

Lawyers' hourly rates too high? There's an elephant in the room

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I read with interest the report of the Centre for Policy Studies on “*The Price of Law*”.

The attention-grabbing headline emerging from the report and picked up by the national media this morning is that partners in the top commercial law firms are charging over £1,000 per hour and that the traditional time-charging method of billing is unsustainable because access to justice is being denied to clients.

The causes of this legal costs bonanza are said to be the complexity of the UK tax and legal systems, a lack of transparency in pricing and a lack of competition on the market.

The answer is thought to be that steps should be taken to ensure fair pricing, leading to a move away from the hourly charging rate, a point that has been echoed by senior members of the judiciary this week in the context of the costs of civil and commercial litigation.

But there are a number of wider points that should be made to set this report in its proper context

1. A lot of the work of the top commercial firms is highly complex and with an international dimension. There are very few firms that are able to do that work and the rates they charge reflect the skills that they are able to deploy. I doubt that clients would be prepared to pay such high rates if they were not receiving value for money.

2. However, in the important field of civil and commercial litigation the report ignores the rise of specialist boutique law firms which have the ability to compete with the top commercial firms at very substantially lower cost. My own firm Humphries Kerstetter was founded in 2009, after having spent nearly 25 years in a magic circle firm. More than six years later, the



Strong words:
The
Independent
devoted its
front page to
the report

charging rates are the same as they were when the firm was founded and we presently have no plans to increase them.

By way of example, our average partner rate is £365 per hour and our senior associate rate is £200 per hour. These rates are applicable to all clients, whether they be banks, major corporations or individuals. There are a number of other boutiques who compete with us in this market and, as a group, these specialist firms are increasingly drawing work away from the much larger commercial firms.

3. The boutiques will offer clients in appropriate cases whatever charging structure the clients want, sharing the risks of the litigation with their clients and in some cases removing them entirely. We will handle cases at hourly rates, for fixed fees (for part or all of the case), with floors and ceilings, wholly or partly contingent upon success, with or without litigation funding and insurance for opponents' costs or *pro bono* (in deserving cases). In fact, we will offer clients whatever charging arrangements we are legally permitted to offer.

Thus, for example, we would like to offer partial DBAs but we are not legally permitted to do so.

These innovative arrangements are the future. They are not as yet generally offered by the larger firms, or at least not as widely as in the boutiques; but, fast-forward ten years and I have a strong feeling that the position will have changed dramatically.

4. However, clients should be wary of any reports suggesting that hourly rates should be killed off. The system requires hourly rates to be used even where other fee arrangements are superimposed above them. This is because of the need to evidence claims for costs in successful cases due to the "*costs follow the event*" system that operates in UK litigation. Now it is necessary to file costs budgets to manage the costs of the litigation which are themselves based on hourly rates. There is a huge costs industry built up around hourly rates charging and there are vested interests that will fight hard to prevent any innovation that negatively impacts its business model.

The system supports the concept of hourly rates because it is not thought fair to inflict on other parties the risk of having to pay higher charges that might flow from the client's preferred charging structure.

5. There is an elephant in the room that nobody is mentioning. UK litigation costs are too high, but not necessarily because of hourly rates.

At a stroke I could single-handedly reduce the cost of UK civil and commercial litigation by at least 50% across the board. But it will never happen.

Why? The judiciary is wedded to the idea that the court-mandated disclosure of relevant documents ensures a higher quality of decision-making and therefore a better prospect of justice. So it may; but it has become, practically speaking, unaffordable.

Litigation is by its nature retrospective. We need to look back at documents that have been generated normally over a period of a few or sometimes many years.

In the present age of electronic data the disclosure of documents is no mean feat even in a fairly moderate case. It often involves outsourcing to electronic disclosure providers who themselves are not cheap. Yet how many cases end up being decided differently because of disclosure documents that would have remained hidden in a different system? Not many in my experience – nowhere near enough to justify the money wasted on the disclosure process.

And nobody suggests that the litigation systems in France or Germany or many other overseas systems, or in international arbitration, are ineffective because they do not provide for disclosure.

The most important step needed to get litigation costs under control, the most crucial innovation needed to increase access to justice, is to replace disclosure with a mandatory regime in which no documents are required to be disclosed unless a party can make a case that a specific, identifiable document needs to be disclosed in the interests of justice or to save costs.

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