the net value of your services to the employer, expressed in the most universal, irrefutable measure: time.

There’s nothing earth-shattering about this, and it’s been the basis for how lawyers are compensated, by their employers and their clients alike, for decades if not centuries. Starting with our first job after law school, we’re all conditioned to use time as the basis for evaluating the value of our work.

This was never more clear to me than when I worked at Pangea3, the legal process outsourcing provider. Despite our best efforts to be “innovative” in terms of how we priced our services, clients and prospective clients always found shelter in the billable hour. Offers of unitized rates for drafting and negotiating contracts were always met with something like “And how many hours of work does that represent?” It quickly became clear that although we were doing what the market had asked us to do (i.e., offer fixed, unitized and other alternative fee arrangements), the only way that the market could understand the value of our pricing was to stack it against the only measure of value on which we’ve all been conditioned to rely: time.

So, in my view the billable hour, at least as a point of reference, is not leaving us any time soon. I also believe that the dialog on the death of the billable hour will endure, which brings me to my sports analogy: every sport has its icon, it’s timeless superstar, that single player who is cited by experts and amateurs alike as the one against whom all others should be measured. Jordan, Gretzky, Ruth. The list goes on.

That’s the billable hour. Just like our greatest sports heroes, all other expressions of the value of legal work will forever be measured against the billable hour. Further, it will always be acceptable to re-evaluate whether the billable hour is still the standard by which all other pricing is to be measured.

Once lawyers and others who buy and sell legal services acknowledge this concept en masse, I believe that we will all take a much-needed leap forward in confidently buying and selling legal services under pricing constructs other than the billable hour.