

Work InBalance

By Deborah
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Facing the FACTS: Introducing Work/Life Choices for All Firm Lawyers Within the Billable Hour Model

This column is the last of six articles that will be written this year about the balancing and juggling act that we all experience as busy lawyers trying to keep our work and personal lives in order and balance. It is our hope that this series of articles will spark a meaningful dialogue and assist our readers with managing their busy lives.



Deborah Epstein Henry

Work/life satisfaction is at an all-time low in law firms.¹ To address work/life challenges, we need to face the FACTS—a new methodology that revolutionizes the way we approach the billable hour model and enables lawyers to meet billable hour demands while offering all lawyers work/life choices. FACTS stands for Fixed, Annualized, Core, Targeted, and Shared Hours, and all firm lawyers fit into at least one of these categories. Thus, work/life balance choices become a reality, not just a fantasy.

Why Face the FACTS?

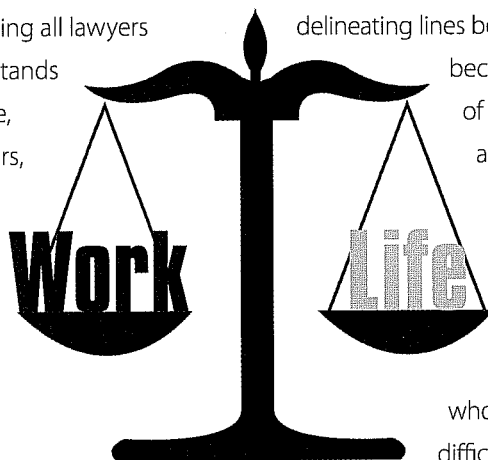
The pervasive work/life balance dissatisfaction across the profession (not just among working mothers) is largely attributable to three converging factors. First, lawyers are working more hours than ever despite the fixed 24-hour day. In 1965, the American Bar Association found that American lawyers billed between 1,200 and 1,600 hours annually.² Today, the expectation is often 2,000 to 2,200 hours³ or more. A recent Massachusetts Institute of Technology

study found that attorneys cite long hours as an important factor in leaving their firms.⁴

Second, technology has given lawyers the gift of flexibility but it has also led to around-the-clock availability. Lawyers are suffering from greater work/life conflict and difficulty delineating lines between work and home because of the expectations of immediate responsiveness and accessibility,⁵ along with increased demands of parenting and community. More than 60 percent of women and 40 percent of men lawyers who leave firm practice cite difficulty integrating work with family and personal life.⁶ The

ease of technology has also enabled large firms to compete in global markets and time zones, furthering work/life challenges for lawyers.

Third, generational shifts and changes in demographics are driving workforce change. Research supports that the 80 million “millennials” or “Generation Y” individuals—born between 1980 and 2000—will be the largest consumer and employee group in U.S. history, and they will not want to make the same sac-



rifices “traditionalists”⁷ and “boomers” made.⁸ Millennials are characterized as seeing work as one of multiple priorities, valuing things other than income and status as primary in life, and thus willing to make trade-offs to live their values.⁹ They are typically described as confident, impatient, eager to live life now, pro-education, goal-oriented, socially conscious, highly tolerant, plugged in to technology, parallel thinkers, and family-centric.¹⁰ The 46 million “Generation X” members born between 1965 and 1980 are also less inclined to conform to existing models. They are typically self-reliant, prone to rule-morphing, comfortable accessing a wide variety of information, and tend to place loyalty to friends above loyalty to institutions.¹¹

In April 2007, two male Stanford Law School students sent 100 letters to the nation’s top law firms, requesting that firms either switch to billing systems that charge clients per transaction, not per hour, or expect lower billable hours of associates, with improved work/life balance in exchange for lower salaries.¹² As one proponent, Craig Holt Segall, put it, “[t]he market doesn’t determine what’s right. We the students can determine the market. The way firms work now does not serve their clients, the community or the associates.”¹³ Andrew Canter, Segall’s partner in the initiative, added, “[l]aw students want firms to be upfront about expectations and whether or not they are making real progress on the issues associates care about.”¹⁴

Law firm attrition figures demonstrate that the current billable-hours model is not working. According to a 2005 report of the National Association for Law Placement Foundation that tracked associates from 2002 to 2004, 78 percent of both female and male associates leave their firms within five years.¹⁵ This attrition does not come cheap. By conservative estimates, it costs a law firm \$200,000 to \$500,000 to replace a second-year associate.¹⁶ Law firms claiming to rely on the attrition model and “up or out” approach still want to be able to influence which associates leave.

Eliminating billable hours is one option.¹⁷ However, in response to the converging work/life dissatisfaction factors, law firms can also make changes within the billable hour structure. This article introduces the FACTS methodology to provide work/life choices for all lawyers within the billable hour model while continuing to meet firms’ economic needs.

Target Hours as the Foundation for FACTS

The FACTS methodology hinges on replacing the terms “full time” and “part time” with Target Hours (the “T” in FACTS). “Full time” and “part time” are misnomers that result in stigmatization (because they are not uniformly defined or applied) and inequity (because salary and treatment do not match contribution). “Part-time” law firm lawyers typically work a 40-hour week, when billable and non-billable hours are combined. For associates at

the same firm in the same year, a “full-time” mergers and acquisitions lawyer may bill 2,300 hours and a “full-time” trusts and estates lawyer may bill 1,800 hours, while a “part-time” litigator may bill 1,800 hours and a “part-time” family lawyer may bill 1,500 hours. Just as areas of specialization may affect billable hour demands, billing also varies depending on the stage of a lawyer’s career or the firm at which a lawyer works. A “full-time” lawyer the year before being considered for partnership might bill 500 more hours than a more seasoned “full-time” partner in the same firm who is spending more time on business development or firm management. Similarly, a small firm lawyer’s “full time” might be hundreds of hours less than a large firm lawyer’s “full time.”

Under FACTS, every lawyer would annually evaluate his or her billable and non-billable Target Hours for the upcoming billing cycle.¹⁸ (Associates would do so at review time with supervisors and/or department chairs.) To set Target Hours, I recommend that firms internally publish their average billable and non-billable hours by category—attorneys grouped by department, years in practice, and designation such as junior, midlevel, and senior associate, counsel, non-equity partner (where applicable), and equity partner. Those averages would then be considered, along with the individual attorney’s average billable and non-billable hours reached over the past two years and the accompanying circumstances.¹⁹

The same determination would be made for lawyers who propose to work fewer Target Hours than average. Meetings with supervisors and/or department chairs would ensure that business and individual needs are met. Those working fewer Target Hours would remain eligible for partnership, assuming they meet the criteria for advancement (with a potential delay in consideration for some). High-billing attorneys could elect to continue to bill hours that exceed firm averages.

To determine compensation for associates, a salary range would be preset for each class by department based on average Target Hours. Individual compensation would be further assessed by factoring in the attorney's billable and non-billable Target Hours, quality of work, contribution to the operation of the firm and business generation, where appropriate.²⁰

Target Hours and associated compensation would be revisited each year to assess whether the lawyer met or exceeded his or her Target Hours, the lawyer's other contributions to firm operation, and anticipated goals for the next year.

Although Target Hours provide the framework for FACTS, they do not relate to where, what, how, and when work gets done. These are the focus of

the other four prongs in FACTS. After setting Target Hours, lawyers who want to further delineate hours and scheduling issues would also discuss at their annual review whether to work Fixed, Annualized, Core, and/or Shared Hours. Lawyers without additional scheduling requests would simply rely on their billable and non-billable Target Hours.

Fixed Hours

Some lawyers are willing to make sacrifices in their quality of work in exchange for more control over their schedules. Firms, in turn, often have certain work that is more predictable, but perhaps less high profile or exciting, resulting in Fixed Hours (the "F" in FACTS). This work has historically been assigned to contract attorneys. It is not always available, and therefore may be offered on a temporary basis. Lawyers may choose to work Fixed Hours only temporarily or during a certain life stage, and later resume more challenging work, with its often more irregular hours, if the business needs exist.²¹

Annualized Hours

Some lawyers want fewer hours but do not want to sacrifice the quality of their work. They are willing to accept the often erratic hours and expectation of 24/7 availability but prefer more frequent or longer reprieves between high-intensity deals or matters. These lawyers should opt for Annualized Hours (the "A" in FACTS) where they are available whenever

necessary for high-profile deals or matters, followed by breaks before being staffed again. For Annualized Hours (gaining the most interest in corporate departments), it is preferable to track hours quarterly rather than monthly, so that as the year progresses, the attorney and firm can make necessary adjustments to ensure that they are mutually on pace with the Target Hours.

Core Hours

Some lawyers want quality work while working less conventional hours. Core Hours (the "C" in FACTS) would apply to these lawyers. Core Hours refers to blocks of key hours in most or all workdays when a firm would expect the lawyer to be working and/or available. Core Hours would apply to those who telecommute (from home or another location)²² and those who work unconventional hours in the office, whether they are higher, average, or lower Target Hours.

To determine Core Hours for an individual attorney, the department chair would consult with supervisors and meet with the attorney to determine the lawyer's workweek schedule and location preferences and match them with departmental and client demands.²³ For example, a working parent may work "bus-stop hours" from home from 9:00 to 3:00 two days per week, with two longer days in the office. Another lawyer, who is a late riser or has a long commute, may prefer to work in the office from noon to 10:00 p.m.

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daily. It is critical that lawyers working Core Hours, and especially those working fewer Target Hours, maintain excellent communication and remain flexible and available for crises, unexpected deadlines, and client needs during non-Core Hours.²⁴ In turn, the firm needs to be flexible and allow for changes in scheduling when matters are not pressing.²⁵ Many firm lawyers are working Core Hours unofficially. The benefit of officially acknowledging these schedules is to avoid ad hoc treatment, secrecy, and the crises that result from not being able to reach someone who has not disclosed a planned absence from the office.

Shared Hours

Some lawyers seek fewer hours and more predictability and control in their lives, but not at the expense of losing high-quality work. For these lawyers, "Shared Hours" (the "S" in FACTS) is the right fit, so long as the lawyers are organized and adept communicators. The job share enables two attorneys to share the same position and functions, with each stepping into the other's shoes on a preset rotating basis (e.g., 60 percent schedule and salary for each, Monday–Wednesday and Wednesday–Friday) to share the

workload of one lawyer.²⁶ By offering coverage in the office five days a week, Shared Hours potentially minimizes many of the perceived "part-time" pitfalls, including continued schedule unpredictability, the need to always be available, working more hours than were negotiated, not getting paid for excess hours, difficulty delineating lines between work and home, and overpaying for child care.²⁷ With the job-share team covering the office all week, management concerns about responsiveness and accessibility, and lawyer concerns about their schedules not being honored, should be minimized.²⁸

Implementation and Written Policy

To successfully implement FACTS, it is critical to have a written policy whose tone does not suggest accommodation, but instead, stresses business need. It is also important to establish a level of transparency concerning

the various options. Management and supervisory partners should demonstrate leadership and support through openness and create a community among the lawyers availing themselves of the program variations. Ongoing flexibility and communication by the lawyer and employer are key, as is designating a point person to oversee the lawyers working different schedules. Lawyers need to be trained to meet the demands within their chosen schedules, and their supervisors need to be trained to become effective at delegating and supervising, so that assigning and mentoring do not become unnecessarily burdensome or complicated. Firm-wide training concerning why it is in the firm's financial interest to endorse alternative work methodologies within the billable-hour model will help increase support and minimize colleague resentment.

Additionally, a written policy should be drafted to address:

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eligibility; assignments; training; technology; compensation; benefits; bonuses; vacations; advancement; applicability to partners; emergency contact information; minimum number of days in the office, if any; and, a firm-designated point person to review hours, schedules, work assignments, and opportunities for promotion. It should also address the process for determining billable and non-billable Target Hours, the annual review of hours and schedules, how to use the Core Hours' range of options, and the expectation of responsiveness for non-Core Hours.

In Sum

The goal of FACTS is to create a new way to manipulate the traditional billable hour to meet different lawyers' work/life needs and recognize that lawyers' hours may change at different stages of their career trajectory.²⁹ This transparency will benefit firms, which will be better able to plan, for example, a millennial's anticipated commitment or a baby boomer's use of lower Target Hours to phase into retirement.

The unrealized benefit of the billable hour is its flexibility—a firm generates the same revenue from a lawyer billing from home as one in the office. Yet this benefit has never

been fully capitalized upon, largely due to law firms' face-time culture. By creating a methodology with openness where everyone is in the same system,³⁰ firms can better utilize and understand our workforce's contributions and more accurately reflect the actual billable and non-billable hours of all lawyers. In this way, firms can help minimize the stigma traditionally attached to lawyers working flexible hours and create greater equity and flexibility among all lawyers. In turn, firms will maximize their opportunities to attract and retain high-quality and satisfied lawyers, with greater continuity for clients and productivity for law firms. **DB**

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NOTES

1. Mona Harrington and Helen Hsi, "Women Lawyers and Obstacles to Leadership" (MIT Workplace Center) 2007 at 13, Chart 2(a) and (b).
2. Adam Liptak, "Stop the Clock: Critics Call the Billable Hour a Legal Fiction," *The New York Times* (Oct. 29, 2002).
3. Scott Turow, "The Billable Hour Must Die," *ABA Journal* (Aug. 2007).
4. Harrington and Hsi, *supra* note 1, at 14–15 and Table 2(c).
5. See e.g., Lauren Stiller Rikleen, *Ending the Gauntlet: Removing Barriers to Women's Success in the Law* at 248–49 (Thomson/Legalworks 2006); see also Maggie Jackson, *What's Happening to Home?* at 21–38 (Sorin Books 2002).

6. Harrington and Hsi, *supra* note 1, at 13, Chart 2(a) and (b).
7. BSG Concours, "Engaging Today's Young Employees (Preliminary Report)," at 5–14, 46 (2007). There are 59 million "traditionalists" born between 1928 and 1945 who are characterized as being comfortable with hierarchy, loyal to institutions, respectful of authority, and seen as rule makers and conformists, motivated by financial rewards and security. *Id.* at 46.
8. There are 76 million "baby boomers" born between 1946 and 1964, characterized as antiauthoritarian, idealistic, motivated to change the world, and competitive. *Id.*
9. *Id.* at 5–14, 46.
10. *Id.*
11. *Id.* at 5, 46.
12. John Roemer, "Students Prod Big Firms to Change," *San Francisco Daily Journal* (Apr. 10, 2007).
13. *Id.*
14. *Id.*
15. Paula A. Patton and Cynthia L. Spanhel, "Toward Effective Management of Associate Mobility. A Status Report on Attrition," (Overland Park, Kan., The NALP Foundation) 2005 at 21, Table 6. For women associates of color by their fifth year of practice, the figure is the highest at 81 percent (compared to 78 percent for women generally). *Id.* at 24, Table 12, 22, 8.
16. Joan Williams and Cynthia Thomas Calvert, "Balanced Hours: Effective Part-Time Policies for Washington Law Firms," at 7, The Project for Attorney Retention Final Report, 2nd. ed. (Aug. 2001).
17. See, e.g., Heller Ehrman LLP Opt-in Project Report (May 31, 2007); Turow, *supra* note 3.
18. The FACTS methodology is intended for all lawyers, including partners, and law firms can tailor the recommendations herein to the varying ways that partners differ.
19. Other approaches include firms' setting varying minimum Target Hours based on departmental needs and stages of practice (with or without factoring in attorneys'

prior hours). These approaches are not preferred.

20. Methods of compensating partners varies widely, but the FACTS framework can be generally adapted to partners.

21. Historically, some "part-time" lawyers did this type of predictable work (some by choice, others not) while other "part-time" lawyers took a reduced workload with highly challenging work. The benefit of separately labeling Fixed Hours work is to avoid confusing and stigmatizing those lawyers who work lower Target Hours but who engage in highly challenging work to advance.

22. Depending on firm culture and other circumstances, some firms may require that lawyers working Core Hours be in the office a minimum number of days a week while other firms may allow lawyers to telecommute all week. For firms concerned that attorneys outside the office will not share in the responsibility of emergency work, they can set up a rotat-

ing schedule where different attorneys are notified in advance that they are "on weekend call" a Friday afternoon through the weekend and if a new matter or deal comes in during that time frame, they should expect the call. Those working lower Target Hours and paid a proportionate reduction would be included less frequently in the rotating schedule.

23. The less preferred approach is for firms to assign across-the-board Core Hours.

24. See Deborah Epstein Henry, "Prevailing Principles to Make Reduced Hour Schedules Succeed," *Diversity & the Bar* (Sept./Oct. 2007), <http://www.flextime lawyers.com/art.asp>.

25. *Id.*

26. See Deborah Epstein Henry, "Stepping Into Your Shoes: It's Time for Job-Shares in Law Firms," *Diversity & the Bar* (July/Aug. 2007), <http://www.flextimelawyers.com/art.asp>.

27. *Id.*

28. *Id.*

29. This notion of work/life demands changing over the course of a professional's career is gaining traction in the accounting profession. See Cathleen Benko and Anne Weisberg, "Why Flexible Work Arrangements Are Not the Answer: The Case for Career Customization," *Deloitte & Touche USA LLP* (Dec. 2005).

30. Deloitte's career customization program is founded on transparency and accessibility for all employees. *Id.*



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