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The Billable Hour Is Dead; Long Live The Billable Hour

The French would say "Le roi est mort, vive le roi" (the king is dead, long live the king) when one king died and sovereignty was immediately transferred to the new king. That way, there would always be a king. Even though the old and new kings were often quite different, both were called king.

So it similarly goes with the billable hour. The time when firms had free reign to not only set their hourly rate but also define for themselves what constitutes an hour's worth of work is over. But at same time, the billable hour will continue as one of the means of evaluating attorneys' value.

It was not until the 1960's and early 1970's that billable hours became the standard for law firms to use in charging their clients. Before that time, the way lawyers and law firms charged their clients went through many iterations, but mostly the charges were an agreed-upon flat fee. Over time, the flat fee was variously viewed as a set amount that could be charged, a minimum or maximum amount that could be charged, or a suggested amount that could be added to or subtracted from depending on the services rendered.

The concept behind all such amounts was to attempt to put a value on the service provided by the particular attorney providing the service. In arriving at the fee, things like experience, reputation, and difficulty of the task were all taken into account. When the task was complete, the client could adjust the fee depending on the outcome. The bottom line was that the lawyer would be paid for the value he or she provided to the client.

As the need for law firms grew, due to the increasing complexity of the laws and the society to which they related, law firms began to use billable hours to help account for what lawyers were doing, as well as the cost and benefit of each lawyer in the firm. It became clear that billable hours could not only be used to determine the value of the service, but also determine the profits of the firm. The connection to profits created pressures that, over time, have been a source of inappropriate billing practices, including so called "padding" and doing unnecessary work, among other things.

These practices and the increasing sophistication of clients led clients to employ mechanisms to counteract improper billing practices, such as the use of guidelines and audits. They have also led clients to seek out alternative fee arrangements, like going back to the flat fee. The flat fee alternative was heavily pushed by some clients over the past 10 years, but more recently flat fees have been used less frequently due to intrinsic problems, such as conflicts and escape clauses, which have created difficulties for attorneys and clients alike.

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In the new case of *Gaines v. Fidelity National Title Insurance*, the California Supreme Court clarified what constitutes a "complete stay" for purposes of tolling Code of Civil Procedure section 583.310′s five-year limit to bring a case to trial. The Court ruled that a stay of the proceedings to allow the parties to engage in mediation was not a "complete stay" of the action and, therefore, did not toll section 583.310's requirement that an action "be brought to trial within five years after the action is commenced against the defendant."

The case stemmed from the sale of the plaintiff's home after she and her husband missed multiple mortgage payments. The plaintiff alleged that the defendants deceived her into selling the home to the defendants. After the plaintiff failed to bring the case to trial within five years of filing, the defendants moved to dismiss the case, and the trial court granted the motion.

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Critical Issues To Consider In Naming A Trustee

When our clients come in to prepare their estate plans, one of the toughest and most important decisions they need to make, and tend to struggle with, is who to name as their successor trustee (for their trust) or executor (for their will). The successor trustee or executor is the person who will administer your estate upon your death. This may initially sound like a simple task, but clients often struggle to decide who is right for the job.

Responsibility of Trustee/Executor

The successor trustee or executor is charged with all actions necessary to administer your estate upon your death. Initially, this will entail marshaling and accounting for all of your assets. This person will also need to locate your estate plan to determine how you intended for your assets to be administered and distributed. During administration, the trustee/executor will be responsible for determining title of all of your assets, how to effect the sale or distribution of each asset, and communicating with each beneficiary regarding these actions. The trustee or executor is obligated to pay the decedent's debts and tax liabilities.

Liability of Trustee/Executor

Once the trustee or executor accepts his or her role, the law imposes certain fiduciary duties upon them. There are monetary consequences, personal to the trustee or executor, for any breaches of these duties. A prudent and reasonable person will keep these fiduciary duties in mind as he or she navigates through administration of the estate.

Compensation of Trustee/Executor

The trustee or executor is entitled to compensation. If acting as an executor, the person is entitled to fees set by California law; if acting as trustee, the fees can be set in the trust declaration. If the trustee is a professional fiduciary, he or she typically has set fees that likely will be a percentage of the entire value of the estate. A professional fiduciary's fees can end up being unnecessarily large with a simple estate administration, especially if the administration lasts for a significant period of time (i.e. when sub-trusts are set up to last for many years).

Options for Naming Trustee/Executor

When determining who to appoint as your trustee or executor, you should consider the responsibilities that person will be charged with. There are three basic options when naming a trustee or executor: a family member (beneficiary or non-beneficiary), a friend or trusted professional, or a professional fiduciary (named or to be determined after your death). Many clients decide to name a family member simply because the person is trusted, and because placing such a significant responsibility on a non-family member is often viewed as a burden. But keep in mind that the trustee or executor can be compensated for his or her troubles. When naming a family member, you should also consider your relationship with the beneficiaries. The trust administration process is often complicated and confusing, and can seem overwhelming at times. The emotions and conflicts that arise as a result of family dynamics can make that process even more difficult. A third-party trustee or executor may be able to separate these emotions from the administration of the estate.

Ultimately, it is more important to name someone who will impartially, reasonably, prudently, and timely administer your estate. And, as long as the trust or will remains revocable, you can always change the named trustee or executor if circumstances change. For more information about naming trustees, contact Darcie Colihan in LGC's San Diego office.

LGC Attorney Appears On "Real Talk" Show

Darcie Colihan

LGC associate Darcie Colihan appeared on ESPN radio's Real Talk San Diego on March 23, and discussed the importance of having a well-prepared estate plan, as well some of the unfortunate pitfalls and consequences of not doing so.

Ms. Colihan provided some valuable tips on how to start planning for the future, including preparing an estate plan that is right for you. She also provided guidance for people who are in the process of trying to navigate administration of an estate.

You can watch a clip of the show by clicking here. Or, click here to listen to the podcast of the entire episode.

LGC's trusts and estates attorneys work closely with our clients to understand their goals, needs, and wishes, and tailor testamentary documents to best meet their situations. For more information about how LGC can help protect your interests for future generations, contact Darcie in LGC's San Diego office.

Appellate Decision Clarifies Five-Year Rule

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On appeal, the plaintiff relied on subdivisions (b) and (c) of section 583.310, which provide that the five-year statutory timeframe is tolled during periods of time where "[p]rosecution or trial of the action was stayed or enjoined or [b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile." The plaintiff argued that various delays in the course of pretrial proceedings satisfied the foregoing exceptions, including the 120-day period where the trial court stayed the action, vacated the trial date, and ordered mediation.

In evaluating the plaintiff's arguments, the Court first analyzed whether the stay was a "complete" stay of the action that would toll the statute, or a mere "partial" stay. To be a "complete" stay, it must "freeze a proceeding for an indefinite period, until the occurrence of an event that is usually extrinsic to the litigation and beyond the plaintiff's control," such as waiting for the resolution of a related appeal.

In this case, the trial court's order directed the parties to respond to previously served and outstanding discovery and to mediate, both of which were events related to the litigation that moved the case "forward." Thus, despite the fact that the order also vacated the parties' trial date, the stay was not "complete" and did not toll the five-year timeframe.

Second, the Court considered whether the five-year statute could be tolled on the basis of the exception for periods of time where it is "impossible, impracticable, or futile to bring the action to trial." Whether it is impossible to bring an action to trial during a given period of time depends on the unique facts of each situation, and the Court noted it would not toll the statute during mere "period[s] of time during which the plaintiff does not have it within his power to bring the case to trial."

Section 538.310's time limits, the Court explained, already contemplate the reality that getting to trial is a lengthy, multi-step process. Instead, the exception is meant to address events outside the plaintiff's control and extrinsic to the litigation that prevent the parties from "moving the case toward trial" and "deprive the plaintiff of a substantial portion of the five-year" period of time.

Here, because the parties participated in mediation on their own accord, the Court felt that any resulting delay in moving toward trial was within the parties' control, not due to outside forces. Thus, the time spent in mediation did not warrant tolling the statute.

This case demonstrates the strict application of the five-year limitation on bringing actions to trial, and the limited instances in which a "stay" will toll the deadline. It is significant because several jurisdictions in California, most notably the complex division of the Los Angeles Superior Court, known as Central Civil West, frequently impose partial stays on cases to coordinate discovery or facilitate mediation. Under this precedent, such partial stays likely will not toll the five-year limit to bring a case to trial.

The five-year rule is "jurisdictional," meaning a violation will result in dismissal of a case, no matter how meritorious. Given the steep consequences, parties should conservatively work under the theory that partial stays will not toll the timeframes of section 583.310.

For more information about the case and its significance, please contact Danica Brustkern in LGC's San Diego office.

Partner Chris Schmitthenner Selected To Rising Stars

LGC is pleased to announce that Chris Schmitthenner, a partner in LGC's San Diego office, was selected by *Super Lawyers Magazine* to its 2016 list of Rising Stars. He was elected to the list of Rising Stars in the category of civil litigation for the second straight year.

The annual Rising Stars list is a distinction given to the top 2.5% of lawyers under 40 years old. Honorees are determined through Super Lawyers' selection process, which includes peer nomination, evaluation in 12 categories, and peer review of a panel of lawyers within the honoree's practice area.

Mr. Schmitthenner's civil litigation practice includes personal injury, bad faith, construction claims, contract disputes, class actions, and commercial litigation.

Click here for more about the selection process for Super Lawyers' Rising Stars.

The Billable Hour Is Dead; Long Live The Billable Hour

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Tom Lincoln

We are now seeing a reemergence of the billable hour, but it's a new kind of billable hour. It's an hour that is looked upon by clients as one of many factors to be considered in coming to an agreement as to what the cost of the service should be. Clients and lawyers have begun to use various additional factors in order to determine the amount to be paid for the attorneys' services.

Regrettably, some of these methods used by clients and lawyers alike are disingenuous, and stem from a lack of trust, communication, and transparency. Trust, communication, and transparency are among our firm's top goals with clients and, using those goals, we stress that clients should pay for value, not just time. The old billable hour is dead; long live the new one.

LGC Partner Tom Lincoln regularly serves as an expert witness regarding attorney billing practices. For more information, contact Tom in LGC's San Diego office.

New Appellate Case Finds "Other Insurance" Provision Invalid

In the new case of *Certain Underwriters At Lloyds, London, v. Arch Specialty Insurance Company*, California's Third District Court of Appeal held that an "other insurance" provision in a commercial general liability policy, which purported to excuse an insurer's defense obligation when other insurance was defending, violated public policy and was unenforceable.

The case arose out of underlying construction defect litigation in Sacramento. A framer called Framecon was sued in numerous lawsuits involving alleged construction deficiencies in projects where KB Home was the developer and/or general contractor. Framecon had two years of commercial general liability insurance with Certain Underwriters at Lloyds, London (Lloyds) from 2000 to 2002, and one year of coverage with Arch Specialty Insurance Company (Arch) from 2002 to 2003.

Framecon's policy with Arch provided, "We have the right to defend you, the Named Insured, against any suit seeking tort damages *provided that no other insurance affording a defense against such a suit is available to you.*" The policy further stated that if other insurance is available for a covered loss, Arch's policy would be excess to other any other insurance, and when Arch's insurance is excess, Arch would have no duty to "defend any claim or suit that any other insurer has a duty to defend."

Based on the foregoing policy provisions, Arch refused to defend Framecon in the various underlying lawsuits where Lloyds was already providing a defense to Framecon. Arch did, however, indemnify Framecon by contributing to the settlements in the underlying lawsuits. After settlement of the underlying cases, Lloyds filed an equitable contribution action against Arch to recover a portion of the costs paid by Lloyds to defend Framecon.

The trial Court granted summary judgment in favor of Arch, ruling that the "other insurance" provisions prevented any defense obligation by Arch in the underlying lawsuits. Lloyds appealed.

On appeal, the Court noted that "other insurance" clauses were originally conceived to prevent "multiple recovery by insureds in cases of overlapping policies providing coverage for the same loss." However, primary insurers subsequently attempted to use "other insurance" clauses to shift the burden onto other available insurance. As a result, ourts have considered such "other insurance" provisions to be improper "escape clauses," and have instead required co-primary insurers to contribute on a *pro rata* basis regardless of the existence of "other insurance" clauses in their policies.

Arch attempted to distinguish this precedent by arguing that those "other insurance" provisions were located only in the conditions sections of the insurance policies, whereas Arch's provisions were in the coverage section. The Court of Appeal, however, found such a distinction unpersuasive, and concluded that it would be against public policy to permit Arch to shift the entire loss to a co-primary insurer. As a result, the Court of Appeal reversed the trial court's decision, and found that Lloyds was entitled to receive equitable contribution from Arch.

For more information about the case and its impact, contact Partner Chris Schmitthenner in LGC's San Diego office.

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