A CALL FOR LEGAL ENTREPRENEURSHIP

One Client's Views and Suggestions Regarding Our Civil Litigation System

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"The term [a profession] refers to a group . . . pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."

Roscoe Pound
The Lawyer from Antiquity to Modern Times
1953

TO THE READER

Many of the topics discussed in this paper are controversial. As a layperson, rather than an attorney, I have never walked in the shoes members or the bar wear every day as they practice law. So my views are limited and certainly biased to those of a client, albeit a client who has paid millions in legal fees over the years. I have though experienced firsthand many of the issues long discussed in the profession from the perspective of witness, expert, plaintiff and defendant over the last thirty years. This paper is an attempt to constructively capitalize on those experiences.

Like many, I believe the system needs to be improved. Although "Big Law" today is well over a $100 billion industry, revenue growth is largely based on steadily raising hourly rates, increasing billable hours, lateral recruiting (hiring other firms' lawyers with their clients in-trail) and finding rate-insensitive work – *none of which benefits the user*.

The issues have been long-standing and resistant to correction. A fresh approach is needed, and I believe that legal entrepreneurship can play an important role. Law truly is a major new business opportunity – new ground that has not been plowed over many times. There is strong pent-up demand in this market for more accountability, transparency, productivity, and innovative competition. For specific examples of these issues, see our accompanying paper, *Anatomy of a Lawsuit*.

From an entrepreneurial perspective, law has historically been an isolated valley, remote to outsiders but verdant in its possibilities. Entrepreneurs will hopefully be stimulated by the issues discussed in this paper. Perhaps some of those ideas may serve as seeds for new businesses focused on making the legal industry more efficient, responsive and broadly available.

The Vallex Fund is an investment firm investing exclusively in the legal marketplace. Our firm's mission is to encourage, finance and support entrepreneurs focused on helping to make legal services more efficient, effective and broadly available when needed. Additional information is available at ValleXFund.com.

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HOW TO READ THIS PAPER

This paper is organized into three sections discussing: law's transition from a profession to a business, the issues surrounding self-regulation and the role that entrepreneurship can play to improve the processes by which law is practiced.

Section I, ***The Business of Law,*** is an insider's perspective of the legal profession drawn almost exclusively from the legal profession ranging from Supreme Court justices to trade magazines. I believe readers outside of the profession will find their introspection surprising and disturbing.

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Section II, ***Is Self Regulation Effective,*** focuses on accountability within our civil litigation system and the major role self regulation plays in enforcing that accountability.

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Section III, ***A Call for Legal Entrepreneurship,*** makes the argument for why law is a major new opportunity for entrepreneurs, but one definitely not for the faint-hearted as the barriers to entry are unusually high.

Many of the issues discussed in this paper – hourly billing, self-regulation, protracted discovery and others – are analyzed in detail in the companion case study, *Anatomy of a Lawsuit*. The study is based on an actual multi-million dollar federal lawsuit and details the lawsuit's actual expenses by hour, individual and work product and in particular focuses on the inefficiency of the discovery process as practiced today in many civil lawsuits.

Lastly, this paper takes strong positions on many important issues. As the reader you may wish to contribute to this discussion. We urge you to do so and would appreciate your thoughtful perspectives, criticisms and suggestions regarding the issues herein. You may submit these at…

http://www.VallexFund.com/Forum

We welcome your contribution.

INTRODUCTION

Just fifty years ago one of the most respected professionals in western society was the American lawyer. Respect for lawyers was strongly reflected in our literature and media. Movies such as *To Kill a Mockingbird, Judgment at Nuremberg, Inherit the Wind, Witness for the Prosecution, Anatomy of a Murder* and *Twelve Angry Men* portrayed the law and lawyers as noble, courageous and even heroic. Certainly, few television characters were more respected than Perry Mason. Atticus Finch, the small town lawyer portrayed in *To Kill a Mockingbird*, has inspired two generations of idealists to pursue a legal career.

Yet today, respect and confidence for lawyers and our legal institutions are very low. A recent study sponsored by the American Bar Association found that only 19 percent of Americans stated they were extremely or very confident regarding the legal profession and lawyers when about their confidence in different institutions in American society.[1] Only the media ranked lower. This is a complex issue, of course, and for many people, their dissatisfaction is surely based on impatience with the procedures and limitations of the law itself.[2] Lawyers, as the personification of the law for many people, have been blamed for these deficiencies for centuries perhaps most famously so by Shakespeare in *King Henry VI*, "The first thing we do, let's kill all the lawyers."[3]

Today, the popular opinion regarding lawyers can be perhaps be summarized by a joke that Chief Justice William Rehnquist told speaking at the dedication of a new building at the University of Virginia Law School:

> "In the past, when I've talked to audiences like this, I've often started off with a lawyer joke, a complete caricature of a lawyer who's been nasty, greedy and unethical. But I've stopped that practice. I gradually realized that the lawyers in the audience didn't think the jokes were funny and the non-lawyers didn't know they were jokes."[4]

While we may joke about lawyers, the issues are serious. Our nation's approach to civil litigation is based on an adversarial system in which courts delegate the "search for the truth" to partisan attorneys. Unfortunately, our civil law system allows, even encourages, attorneys to attempt to gain advantage through delay, obfuscation, intimidation and manipulation during discovery, measures hardly conducive to fact-finding. Law firms are under pressure to generate strong financial results; ever-growing profits per partner are a prerequisite for attracting and retaining talent in today's big firms. Financial pressures coupled with abuses of hourly billing inflate costs.

The issues unfortunately go beyond high costs. Federal District Judge Harold Baer in a 2007 opinion reprimanding an attorney for her behavior during a case brought before his court assessed the state of the legal profession as he saw it:

> "While I may be dismayed at the way in which many law firms today approach the practice of law, I realize that for the most part it is none of my business and indeed not the business of the judiciary in general. The fact that partners are at times made and retained for their rainmaking skills and not for their legal skills; that the number of billable hours is not only the alpha and omega of bonuses but that these hours – or at least the ones that count – often exclude pro bono hours; that who gets credit for originating a piece of business can throw a firm into turmoil and prompt major internecine struggles; or that the bottom line has eclipsed most everything else for which the practice of law stands or stood, to the extent that the practice of law is now frequently described as a business rather than a profession.
>
> "While decriable, these are, as I said, really not my concern. Rather, it is the fallout from such conduct, some of which we witnessed here, that ineluctably drives some lawyers and some firms to the kind of conduct that played out before me at this hearing and then becomes the business of the courts."[5]

Judge Baer's reprimand was directed at a single lawyer. Yet many who have worked with and within the legal profession believe the problems go beyond rogue lawyers and need correction. Why is litigation so expensive and time-consuming? Are lawyers truly accountable to clients? Why are innovation and productivity improvements so limited? Can entrepreneurs and outside capital help evolve the industry as they have in so many other areas? This paper attempts to address these questions.

THE BUSINESS OF LAW

In 1958 the American Bar Association issued a report entitled "The 1958 Lawyer and His 1938 Dollar." The report focused on the failure of lawyers' earnings to keep up with the rate of inflation in contrast to other professions including doctors and dentists. The report observed that lawyers' primary focus of "devotion to public interest" was affecting their performance as businessmen and urged lawyers to take a more business-like approach to their work habits. One suggestion was that lawyers better track the actual hours spent on every case to ensure they were reasonably compensated for their efforts.[6]

Long past competing with doctors and dentists, today there is little concern that lawyers under-bill for their services. "Law firms are incredibly profitable businesses. Since 1987, the weighted average operating margin for firms in the Am Law 100 [the top 100 U.S. law firms] is at least twice that of America's 100 largest traded corporations," writes Professor Clayton M. Christensen in a Harvard Business School case study.[7] Total revenues for the nation's 200 largest firms grew 65 percent from 2001 through 2006 versus a 14 percent increase in the Consumer Price Index over the same period.[8,9] In 2006 the nation's 200 largest law firms generated $72.5 billion in gross revenues and employed a total of 100,523 lawyers. Revenues per lawyer averaged $721,228.[10] Profits per partner for the largest 100 firms averaged $1,210,185 in 2006.[11]

Figure 1: Trends in Legal Compensation

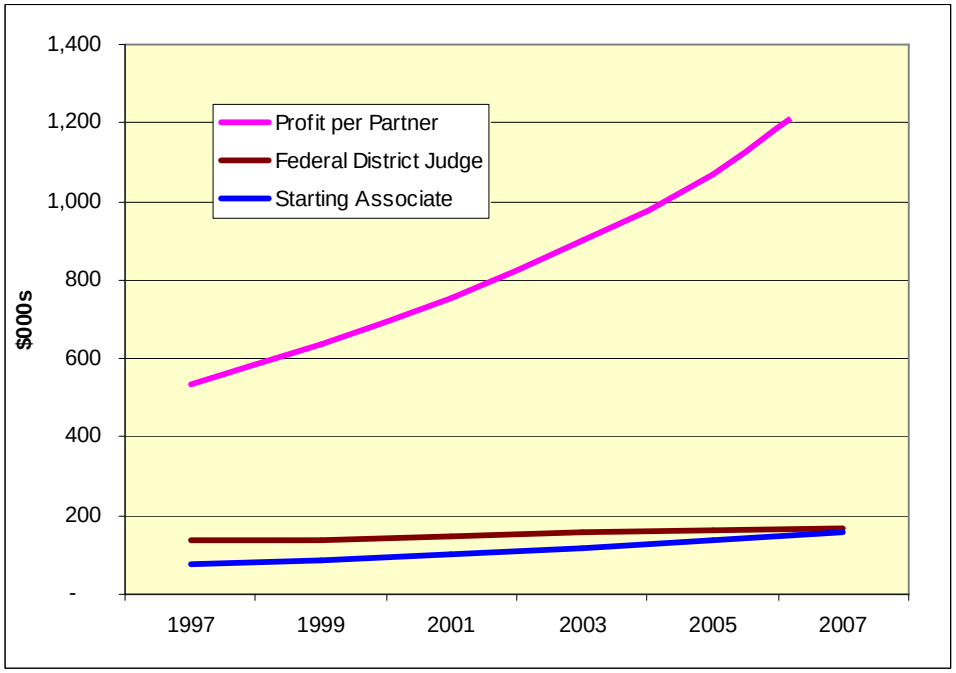


Figure 1, "Trends in Legal Compensation," plots compensation trends for the largest 100 law firm lawyers, their starting associates and federal district judges. Strong revenue growth has pushed up legal salaries – and the resulting legal fees – to the point that "many law firm newbies will make more their first year than an associate justice of the U.S. Supreme Court," comments Susan Hackett, general counsel of the Association of Corporate Counsel. [12] Chief Justice John

G. Roberts, Jr. in his *2006 Year-End Report on the Federal Judiciary* writes "We do not even talk about comparisons with the practicing bar anymore. Beginning lawyers fresh out of law school in some cities will earn more in their *first year* than the most experienced federal district judges before whom those lawyers hope to practice some day."[13] Associates at many large firms are now starting at $160,000, a salary approaching the $165,200 federal district judges currently earn.[14]

The Billable Hour

What has come to be known as "The Billable Hour" has played a major role in transforming law from a profession struggling to keep up with inflation into a major industry. Yet this deeply entrenched practice has only emerged in the last forty years. Through the first half of the twentieth century lawyers used a combination of billing methods including flat-fee schedules, contingency billing and annual retainers. State bar associations set flat-fee schedules for many legal tasks and the American Bar Association made it an ethical violation for lawyers to "undervalue" their services. Many bills were based on the success of the lawyer's efforts. Lawyers and clients shared risk and there were few fee disputes. During this period Frederick Taylor's theory of scientific management based on meticulous time management of discrete tasks was taking hold throughout industry. Taylor advocated that traditional rule-of-thumb processes be replaced by approaches based on careful time and motion studies. Many of Taylor's ideas were adopted by a Hale and Dorr lawyer, Reginald Heber Smith, who in 1940 wrote the highly influential *Law Office Organization* advocating accurate cost accounting through the careful tracking of time.[15]

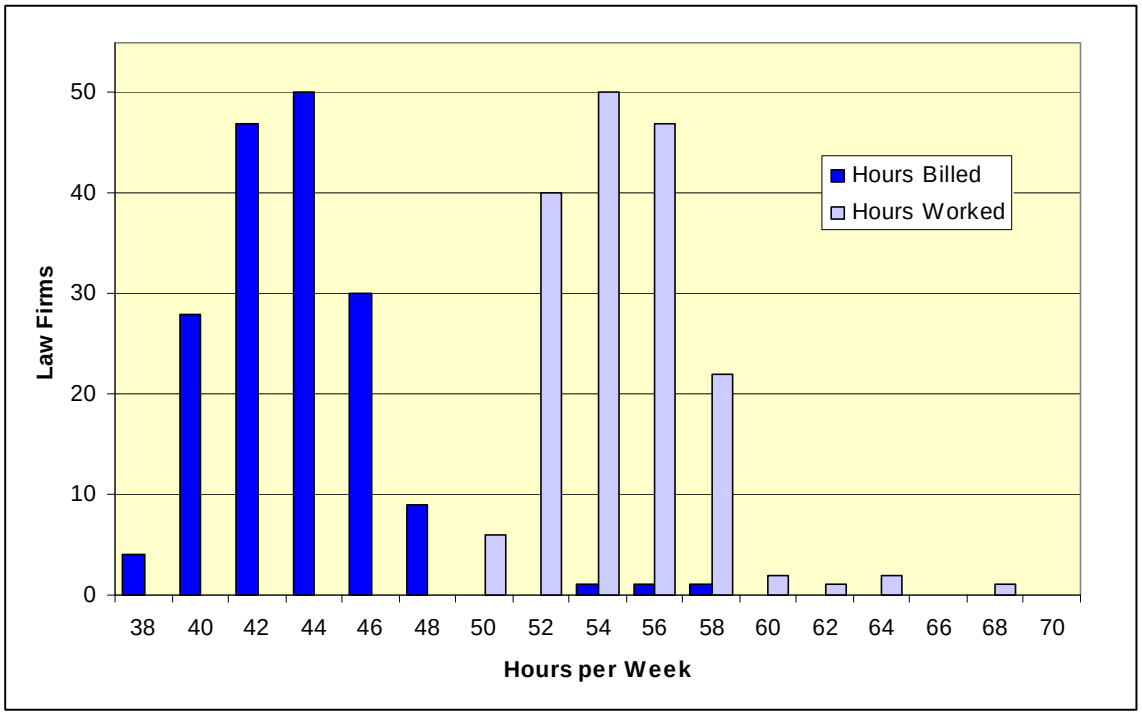
As Reginald Smith's system laid the groundwork, four trends were converging starting in the 1950s which ended traditional billing practices: i) a large increase in pre-trial discovery resulting from revised Federal Rules of Civil Procedure made work estimates more difficult, ii) the American Bar Association mounted a nationwide campaign advocating the use of time records for legal billing as a better means for determining fair compensation, iii) the rise of the trial lawyer and the large judgments in their mass tort cases rendered the flat-fees schedule obsolete, and finally, iv) in 1975 the U.S. Supreme Court ruled flat-fee schedules violated antitrust law.[16]

By the early 1980s, hourly billing was pervasive. Less than 15 years later concerns were growing widespread for this new approach. Today "the concept of 'billable hours' permeates virtually every aspect of law firm life,"[17] William R. Keates, a former law firm associate, wrote in his book *Proceed with Caution*. What began as a means of making legal billing more accurate and objective was evolving into a system fraught with serious problems. "It's a constant source of irritation to lawyers, and brings a host of problems to practicing law … It promotes inefficiency by eliminating the incentive for law firms to be efficient … Large firm associates have no incentive to complete assignments quickly … It pits the economic interests of partners against associates … It doesn't ensure a relationship between quality and fees ... Since associates are rewarded primarily on the basis of the number of hours they bill, *inefficient* associates may receive higher bonuses than *efficient* associates! As a result, the hourly system creates rewards that defy common sense,"[18] Keates asserted.

What happened? In the last three decades pressures to maximize hourly billings have badly distorted the practice of law. In 1958 the American Bar Association set what it considered a realistic goal of 1,300 billable hours a year.[19] By the early 1980s at least at one firm "it was mandatory that every associate bill 1,800 hours a year" resulting in her fellow attorneys "churning files just to meet their numbers" and "pitted against each other so they wouldn't get fired or so they'd get their bonus." observes Stephanie Morris, now a successful bankruptcy lawyer in San Francisco.[20] An American Bar Foundation study conducted in 1979 of 180 Chicago-area litigators reported that "meter running" (performing unnecessary work primarily for the purpose of milking additional fees from clients) had become a common abuse. "Even litigators who frankly admitted that they were becoming wealthy primarily because of fees attributable to discovery expressed amazement and concern about the rapid escalation of the expense of conducting and complying with discovery."[21]

Today many law firms require their younger attorneys to bill as many as 2,000 or more hours per year.[22] The Yale Law School Career Development Office counsels students "Firms 'average,' 'target' or 'minimum' stated billables typically range between 1,700 and 2,300, although informal networks often quote much higher numbers."[23] The American Lawyer's 2006 Associates Survey[24] corroborated these high billing rates. See Figure 2, "Associate Hours per Week." The survey found mid-level associates billing an average of 44.5 hours per week, or an annual, 50-week rate of 2,225 billed hours. On average associates work an additional 11.2 unbilled hours per week for a total work-week of 55.7 hours. One firm, New York-based Wachtell, Lipton, Rosen & Katz, billed a grueling 59.6 hours per 69.1 hour work-week.

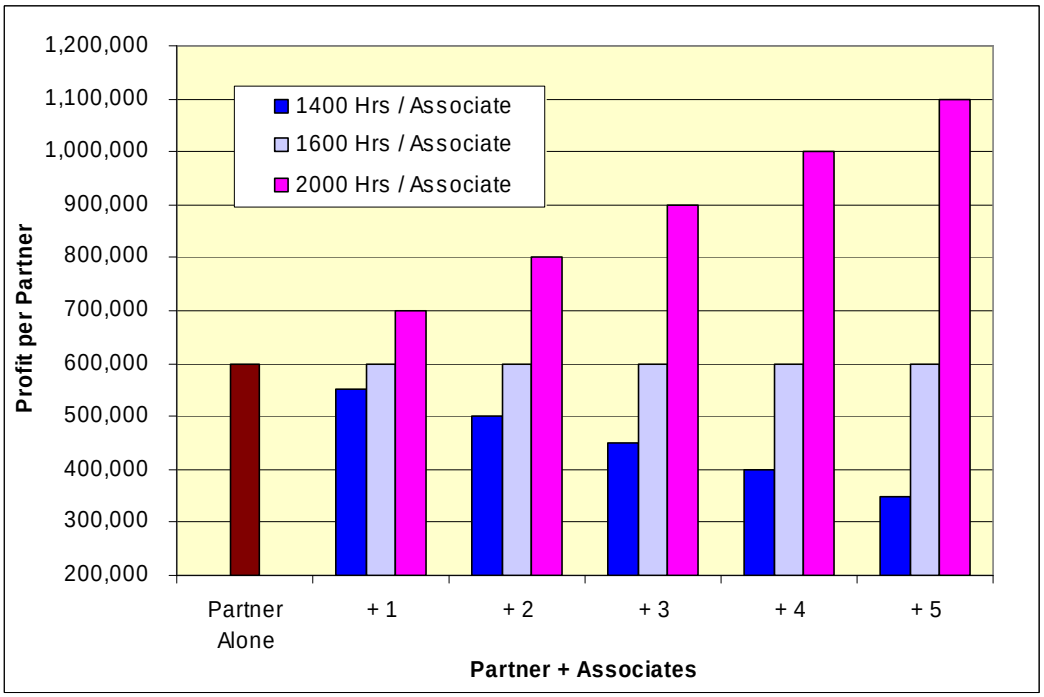
Figure 2: Associate Hours per Week



The unrelenting pressure to bill hours is largely due to the practice of *leverage* by today's law firms. Leverage in this context is the expansion of the law firm partners' income through the use of the firm's non-partner staff – primarily legal associates but also paralegals and administrative staff – to generate hourly billings beyond that possible by a single partner. A firm that is highly leveraged might employ four or even more associates for every partner. If a firm can keep those associates busy, then it will generate revenues and profits well beyond what is possible by its partners alone. Conversely like any form of operating leverage, if the associates – the firm's fixed assets – are underutilized, profits decline or even disappear. Figure 3, "Law Firm Leverage," illustrates this two-edged sword.

The graph assumes: i) a partner bills 1,800 hours per year at $500 per hour, ii) associates bill between 1,400 and 2,000 hours per year at $250 per hour, iii) the partner takes no salary receiving compensation through shared partner profits, iv) the average associate salary is $200,000, and v) allocated overhead for each lawyer is one-third their hourly rate based on the common law firm "Rule of Three."[25] Although typical these parameters vary across firms, but the basic relationships hold for all firms.

Figure 3: Law Firm Leverage



Clearly, partners significantly increase their earnings by keeping as many associates (and paralegals) billing as many hours as possible. Few lawyers by their own efforts could earn $1 million or more per year, but associate leverage now makes it a reality for many. This is especially true for litigation. "Litigation, especially big-bucks trench warfare litigation, is innately highly-levered as associates can be drafted into document production and review almost as massively as the Western Front consumed recruits in 1918."[26] A client engaging a firm which maximizes associate leverage can be assured that to a fault every discovery document is

thoroughly reviewed, that every court pleading is meticulously drafted, that every legal question is researched extensively, that every deposition is comprehensively prepared, that every possible motion, countermotion and supplemental memorandum is filed, and that all time extensions allowed by the court are taken.

On the other hand, a highly-leveraged firm that underutilizes its associate staff quickly reduces partner income. In the extreme case partners earn nothing or are even forced to fund losses generated by their under-employed assets. Imagine the managers of a $100 million factory funding its losses out of their own pocket and you have an idea of the financial pressures partners feel to keep their staff billing at maximum rates.

The Corrosive Impact on the Profession

Law firm associates are very aware of their status as engines of partner profit. Twenty years ago Chief Justice William Rehnquist lamented that law firms treat associates "very much as a manufacturer would treat a purchase of one hundred tons of scrap metal. If you use anything less than the hundred tons you paid for, you are simply not running an efficient business."[27] "In its most recent survey, the NALP [National Association of Law Placement] found that the annual attrition rate at U.S. law firms is now 19 percent, the highest ever documented. Even more striking, NALP found that 80 percent of associates leave their firms by the end of five years."[28]

The American Lawyer, the profession's leading trade monthly, commented in their 2005 Annual Associates Survey that "… Partners aren't giving their younger colleagues any incentive to work harder, associates say. Many treat their associate ranks as replaceable billing units, which are easily eliminated in a downturn, instead of as potential long-term members of the firm.

'Why should we kill ourselves for you? We now know we are completely fungible,' states one associate at Wilmer Cutler Pickering Hale and Dorr. Associates say partners pile on the assignments in a never-ending effort to boost profits per partner without a thought to giving younger colleagues direction, feedback, or guidance on their development as lawyers. Mentoring and communication about longer-term career prospects are largely absent, say many associates."[29] Mark Harris, founder of Axiom Legal, left Davis Polk & Wardwell when he realized, after spending a grueling month in the summer of 1999, that his billable hours for that month nearly equaled his entire annual salary. "The rest of the year his work would cover overhead and pad partners' pockets. 'I felt like I was living this tale of inefficiency, total inefficiency,' he says."[30]

These sentiments are quite different from those that historically motivated some of our brightest, most dedicated people to become lawyers who were inspired by great lawyers – Thomas Jefferson, Alexander Hamilton, Abraham Lincoln, Oliver Wendell Holmes, Jr., Thurgood Marshall, Earl Warren and many others – who have shaped our country. Alexis de Tocqueville observed that a strong community of lawyers is essential to our American Democracy. Is there any greater ideal of American citizenship than the small-town lawyer, Atticus Finch, in *To Kill a Mockingbird*? Yet many believe law's historical values are being undermined by a relentless focus on the bottom line leading to widespread dissatisfaction inside and outside the profession.

Some of the most respected individuals in the profession are very concerned and beginning to call for change. American Bar Association president, Robert E. Hirshon, in the association's highly candid *2002 ABA Commission on Billable Hours Report* warned that "The profession is paying the price. Disaffection with the practice of law is illustrated by a feeling of frustration and isolation on the part of newer lawyers … Not coincidentally, public respect for lawyers has been waning since the 1970s … Many lawyers indicate they would gladly take a pay cut in exchange for a decrease in billable hours."[31] In the same report Supreme Court Justice Stephen G. Breyer commented "Roscoe Pound wrote that the legal profession is characterized by a 'spirit of public service'… Yet over the past four decades it has become increasingly difficult for many lawyers to put this spirit into practice. The villain of the piece is what some call the 'treadmill' – the continuous push to increase billable hours."[32]

The ABA report cited fifteen potential problems stemming from the over reliance of billable hours by the legal profession:

1. Results in a decline in the collegiality of law firm culture and an increase in associate departures
2. Discourages taking on pro bono work
3. Does not encourage project or case planning
4. Provides no predictability of cost for client
5. May not reflect value to the client
6. Penalizes the efficient and productive lawyer
7. Discourages communication between lawyer and client
8. Encourages skipping steps
9. Fails to discourage excessive layering and duplication of effort
10. Fails to promote a risk/benefit analysis
11. Does not reward the lawyer for efficient use of technology
12. Puts client's interests in conflict with lawyer's interests
13. Client runs the risk paying for:
    - the lawyer's incompetency or inefficiency
    - associate training
    - associate turnover
    - padding of timesheets
14. Results in itemized bills that tend to report mechanical functions, not value of progress
15. Results in lawyers competing based on hourly rates. [33]

Elaborating, the report observes "Normally, the client's interest is to resolve a matter or project efficiently and quickly. If hourly billing is utilized, the efficient and quick lawyer will earn a lower fee than an inefficient and slow lawyer. Because of this, hourly billing fails to align the interests of the lawyer and client, and under many circumstances puts their interests in conflict."[34]

Unfortunately, little has changed since the American Bar Association issued their report in 2002. Hourly billing, along with its associated pressures, still dominates law. Once again taking a leadership position, the ABA in an even more critical 2006 report, *Renaissance of Idealism in the Legal Profession*, admonishes that "the practice of law has undergone a transformation so

sweeping as to cause many to question whether the ideal of service can survive the tyranny of the billable hour and the relentless focus on the bottom line. Some have argued that the profession is losing its soul, that the ideal of the lawyer-statesman has been replaced by what Professor Robert W. Gordon of Yale Law School has called *a whole new school of corporate practice – ruthlessly competitive, powered nearly exclusively by the drive for profits, so demanding as to leave no time or energy for other commitments, and mostly indifferent to social responsibility and public values.*" [35]

Calls for change come from many quarters. Recently, for example, 125 leading law students initiated a national campaign to encourage the nations' 100 largest law firms to adopt "balanced-hours policies 'that work' and reduce partnerships' billable-hour expectations."[36] On their website, *Law Students Building a Better Legal Profession*, the students state that the current system "Encourages Inefficient Work Habits: Maximum profits are obtained by maximum billing, even if this means unnecessary additional work is performed. Cloaked in the language of 'zealous advocacy' is the reality that attorneys frequently produce or expand deliverables far beyond their usefulness to clients and judges."[37]

Are these practices as pervasive and corrosive as the law students believe? Carl T. Bogus, professor of law at Roger Williams University, writes in his paper, *The Death of an Honorable Profession*, that "Padding time records is a genuine professional plague, one not confined to a few firms or even a few lawyers within most firms. It is a silent epidemic: the realization of what has occurred is so unwelcome that it is largely ignored."[38]

Abuse of the legal process is particularly common during the discovery phase of a lawsuit. So common that Robert M. Dawson, a partner at Fulbright and Jaworski (34th highest-grossing law firm in the United States[39] and Leon Jaworski's, Watergate Special Prosecutor, firm) in *How to Win (& Survive) a Lawsuit* counsels his lay readers, with near total resignation:

> "They [the other side] may be in a position to increase the cost of the lawsuit, well beyond what is reasonably necessary, and unfortunately there may be little that you and your lawyer can do to stop that from happening. This is one of the unfortunate parts of the legal process. In many cases, one side of the lawsuit is in a position to cause the other side to expend far more than is reasonably necessary, simply by generating activity. It is a flaw in the system that no one has figured out a solution to."[40]

Patrick J. Schiltz, Associate Professor of Law at Notre Dame Law School, writing to law students about to enter the profession counsels in his paper *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, "…the profession you about to enter is absolutely obsessed with money. '[M]oney is not just incidental to the practice, but at its core.' Money is at the root of virtually everything that lawyers don't like about their profession: the long hours, the commercialization, the lack of collegiality and loyalty among partners, the poor public image of the profession, and even the lack of civility." [41]

Professor Schiltz maintains billing pressures breed unethical behavior in many lawyers. Counseling law students, he describes the process:

> "Let me tell you how you will start acting unethically: It will start with your time sheets. One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and

> you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of work for the client for 'free.' In this way, you will be 'borrowing,' not 'stealing.'
>
> … And then you will pad more and more—every two minute telephone conversation will go down on the sheet as ten minutes, every three hour research project will go down with an extra quarter hour or so. You will continue to rationalize your dishonesty to yourself in various ways until one day you stop doing even that. And, before long—it won't take you much more than three or four years—you will be stealing from your clients almost every day, and you won't even notice it."[42]

Not surprisingly, Scott Turow, the author of six novels on the law and practicing attorney at Sonnenschein Nath & Rosenthal, frames the moral dilemma perhaps most clearly:

> "But from the time I entered private practice to today, I have been unable to figure out how our accepted concepts of conflict of interest can possibly accommodate a system in which the lawyer's economic interests and the client's are so diametrically opposed.
>
> "Looking again to the [American Bar Association] Model Rules [of Professional Conduct], Rule 1.7 provides in part that 'a lawyer shall not represent a client if the representation involves a concurrent conflict of interest' which the rule defines as occurring when 'there is a significant risk that the representation of one or more clients will be materially limited by …a personal interest of the lawyer.'
>
> "When was the last time any of us actually and explicitly set forth the problems of this system for a client, the way we do with other conflicts? Who ever says to a client that my billing system on its face rewards me at your expense for slow problem-solving, duplication of effort, featherbedding the workforce and compulsiveness – not to mention fuzzy math? Does anyone ever tell the client what the rule seemingly requires? *I want you to understand that I'm going to bill you on a basis in which the frank economic incentives favor prolonging rather than shortening the litigation for which you've hired me.*"[43]

These are strong words indeed coming from Supreme Court Justices, the American Bar Association and leading law scholars and attorneys. Do billing pressures actually erode the ethics of many lawyers to the point that they are routinely over-billing their clients, either by outright bill-padding or performing services that are not truly needed under the cloak of zealous advocacy? Can a business be more critically flawed than having a core ethic that is in fundamental conflict with its clients' best interests? Where inefficiency and prolongation are surer profit generators than efficiency and dispatch? Where zealous advocacy is but a guise for excess? And where financial pressures breed unethical behavior in those very individuals whose profession it is to maintain our society's laws and ethics?

It seems unlikely. Yet, billing practices are hardly improving and may be getting worse. Professor William G. Ross of the Cumberland School of Law at Samford University has conducted three national surveys regarding attorney billing practices starting in 1991. In his latest survey covering 2006-07 Professor Ross comments, "The results of my 2006-07 survey are in many ways quite similar to my earlier surveys, which indicated that a distressingly high percentage of attorneys believe their time-based billing results in bill padding and provides incentives for attorneys to perform unnecessary work … Moreover, the attorneys who responded

to the most recent survey seemed, on the whole, to be less ethical in their billing practices than those who responded to the earlier surveys."[44] Reporting on Ross's survey, The Wall Street Journal's Law Blog writes "… 54.6 percent of the respondents (as compared with 40.3 percent in 1995) admitted that they had sometimes performed unnecessary tasks just to bump up their billable output. Ross says that bill padding involves invoicing a client for work never performed – or exaggerating the amount of time spent on a matter – while unnecessary work is that which 'exceeds any marginal utility' to a client."[45]

The Legal-Industrial Complex

Yet the tyranny of The Billable Hour seems likely to be with us for the foreseeable future. It is far too successful as an engine of growth to be abandoned. With approximately 20 percent of the 2006 World Gross Domestic Product, the United States is home to 76 of the world's top 100 law firms measured by revenues.[46] Only the United Kingdom, our common-law parent, has a higher concentration of major law firms. Excepting the United Kingdom, just two of the world's top 100 firms, one each in France and the Netherlands, are located in the European Union. Germany and Japan with a combined GDP over half that of the United States manage with none.

American law is now big business every bit as much as oil, fast food and pharmaceuticals. Law's historical societal role of lawyer-statesman working in a spirit of public service has been largely replaced by an obsession with crass ratios such as Value per Lawyer and Profit per Partner. Any doubters should consider how *The American Lawyer*, indulging in old-fashioned boosterism, recently described the legal industry:

> "Like the universe, it grows and glows. This is now a $65 billion market – and there's no end in sight.
>
> "It's hard to know which is the more impressive number: 96,000, which is roughly the head count of The Am Law 200, or $675,000, which is the revenue per lawyer of the aggregated Am law 200. Never have so many (lawyers) earned so much in such a short amount of time.
>
> "The explosion of the legal economy has tracked – and exceeded – the success of what we may call the lay economy. The Am Law 200, essentially the legal-industrial complex, has left inflation in its wake, converting The Billable Hour into a commodity that even the purveyors of oil and gas can envy – and retain. 'Commodity,' of course, is an unflattering word in these precincts, for that which is not a commodity can be billed at a premium. Lawyers of the Am Law 200: These are the good old days."[47]

For many lawyers law is no longer the spirit of public service, but the drive to sell Billable Hours by the barrel. Like barrels of oil the Billable Hour has fueled remarkable growth and profitability for American law firms. But unlike its oil equivalent, the Billable Hour requires no geologists, drilling rigs, pipelines, or refineries, only an ever-growing supply of new lawyers billing at ever-increasing rates.

IS SELF REGULATION EFFECTIVE?

Do Lawyers Abuse Their Professional Privileges?

Overly complex, expensive litigation is clogging our courts and restricting access to the legal system for many. Scores of studies have confirmed that abuse of the legal system is rampant. Over 35 years ago Supreme Court Justice Lewis F. Powell, Jr. summarized the situation:

> "Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules…Lawyers devote an enormous number of 'chargeable hours' to the practice of discovery. We may assume that discovery is usually conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of the weaker opponent…Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system."[48]

No wonder a significant percentage of the public holds "a low opinion of lawyers' ethics and competence: about two in five believe lawyers would engage in unethical or illegal activities to help a client and that the profession does nothing about misconduct…These numerous and disparate grievances can be subsumed under a single heading: *lawyers abuse their professional privileges* (emphasis ours)."[49]

Lawyers abuse their professional privileges – a good summary of the situation but actually a better statement of the effect rather than the cause of the problem. The fault lies with the *lack of accountability* inherent within our civil law system. This lack of accountability allows lawyers under competitive and financial pressures to abuse their professional privileges.

Today there are far too many factors that left unchecked, corrupt a system that is based almost solely on self-regulation: Law firms, today much more members of big business than a profession, are under intense financial pressure to sustain and improve their financial performance. As one firm chairman recently stated after terminating a number of low-producing partners, "We want to drive our 'stock price' up."[50] Law firm associates are under constant personal pressure to work "like pack mules"[51] to increase their billable hours in the hopes of eventually becoming an equity partner. Clients pressure their attorneys to "spring something on their opponents" or employ "Rambo tactics" including evading, obstructing, and jerking the adversary around.[52] Many lawyers now consider, even enjoy using, discovery as a weapon to be employed to damage, obstruct or bully their opponents by any means possible.[53]

Competitive and financial pressures however are not unusual, particularly in business. Business though has numerous checks and balances, as imperfect as some are, to help assure that it works in the best interests of its customers, shareholders, employees and community. Companies raise prices and competitors lower them. Managers fail to meet their commitments and they are replaced. Financial results lag and shareholders revolt or private equity firms acquire ownership replacing management. Management back-dates stock options and the media exposes the practice. Business is a huge feedback system with competitors, the media, government, shareholders and company management all providing checks and balances.

Similarly, our federal government was designed as a system of checks and balances with the executive, legislative and judicial branches working in tension, sharing power and, over time correcting imbalances.

With all their faults, business and our government are largely held accountable by their constituents. These checks and balances are notably absent in today's civil litigation. Is this true? Do not bar associations and law schools promote standards for the profession? Do not the courts manage and when necessary police the civil litigation process? Do not law firms compete in an active, client-driven marketplace?

Do Not Bar Associations and Law Schools Promote Standards for the Profession?

Yes, very much so. The bar associations, especially the American Bar Association, have for over a century promoted Model Rules for Professional Conduct.[54] Beyond that, many bar associations and law schools very actively conduct studies, write papers and generally proselytize for change. Even a casual student of the legal industry would be impressed with the volume, depth and sincerity of papers calling for change whether for improvements to the discovery process, an end to the Billable Hour or increases in judicial funding and compensation. Consider a sampling of the titles from papers referenced in this document:

- *The Hours: The short, unhappy history of how lawyers bill their clients*
- *The Truth About the Billable Hour*
- *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*
- *American Bar Association Commission on Billable Hours Report*
- *Bar Association Commission of the Renaissance of Idealism in the Legal Profession*
- *The Billable Hour Must Die*
- *Containing the Cost of Litigation*
- *Confronting Civil Discovery's Fatal Flaws*
- *Lawyers 'Discover' How to Beat the Rap – Discovery Phase Becomes Tactic in Civil Litigation*
- *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*
- *Addressing the Adversarial Dilemma of Civil Discovery*

By their nature, lawyers excel at identifying, analyzing and documenting problems. Legal literature has become rich over the last thirty years with studies and papers regarding billing and civil litigation abuses. These long-standing calls for change conflict with the industry's lucrative Billable Hour and the considerable freedom lawyers enjoy to conduct litigation largely as they wish.

Do Not the Courts Manage and When Necessary Police the Civil Litigation Process?

Not sufficiently. Civil discovery today relies on self-enforcement by its practicing attorneys as its primary regulatory mechanism, an approach that was developed nearly 70 years ago with the passage of the 1938 Federal Rules of Civil Procedure. The 1938 rules replaced an earlier court-intensive discovery process with a system largely conducted outside of the court by opposing attorneys with little judicial oversight. Most states have adopted the federal rules for use in their own courts.

Self-regulation may have worked well in earlier times when attorneys viewed their primary responsibility as that of officers of the court responsible along with judges and juries for the

proper functioning of our judicial system. The bar was also much smaller and more homogeneous being a "tightly knit men's club whose members respected each other and needed to retain each others' good-will. It was not a very good deal for women or minority lawyers, but this gentlemanly system at least had the advantage of maintaining high levels of trust among the old-boy lawyers."[55] And legal billing 70 years ago was not based on the Billable Hour. Most lawyers billed an annual retainer or a fixed fee based on value delivered.

However, today there is widespread belief that critical elements of our civil litigation system are badly flawed. As Justice Powell observed – "The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedure." Judges and litigators are well aware of the abuses within civil litigation. Over the years – 1948, 1963, 1966, 1970, 1980, 1983, 1987, 1993, 2000, and 2006 – many amendments to the Federal Rules of Civil Procedure have been adopted intended to curb discovery abuse including limitations on interrogatories and depositions, new rules for document inspection, scheduling conferences, increased sanctions, mandatory disclosure and electronic discovery procedures.

Yet there is a growing realization that incremental rule changes have largely been ineffective. Professor John S. Beckerman of the University of Michigan Law School writes in *Confronting Civil Discovery's Fatal Flaws* that without a fundamental change discovery abuse will continue because:

> "Discovery is riven to the core with irreconcilable theoretical and practical conflicts and will remain so despite recurring reform efforts. Given the nature of discovery's defects, what it would take to cure them, and the limits imposed on possible change by fundamental values of our litigation system, discovery disputes are likely to plague us for a very long time, perhaps forever."[56]

Little wonder that Professor Beckerman feels a sense of resignation. Not much has changed since the American Bar Foundation commissioned a major study in 1980 of Chicago litigators concerning the problems and abuses of civil discovery. Today's litigants would easily recognize the lawyers' candid comments from nearly 30 years ago:

> [In response to the] "first wave of discovery we don't produce information that could be discovered by follow-up discovery."[57]
>
> "The purpose of discovery," [a blunt lawyer] declared, "is to give as little as possible so [your opponent] will have to come back and back and maybe will go away or give up."[58]
>
> "I always have the client put the interrogatory answer in the worst possible light, and I will jazz it up somewhat if I can do so. This is my job and the other side does this to me."[59]
>
> "Never be candid and never helpful and make [your] opponent fight for everything."[60]
>
> [There is a] "direct linear relationship between the amount of money at stake and the difficulty of discovery. There is a dollar threshold above which many attorneys feel it is permissible to lie."[61]
>
> "Most attorneys still see discovery as a game and play it to the hilt to avoid disclosure."[62]
>
> "Discovery is a trial by avalanche of documents…This is contrary to discovery but I view it this way. I bombard opponents with mounds of information and see if they can wade through it."[63]

> "By being an obstructionist you can avoid providing about 80 percent of the information because it's expensive for [an] opponent to go to court to compel discovery."[64]
>
> "…discovery gives incredible leverage to parties and firms with big resources…use this power to penalize opponents whenever [possible.]"[65]
>
> "Unless judges take a strong stand no one will quit playing games because you know you can get away with it."[66]

"Unless judges take a strong stand no one will quit playing games because you know you can get away with it."

That's the problem in a nutshell. Many studies over the years have confirmed the need for much stronger enforcement of the rules by the courts.

The Need for Greater Judicial Involvement

Explaining the need for greater judicial management in 1958, Judge Joe E. Estes noted: "As every trial lawyer knows, the great abuse of discovery occurs in the court whose judge is unwilling to enforce the powerful sanctions available. There are few lawyers who fail to heed the considered suggestions of a firm judge."[67]

A 1981 American Bar Foundation study commented "Nine out of ten big case lawyers we interviewed reported feeling that they did not 'get adequate and efficient help from the courts in resolving discovery disputes and problems.' A similar percentage wants the courts to use more often their power to impose sanctions for discovery abuse, and four out of five expressed their desire for generally greater judicial involvement in the discovery stage of litigation…In fact, federal judges have been notoriously reluctant to use the one tool for controlling discovery that the Federal Rules of Civil Procedure explicitly encourage: sanctions for discovery abuse."[68]

A 1993 study in *The Judges' Journal* concerning attorneys' views of civil discovery concluded "In all courts, the most effective discovery measures cited by lawyers call for direct involvement of the courts…The substantial support attorneys demonstrate for imposing costs and sanctions is consistent with their views that the unreasonable or inexperienced behavior of opposing counsel is the primary cause of discovery problems. Attorneys apparently want judges to use their power of the court to shape their colleagues' conduct."[69]

In the last ten years studies by the Civil Rules Advisory Committee, the RAND Corporation and the Federal Judicial Center are "only among the most recent examples of an unbroken tradition of calling for greater judicial involvement and supervision that stretches back forty years at least."[70] The conclusion of scores of studies over the years is that the courts must provide much *stronger enforcement* of the rules of civil litigation. Self-enforcement by attorneys under competitive and financial pressures, particularly for large, complex cases, very often does not work. Unfortunately, "study after study has confirmed that judges are reluctant to impose meaningful sanctions on errant lawyers and even when they are so disposed, the sanction is often untimely and amounts to little more than a slap on the wrist."[71]

With so many calls for their closer management of the civil discovery process, why have the courts not accepted the challenge?

The Imbalance of Bench and Bar Resources

Unquestionably the first issue is the limited resources of our federal and state judiciaries. In 2006 the federal judiciary was staffed by 678 Federal District Judges, 505 Magistrate Judges and 179 Appellate Judges. That year 326,401 new civil and criminal cases were filed, or about 481 new cases per District Judge. The National Center for State Courts reports that for 2005 10,160 full time judges staffed our state courts handling approximately 19 million non-traffic cases, or about 1,870 cases per judge.

Salaries for the combined federal and state judiciaries were approximately $1.5 billion in 2006. In contrast, that year the nation's 200 largest law firms employed 100,523 lawyers and generated $72.5 billion in revenues. If the Federal Judiciary were a Chicago law firm, with 1,362 lawyers it would only be the fifth largest firm in the city, about the size of Kirkland & Ellis. (And at an average salary of $158,600 would quickly lose its legal staff.) Table 28 contrasts the combined federal and state judiciary with the nation's top 200 law firms.

Table 28: The Judiciary vs. 200 Largest Law Firms

	Number[72,73]	Salary ($k)[74,75]	Total Dollars ($k)
Federal Judges			
Appellate	179	$171.8	$ 30,752
District	678	162.1	109,904
Magistrate	505	149.1	75,312
Total Federal	1,362	158.6 (avg.)	215,968
State Judges (full time)	10,160	121.7 (avg.)	1,236,594
	11,522 Judges		$1,453,562 Salaries
2007 AmLaw 200	100,523 Lawyers[76]		$72,492,000 Revenues[77]

Comparing salaries and revenues in Table 28 is, of course, inconsistent. The actual Federal Judiciary Budget in 2006 was $5.72 billion,[78] a figure dwarfed by the $72.5 billion in 2006 revenues of the top 200 law firms alone. And the difference is increasing as the law firms' revenues are growing at over ten percent a year, well ahead of the judiciary's funding. At that rate the annual revenue growth alone of the top 200 law firms each year exceeds the nation's total federal judiciary funding.

Beyond financial comparisons, the total of 11,522 judges is minuscule compared to the 1,128,729 attorneys estimated to be resident and active in the United States by the American Bar Association.[79] To a layman, these numbers suggest an incredibly unbalanced situation. To truly understand how unbalanced the system is, spend a few hours reading reports on the declining state of our federal and state judiciary as published by the Chief Justice of the Supreme Court, the bar associations and the media. Then browse the annual survey issues of *The American Lawyer*, "the nation's leading legal monthly" and whose readers' average household net worth is four million dollars.[80] The financial disparities between our judicial system, one of the three branches of our government, and private law practice are extraordinary. Consider, for example:

Federal and State Judiciary

"Across the nation, some of the best judges have left the bench out of financial necessity. In New York, judicial salaries rank near the bottom of the national salary scale for state judges, and the reason is particularly galling. New York's legislators refuse to give judges a pay raise unless they can get one themselves."

The New York Times
April 8, 2007

"Despite [Chief Justice Rehnquist's] entreaties, the situation has gotten worse, not better. According to information gathered by the Administrative Office, the real pay of federal judges has declined since 1969 by almost 24 percent, while the real pay of the average American worker during that time has increased over 15 percent."

Chief Justice John Roberts, Jr.
2005 Year-End Report on the Federal Judiciary

"Nine out of the last 10 fiscal years began with no appropriations bill passed for the Judiciary…many courts [have been required] to impose hiring freezes, furloughs and reductions in force. In some cases they have cut back services available to the public."

Chief Justice William Rehnquist
2004 Year-End Report on the Federal Judiciary

"Courts simply cannot serve the public effectively if the budgets are cut to the bone…The sad truth is that the current funding crisis exerts a disproportionate impact on the judicial system, which nationally receives less than two percent of states' budgets."

Model Op-Ed: Court Funding Crisis Affects Us All
American Bar Association

When Massachusetts acting Governor Jane Swift proposed to cut $37 million from state court budgets, a Boston Globe editorial observed that Massachusetts state courts are "kicked around like a football in the State House, whose leadership likes to show judges how limited their power is."

Boston Globe
July 25, 2002

U.S. Legal Industry

as documented by *The American Lawyer*

"Fact is, big-firm lawyers have never been richer. The average Am Law 100 partner took home profits of $1.2 million last year. Lawyers in major firms "are doing great," says Steven Kaplan, a professor at the University of Chicago Graduate School of Business, noting that the compensation of that demographic has increased 2.6 times since 1994, even discounting for inflation."

Rich Lawyer, Poor Lawyer (page 15)
December, 2007

"There may not be enough lawyers to feed the hiring appetite. According to our survey of summer associate hires, Am Law 200 firms expect to bring on roughly 10,000 associates next fall… This year's famous hike to $160,000 in starting pay for first-year associates did not buy hiring firms anything in terms of separating themselves from their competition. The firms that can afford to pay more will pay more…"

New Reality (page 91)
August, 2007

"On the surface, at least, it's the same old story. New records galore: Gross revenues up 11.4 percent, profits per partner up 13.4 percent, revenue per lawyer up 7.3 percent, which is to say, at a clip exceeding the annual hike in billing rates. Times are so good for the men and women who own Am Law 100 firms that those who snared profits of a mere million dollars were below par."

Lessons of the Am Law 100 (page 127)
May, 2007

"This is now a $65 billion market – and there's no end in sight…The Am Law 200, essentially the legal-industrial complex, has left inflation in its wake, converting the billable hour into a commodity that even the purveyors of oil or gold can envy – and retain."

The World of the Am Law 200 (page 100)
June, 2006

Our courts are suffering financially while the legal industry is comparing its financial successes to oil-rich Saudi Arabia, "The Am Law 100's total gross revenue rose 10.6 percent last year to $51 billion – about a third of Saudi Arabia's annual revenue from oil sales"[81] as *The American Lawyer* boasted in its May, 2006 issue. The disparity of our courts pleading for funding while private law boasts of financial growth approaching the oil cartel is shameful. As officers of the court the legal profession should ideally provide the leadership necessary to address the situation. But, it has not.

The obvious solution is an excise tax of say, ten percent, on civil litigation to help subsidize the costs of maintaining a strong and independent judiciary. Airlines pay airport and fuel taxes to fund air traffic control services. Truckers pay roadway and fuel taxes to maintain highways. Homeowners pay property taxes, essentially user fees, to finance local schools and services. Corporations pay income taxes to fund government services and regulatory agencies. Yet a lawsuit costing millions of dollars and occupying years of the court's time pays only a few thousand dollars, at most, in court and filing fees.

A civil litigation tax would raise billions annually, an amount that would have a profound effect on our judiciary while being easily absorbed by a single year's annual growth of the legal industry. These additional funds could be used to (i) strengthen our judiciary, (ii) adjust judicial compensation to be at least on a par with law school deans and senior professors,[82] and (iii) provide judges resources such as clerks, technical experts and special masters for better managing litigation, particularly during discovery.

A strong, well-supported judiciary would be able to provide the badly needed oversight of civil litigation – "*Unless judges take a strong stand no one will quit playing games because you know you can get away with it.*" – thereby reducing discovery abuse and ultimately litigation costs.

The Need for Neutral Fact-Finding

Another factor contributing to judges' hesitancy to closely manage discovery is the complexity of modern litigation. Establishing a clear understanding of the relevant facts is the central task of civil litigation as William Blackstone observed in 1768, "[E]xperience will abundantly shew, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of."[83] Blackstone's observation is even more relevant today for our complex, technocratic society. Until the end of the nineteenth century, the majority of civil litigation dealt with property, commercial and maritime disputes, issues generally familiar and understandable by courts and juries. Today however, much of civil litigation deals with arcane technologies or becomes so large and unwieldy it is difficult to understand the issues without specific expertise or a great deal of time. And as discussed in *Anatomy of a Lawsuit*, discovery disputes can be made overly complex by opposing attorneys employing their own experts.

Given their limited time and resources to focus on discovery issues, judges are naturally hesitant to rule with a strong hand when they feel they lack thorough knowledge of the matters. Furthermore, it is well known within the legal profession that judges generally dislike discovery disputes and resent the time that resolving them takes from other judicial activities.[84] Many judges consider discovery disputes "puerile" affairs and are understandably disgusted with lawyers who are abusive of the rules and spirit of discovery.[85]

Civil law as practiced in much of continental Europe is fundamentally different, and may offer lessons. "Many judges in Continental courts do not see their role as waiting for lawyers to present a case and listening passively to arguments from both sides. Rather, judges see themselves as the main actor in court who works on the basis of an extensive file prepared for the case and who in court compensates for the weaknesses in argumentation of an inexperienced party by asking questions and searching for evidence on the bench's own initiative."[86] There "…the judge plays an active role in questioning witnesses, and in framing or reformulating the issues…As the action proceeds, the judge may interject new theories, and new legal and factual issues, thus reducing the disadvantage of the party with the less competent lawyer. In addition, the court may obtain certain types of evidence, such as expert opinions, on its own motion."[87]

The European inquisitorial system, including its independent career track for judges starting from law school,[88] is far removed from our adversarial system. A switch to their approach as

some in the literature have suggested is unrealistic. However, the fundamental advantage of the European system, the court's non-partisan involvement in fact gathering can perhaps be had by assuring the court has sufficient skills and resources to manage and police discovery as required. This can be achieved by providing the judiciary their own competent and independent experts – Judge's Witnesses as they are known in Europe – to study, understand and help resolve discovery disputes. The mere presence of respected experts reporting directly to the court would discourage much of the obfuscation, delay and conflicting expert opinions that exist in many of today's discovery disputes.

Fortunately, there is strong precedent for providing courts independent resources for managing lawsuits through "masters" and "special masters". Traditionally, masters serve an investigative role often compiling evidence and facts for the court while special masters carry out a specific action requested by the court. Today, "special master" is often used to convey both roles and the designation "master" is falling out of use.[89] Recent examples of how special masters have been used by the courts to conduct and manage fact-finding, resolve disputes and generally facilitate civil case management include:

- In a tobacco litigation case, Judge Gladys Kessler used a special master to successfully handle all discovery matters including the authority to issue reports and recommendations. "The parties might appeal 3 or 6 issues in a 100 page report and recommendation,"[90] Judge Kessler stated.
- In South Dakota after Sioux Indians and land developers had been in and out of court for years over burial ground rights, Judge Lawrence Piersol appointed a special master to keep a daily journal and monitor progress and the actions of construction workers and tribal members. The special master worked out so well, Judge Piersol is considering using a special master in another Indian land matter. [91]
- In the Baycol drug product litigation, a special master was used in response to privacy concerns to screen the thousands of medical records involved in the case. "The special masters have gained the confidence of both sides. They've taken the pressure off the magistrate judge and helped me," commented Judge Michael Davis.[92]
- In Northern California, the courts use mental health professionals as special masters to work with high-conflict families during divorce to help the family stay out of court, reduce conflict and meet the children's needs.[93]
- In Florida courts, special masters conduct independent and impartial assessments of property rights disputes and prepare non-binding determinations of whether an action by a government unfairly burdens the property owner.[94]
- In Georgia, special masters hear evidence and make recommendations regarding the fair market value of property to the courts prior to their ruling.[95]
- In the Justice Department's antitrust case against Microsoft, Professor Lawrence Lessig was appointed special master to investigate conflicting technical claims. Lessig was given broad discretion for conducting fact-finding including ordering each side to submit written briefs, debate issues in hearings, and elicit expert testimony. Microsoft fought the appointment and ultimately succeeded in having Lessig suspended. Lessig was then asked to submit an amicus brief to the court which he did.[96]
- In the U.S. Supreme Court case between the State of Maryland and the Commonwealth of Virginia, a special master researched and prepared a report concerning a long standing

dispute over Virginia's right to construct improvements connected to the Virginia shore of the Potomac.[97] The Supreme Court has often employed special masters to assist it in cases involving historical or geographic matters.

Rule 53 of the Federal Rules of Civil Procedure governing the use of special masters has recently been modified and allows for their use when (i) both parties so consent, and (ii) pre-trial and post-trial matters cannot be addressed effectively and timely by an available district or magistrate judge of the district. The revised rule gives both litigants and courts the flexibility to use independent experts and facilitators when necessary.

Professor John H. Langbein, Yale University's Sterling Professor of Law and Legal History, is one of the nation's most respected authorities on comparative law. Professor Langbein states that "The essential insight of Continental civil procedure is that credible expertise must be neutral expertise."[98] Our system of partisan, highly-paid experts battling each other often baffles the courts, especially in jury trials, and leads to a systematic distrust and devaluation of expertise. It is also expensive and favors the party that can best afford the most effective, and usually most expensive, experts. The use of court-appointed experts whose singular role is an objective "search for the truth" would make modern litigation much more efficient both for the courts and the litigating parties.

The Need for More Effective Competition

Do not law firms compete in an active, client-driven marketplace? Yes, but only within certain business segments, primarily large corporate accounts, and even for those segments in a limited manner. Large firms with significant legal experience have both the negotiating leverage and skills necessary to assure competition for their business. Cisco, for example, bundles its patent prosecution projects and puts the package out for bid. Bidders must respond with both a fixed price and the commitment to lower costs five percent each year.[99] Similarly, General Electric asked 200 firms to respond to a detailed Request for Proposal through an on-line auction for certain types of work. The process was successful and GE's legal expenses for outside counsel were down twelve percent for the period 2003 to 2005.[100]

The ability for large, sophisticated clients to obtain competition for their legal services is based on two factors: volume and standardization. The promise of high volumes of business, of course, motivates law firms to be responsive, but it is the trend towards standardizing law services that makes it possible. "When law gets standardized, it can be outsourced, co-sourced, integrated, aggregated, syndicated and shared. One-to-one consultative advice gives way to one-to-many information services. And the client becomes empowered."[101]

These are encouraging trends, but today only a small fraction of legal services are acquired through such competitive, enlightened methods. Most users of legal services, from individuals needing one-time estate planning to companies and other organizations seeking a range of on-going legal services rely on word-of-mouth, Internet searches and even Yellow Page advertisements to acquire legal services. These clients do not enjoy the benefits of a competitive marketplace.

In reality, *true* competition within the legal industry is very limited compared to many markets. True competition generates innovation, improves efficiency, drives down prices and assures consumers are fully informed of their alternatives. Little of this exists today in the legal industry for a number of reasons:

- Few means exist to compare legal services. Certainly it is difficult to compare the quality of thoughtful legal advice, but much of law is formulaic. Transactional services such as patents, trademarks, wills and many contracts are often straightforward with predictable costs. Even complex litigation is simply a sequence of discrete transactions – complaints, counter-claims, motions, oppositions, memoranda, depositions, hearings and so forth – which when aggregated have reasonably predictable costs. Yet, few firms sell their services in a manner that allows users to compare services directly.
- Sporadic need for legal services makes many users poorly informed consumers. Most individuals need legal services infrequently. Even moderately sized companies have limited requirements for certain services such as litigation. Consequently, these sporadic users often have neither the means to locate similar users to compare experiences and seek advice nor even the knowledge of how to evaluate the alternatives. The result is that many legal service users are very poorly informed consumers.
- Many business people think of the legal system as a "Black Box." Law is too often something for the lawyers to worry about. Whereas other well-managed business functions are overseen by financial controllers setting budgets, analyzing costs and arguing for improved productivity, the legal department is too often largely left alone. The lack of scrutiny limits the need to relentlessly seek competitive alternatives.
- A strong sense of community prevails among many attorneys. For example, attorneys often consider themselves attorneys first and employees of a firm second. As a result corporate counsel may treat outside law firms far more deferentially than professional purchasing agents deal with other vendors. This sense of community also inhibits law's ability to regulate itself since many attorneys are unwilling to seek sanctions or other corrective measures against their peers even when clearly justified.
- Law's business practices inhibit change. Lawyers' hourly billing practices have generated tremendous wealth, yet desensitized them to efficiency and innovation opportunities. Their use of client-attorney confidentiality has assured lawyers privileged control of information, but made the process of law more opaque to outsiders. Their unique access to law-making has arguably limited regulatory oversight which in other industries has resulted in more transparency and better financial reporting.
- Non-lawyers are restricted from owning law firms or sharing legal fees (American Bar Association Model Rule 5.4). The rule's purpose is to preserve professional independence and eliminate external pressures on the practice of law. One critical disadvantage is that very few fresh ideas flow into the profession. In many industries outsiders are the source of change. A college drop-out changed the computer industry. A software entrepreneur is changing the aviation industry. A former hippie has revolutionized the music industry. Unfortunately, in the legal industry there are few outsiders and certainly no Bill Gates, Vern Rayburn or Steve Jobs promoting radical alternatives. Without new approaches to old problems, competition is limited to similar firms competing on the margin.

Competition exists within the legal industry, but limited and hardly disruptive on a scale such as occurs in industries more open to outsiders and unburdened by the stagnation that results from the Billable Hour. So it is hardly surprising that the legal industry has become stultified in its approaches and organization. Innovative industries have evolved their organizational structures tremendously over the last few decades. Software companies, for example, have developed highly-focused specialists as toolsmiths, project managers, diagnosticians, architects, librarians, technical writers, human factors specialists, financial controllers and many more functions. All of whom are focused on designing, testing and shipping software on-time and on-budget. The same holds for hardware. The resulting product improvements and cost reductions are well understood.

In many respects a lawsuit, particularly as it grows larger and more complex, is analogous to a software project. There are ample opportunities for job segmentation and streamlining. Experienced lay librarians could conduct legal research quickly and efficiently. Project administrators could hold experts accountable to their deliverables. Financial controllers could provide productivity reports to clients and hold legal teams accountable to budgets. Purchasing agents could negotiate agreements for external services including experts charging hundreds of thousands of dollars or more per engagement. Toolsmiths could construct specialized tools for efficiently reviewing discovery documents. Even tasks such as motion writing, depositions and settlement negotiations could be done by specialists, highly skilled and efficient in their specialties. Yet today other than basic administrative and clerical tasks, attorneys still do nearly everything as they have for centuries.

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Is self-regulation effective? In our opinion, it is not and will not be without stronger checks and balances within the system. Our system of civil law needs more judicial involvement, neutral fact finding and more effective competition to provide those checks and balances. These are major changes and will come slowly and only with great effort. And as is so often the case, much of that change will come from the outside.

A CALL FOR LEGAL ENTREPRENEURSHIP

The Faint-Hearted Need Not Apply

The legal industry is a major, new opportunity for entrepreneurs. Big Law is a $100 billion industry in need of change. As discussed in this and many other papers much of law as practiced today is inefficient, opaque and largely independent of traditional market forces. Dissatisfaction both among clients and within the profession is high resulting in widespread, pent-up demand for better approaches. And sitting on the sidelines are investment firms with large funds always looking for new opportunities.

What is exciting about law as a business opportunity is that few fields have been cultivated in contrast to so much of high-tech whose grounds have been plowed repeatedly. From an entrepreneurial perspective, law has historically been an isolated valley, remote to outsiders but verdant in its possibilities. Perceptive entrepreneurs will ideally find ideas in this paper that may serve as seeds for growing new businesses.

But the task is not for the faint-hearted. There are enormous barriers to entry. Industry practices are deeply entrenched based on traditions going back centuries. Law is conservative and precedent-based, so unlike technology and consumer markets, there are few early adopters in the legal industry. Market incumbents will naturally fight back with the weapons they know best, and that includes litigation as recently happened with Avvo, a new lawyer ranking firm and the target of a class-action suit nine days after their public launch.[102] Expect the market's wealthy and powerful leadership to resist change and, unlike other markets, they have two *extraordinary* advantages:

- As practitioners of the law, lawyers make the rules. They largely populate the legislatures which pass our laws while their bar associations tightly control the tenets under which the profession operates. Their privileged access to confidentiality, for example, has given them a strong marketing advantage over accountants in today's Sarbanes-Oxley world. "The bar's commitment to confidentiality is not just an ideology – it's also a marketing strategy."[103]
- Lawyers have made themselves the exclusive owners of the practice of law. As American Bar Association Rule 5.4 states, in part, "A lawyer or law firm shall not share legal fees with a non-lawyer." Eventually, this barrier will fall as is happening in Australia and the UK,[104] but today in the United States even the most successful, most well-funded (non-lawyer) entrepreneur could not bring innovation to market by starting a company that practices law.

Not even Standard Oil, General Motors or IBM at the height of their powers enjoyed these advantages. But history teaches that few defensive strategies from Troy to the Maginot Line long resist an inspired offensive assault. Or viewed from a Zen perspective, even the largest mountain eventually succumbs to the wind and the rain.

Clausewitz and Siddhārtha aside, what specifically are the entrepreneurial opportunities within the legal industry? The purpose of this paper is to define the problem and encourage entrepreneurs to help solve it, not suggest new companies. But let's bend that just a bit and discuss two specific ideas that might serve as a catalyst:

Court's Counsel LLC

Court's Counsel LLC would provide experts exclusively to the court. Today the litigation support industry is focused almost exclusively on the bar, and not the bench. Many thoughtful lawyers and legal scholars believe that litigation would benefit by providing judges more resources for evaluating and managing lawsuits.

The need for neutral, competent "judge's witnesses" along the European model and special masters to facilitate litigation are examples. These experts would work for and be accountable to the judge. Their primary role would be to support objective, neutral fact-finding during discovery. They would assist the court in adjudicating issues of fact. Through their specialized knowledge, they would hold the litigants' experts accountable and in the process minimize wasteful and specious arguments so often made to the court today by competing experts. When necessary, they would render independent, expert opinions to the court. The benefit for all parties is that discovery cost and time would be reduced.

These experts would largely be drawn from the huge pool of retiring scientists, engineers, economists, professors and executives from today's baby-boom generation. They would be accomplished in their chosen professions, effective communicators and highly motivated by the societal good this new role can accomplish. As retirees, they would also work relatively inexpensively.

A critical impediment will certainly be funding. Just who pays for this expert? Eventually it will be the litigants themselves, but only after their value has been clearly demonstrated. Even a modestly funded start-up could provide experts at no charge to the courts for ten influential cases at a cost, say, of $100,000 per expert.

Of course, many litigants will resist this intrusion of independent and uncontrollable expertise into their case. Many will prevail just as Microsoft was successful in eliminating the court appointed expert in their federal anti-trust case.[105] But eventually the concept will be tested and hopefully proven. Once that is accomplished, the new firm would take their business proposition directly to the litigants starting with the general counsel of major corporations.

General counsel within corporations increasingly are viewing litigation as a business expense to be closely managed. Within this group there will be a few early adopters willing to try, and fund, the new approach.

Unfortunately, unlike most businesses in which only one customer is involved in a buy decision, two are required in this case; both litigants must agree to this new court expert. But the persistent entrepreneur will eventually find such consenting litigant pairs and the company will be onto its next development stage.

Case Contractors LLC

Case Contractors LLC would serve as general contractors for managing lawsuits. Working exclusively for clients, they would provide administrative and management services for budget development, competitive bidding, budget vs. actual cost tracking, cost-benefit analysis, project management and other services necessary to assure the client's lawsuit is executed as efficiently as possible. In doing so, the new firm would help bring transparency and standardization to legal billing which over time would further reduce costs and improve accountability.

As discussed in the companion paper, *Anatomy of a Lawsuit*, many of the costs of litigation are poorly managed relative to other similarly-sized business expenses. Yet over 25 percent of firms with revenues between $100 million to $1 billion spend well over $1 million a year in litigation costs, excluding settlements and judgments.[106] Large firms spend much more. It would be the firm's mission to bring rigorous project and budget management to litigation, particularly for small to medium-sized companies that litigate infrequently and lack experience.

Would a company's general counsel trust the firm in such a sensitive and critical role? Not before the firm and its management had demonstrated their skill, value and commitment. One means for doing this as well as building a valuable asset for the new firm would be to conduct an industry study based on the analytic approach taken in *Anatomy of a Lawsuit*. A moderately-funded start-up could conduct this study for perhaps 100 lawsuits at no charge to the client firms. The study would be based on the monthly invoices over the life of the lawsuit provided by the client firm. In addition, the client firm would complete a survey regarding their satisfaction with their outside law firm's efficiency and effectiveness during the lawsuit. The results of the study would be:

- A confidential case study provided to each participating client firm of their lawsuit similar to that conducted in *Anatomy of a Lawsuit*. The study would include not only detailed analysis of the cost elements of their specific lawsuit as done in Section II, but also compare those costs with the aggregated results of the other study participants.
- An industry report aggregating the results of all case studies, both cost and satisfaction. This report would be a significant step towards providing standardization and transparency of a lawsuit's constituent parts. And by gathering statistics on lawyers' effectiveness providing case strategy, tactics, execution and leadership, the new company could assist future clients in selecting and managing outside counsel.

In addition to quickly establishing the new firm's credibility and commitment, the study would form the foundation of a valuable database while building the new firm's expertise which would then be marketed as unique case management skills.

Understandably, many law firms will resist such close management and tracking. That will be a major impediment initially. But other complex endeavors have long separated creation and management – architects and builders, directors and producers, engineers and managers, physicians and administrators. The firm's mission would be to help drive that evolution.

One Idea Can Change an Industry

In the 1950s the "Big Three" owned the American automobile industry. Cars from GM, Ford and Chrysler were similar in size, quality and price. The manufacturers were so comfortable with their control over the market that they practiced "planned obsolescence," building cars that would literally fall apart after a few years requiring owners to make another purchase. In the 1960s and 1970s mainframe computers were based on proprietary hardware and software. There was virtually no software or hardware compatibility across manufacturers. Users were so tightly locked into a specific manufacturer that Burroughs' president, Ray MacDonald, openly bragged that their policy was to limit service costs to the point that customers were "sullen but not rebellious."[107]

Of course, the automobile and computer industries have changed. And that change was brought about by unknown, seemingly insignificant outsiders: Toyota, Honda, Microsoft, Dell and a handful of others.

Today the legal industry is similar to the music industry just a few years ago. Ten years ago the only way to buy music was to purchase a CD for $15 dollars or more, even if you only wanted one song. The industry supported its revenue growth by selling consumers a great deal of music it did not want. Consumers were dissatisfied, but they had no choice.

Until the Apple iPod. For people who love music, Steve Jobs' iPod has made music both more accessible and more affordable. Today consumers can easily buy a single song of their choice for 99 cents, Tower Records is out of business, and any teen-ager will tell you no one buys CDs anymore.

The same is true today of the legal industry. Much of what law firms sell today is unneeded and over-priced, yet clients have little choice. But that will ideally change as entrepreneurship comes to law. It just takes one good idea to change an industry.

Entrepreneurship, innovation, start-ups, killer applications, paradigm shifts, venture capital are all terms not normally associated with the practice of law. But entrepreneurship is the distinguishing characteristic of American business. One of our nation's greatest strengths should be applied to what many consider one of our greatest weaknesses, our expensive and adversarial legal system.

Building a company consists of many small, difficult steps. That will be particularly true in this market. As an entrepreneur, consider this paper a problem statement of the issues within law today. Defining the problem is the first step towards defining the solution. And successful solutions to important problems are the basis for thriving, new companies.

So, if you are a young law associate hesitant to follow the traditional path, or an entrepreneur looking for truly fresh opportunities or a partner tired of working for a system badly in need of change, what's holding you back?

♦ ♦ ♦

APPENDIX

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