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Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of Its Demise May Be Greatly Exaggerated

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BILL, BABY, BILL:* HOW THE BILLABLE HOUR EMERGED AS THE PRIMARY METHOD OF ATTORNEY FEE GENERATION AND WHY EARLY REPORTS OF ITS DEMISE MAY BE GREATLY EXAGGERATED

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I. INTRODUCTION

There is perhaps nothing so uniquely identified with the practice of law, certainly nothing so central to the lawyer's daily life, as the billable hour. While the

* The title is a play on the phrase "drill, baby, drill," which gained prominence during the 2008 U.S. Presidential Campaign. The phrase was utilized by the McCain-Palin ticket to call for increased domestic production of oil. The former Chairman of the Republican National Committee, Michael Steele, has been cited as one of the first people to use the "drill, baby, drill" phrase, during his speech at the 2008 Republican National Convention. Siobhan Hughes, *Steele Gives GOP Delegates New Cheer: 'Drill, Baby, Drill!'*, WALL ST. J., Sept. 3, 2008, 10:50 PM, <http://blogs.wsj.com/washwire/2008/09/03/steele-gives-gop-delegates-new-cheer-drill-baby-drill/>. The "drill, baby, drill" phrase is itself a likely play on the phrase "burn, baby, burn" which became synonymous with the 1965 Watts riots. See JERRY COHEN & WILLIAM S. MURPHY, *BURN, BABY, BURN! THE LOS ANGELES RACE RIOT AUGUST, 1965*, 63 (1966).

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rest of the world's professionals divide their respective days by mornings, lunches, and afternoons; by a schedule of hour-long appointments; or by the opening and closing bell of a stock exchange, the lawyer's day is often sliced paper thin, and sometimes in maddeningly complex ways. Does he bill for a five-minute phone call? Does she double bill for work done for one client while traveling on behalf of another? If he's working on a memo, does he stop the clock for a trip to the bathroom? These are the types of difficult, and sometimes strange, questions that lawyers ask. And the average lawyer asks them a lot in a year's time; if attorneys are known for the billable hour, they are also known for the staggering numbers of them they log, especially at large law firms.

As economic and competitive pressures on attorneys and on their clients have increased in recent years, both law firms and their governing jurisdictions have begun looking for ways to adapt to a changing world. Not surprisingly, the billable hour is at the center of the discussion. This article aims to explain how the billable hour came to occupy this place of prominence and to address whether its demise is as imminent as some have suggested. Part II discusses the origins of the billable hour. Part III reviews the billable hour's eventual adoption as the standard method of billing, the subsequent abuses that ensued, and attempts to address these continued abuses. Part IV discusses recent developments in the legal market, including job losses, increased global competition, and deregulation, and their impact on the billable hour. Part V discusses the Alternative Fee Arrangement (AFA) and some of its shortcomings as a substitute for the billable hour. Part VI concludes.

II. THE ORIGINS OF THE BILLABLE HOUR

Traditionally, legal services were sold at fixed fees that reflected relatively routinized and simple tasks.¹ As Thomas Morgan explains it:

[The] drafting [of] a will might involve adapting a form to incorporate the client's information, and the client would be charged \$100. An uncomplicated adoption would take a little longer because a court visit would be involved, but the time could be predicted and the job might be priced at \$500. Defense of a drunk driving charge might require more experience and courtroom time, but lawyers could set a fee of \$1,000 that clients would gladly pay to reduce the chance of serving time in jail.²

Historically, these "going rates" were codified by state laws, which regulated what legal fees could be paid, taking into account lawyers' supplements to income, such as annual retainers or discretionary bonuses paid by satisfied clients.³ By the early twentieth century, several different types of billing methods were utilized, including set fees for a particular task, annual retainers, discretionary "eyeball" methods, and contingency fees, which was approved by the ABA in 1908.⁴ In the

1. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 102 (2010).

2. *Id.*

3. Niki Kuckes, *The Short, Unhappy History of How Lawyers Bill Their Clients*, *LEGAL AFFAIRS* (Sept.–Oct. 2002), http://legalaffairs.org/issues/September-October-2002/review_kuckes_sepoct2002.msp.

4. *Id.* However, it was not until 1965 that Maine, which up to that point banned contingency fees as champerty, eliminated the prohibition. Bernardo M. Cremades, Jr., *Third Party Litigation Funding*:

early 1930s and 1940s, state bar associations, wanting to increase attorney incomes, began publishing “suggested” minimum fee schedules that set standard pricing for a variety of legal services, such as drafting a will or handling a contested divorce.⁵ While these minimum fee schedules were supposedly voluntary, if a bar member undercut these minimum prices, it could give rise to disciplinary action by a state bar.⁶ Indeed, the ABA model rules, then in effect through 1969, advised that it was “‘unethical’ for an attorney to ‘undervalue’ his legal services.”⁷ After the Supreme Court’s 1975 decision in *Goldfarb v. Virginia State*, which held minimum fees schedules violated antitrust law, the billable hour method (which was already growing in popularity) became the predominant method of compensation.⁸

However, while the Supreme Court’s ruling in *Goldfarb* set the stage for the predominance of the billable hour as the primary mechanism for attorney fee generation in the United States, the notion that there was a direct correlation between the hours worked by the lawyer and the services she produced (and therefore the fees she generated) had already been long established. In an often-quoted phrase, Abraham Lincoln was purported to have said: “A lawyer’s time and advice are his stock in trade.”⁹ Indeed, with the rise of industrialization and the development of the notion of “time management,” the first widespread adoption of the close tracking of time spent on a project is attributable to Reginald Heber Smith, a Harvard graduate and attorney hired to head The Boston Legal Aid Society in 1913.¹⁰ It is believed that Smith began using timesheets as early as the 1920s, recording time in six-minute increments.¹¹

Additionally, the new Federal Rules of Civil Procedure—adopted in 1938¹² with substantial new pretrial discovery requirements (including the development of the “motion” practice)—significantly increased the complexity and unpredictability of litigation.¹³ This made it far more difficult for lawyers to estimate their workloads and set a reasonable, agreed-upon flat fee in advance with the client.¹⁴ Contemporaneous with these changes to the Federal Rules, the New Deal was growing both the size and the scope of the federal government, increasing the complexity of regulatory compliance for businesses (frequently an unpredictable process and not

Investing in Arbitration, 8 TRANSNAT’L DISP. MGMT. 1, 3–5 (Oct. 2011), <http://www.curtis.com/siteFiles/Publications/TDM.pdf>.

5. Kuckes, *supra* note 3.

6. *Id.*

7. *Id.*

8. See generally *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788–92 (1975).

9. See MORGAN, *supra* note 1, at 102.

10. Smith was enamored with, and inspired by, concepts like scientific management, which was designed to make factories become more productive. See *Slice of History: Reginald Heber Smith and the Birth of the Billable Hour*, WILMERHALE (Aug. 9, 2010), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=95929>.

11. *Id.*

12. Similar changes were subsequently also adopted and incorporated into the various state rules of civil procedure. See Kuckes, *supra* note 3.

13. Kuckes, *supra* note 3.

14. Kuckes, *supra* note 3.

amenable to fixed fee arrangements or “cookie-cutter” solutions).¹⁵ Adoption of the billable hour method was also pushed by clients who perceived uncertainty about the time and effort required by the lawyer to resolve complex matters, and who were starting to believe that the time it took to resolve a matter successfully was the most reasonable measure of value for an attorney’s services.¹⁶ The billable hour method also enabled the client to monitor the time spent by a lawyer on each of the tasks more effectively and transparently, to have detailed data on how the law firm was staffing cases, and on the law firm’s efficiency in general.¹⁷

Another key driver towards timekeeping and the billable hour was, simply put, the desire for lawyers to earn more money. One widely cited ABA study, “The 1958 Lawyer and His 1938 Dollar,” lamented the fact that lawyers’ incomes had not kept up with those of other professionals, notably physicians.¹⁸ The ABA admonished lawyers that, without compromising their professional standards, they could “learn much from our business brother,”¹⁹ specifically by keeping better records of their time in order to justify and therefore realize more revenue from their clients.²⁰ The ABA recommended that lawyers bill 1,300 hours per year, unless the lawyer worked “overtime,”²¹ an annual target which translated to five to six hours of billable time per day, assuming a five or five and one-half day work week.²² While the ABA recognized that not all lawyers could obtain the hourly rates required by their target incomes,²³ those that could not were advised to simply obtain additional business and bill more hours to make their goals.²⁴ The ABA’s 1958 targets seem low, even quaint, by today’s standards, but the underlying methodology and animating mentality remain familiar to every attorney today.

III. THE CONTINUED RISE OF THE BILLABLE HOUR

A. The Massive Growth of Big Law Firms Leads to the Central Role of the Billable Hour

Lawyers’ incomes grew steadily in the 1960s and the 1970s, but really took off in the 1980s, when it became commonplace for law firms to require attorneys to bill 1,750 to 1,800 hours per year.²⁵ The founding of legal publications, such as the

15. Kuckes, *supra* note 3.

16. See MORGAN, *supra* note 1, at 104.

17. *Id.* See also Steven J. Harper, *Why the Billable Hour Endures*, THE BELLY OF THE BEAST (April 24, 2013), <http://thelawyerbubble.com/2013/04/24/why-the-billable-hour-endures/> (“The billable hour regime endures because, like the general counsel of Veolia, clients think they have it under control. But that requires a leap of faith as outside lawyers resolve the ongoing dilemma of a system that pits fiduciary responsibility to a client against the attorneys’ financial self-interest.”) [hereinafter Harper, *Billable Hour Endures*].

18. ABA SPECIAL COMM. ON ECON. OF LAW PRACTICE, THE 1958 LAWYER AND HIS 1938 DOLLAR 5 (1958).

19. *Id.* at 6.

20. *Id.*

21. *Id.* at 10.

22. *Id.*

23. Lawyers were urged to set a target income for themselves, and then divide that number by 1,300 to set their hourly rate. *Id.*

24. ABA SPECIAL COMM. ON ECON. OF LAW PRACTICE, *supra* note 18, at 10.

25. See Scott Turov, *The Billable Hour Must Die*, ABA J. MAG., (Aug. 1, 2007, 2:54 AM), http://www.abajournal.com/magazine/article/the_billable_hour_must_die/.

American Lawyer by Steven Brill in 1979, brought greater transparency to the legal profession and to law firm profits in particular.²⁶ New measures like the “Profits Per Partner” (PPP) metric encouraged firms to increase both billable hour requirements and hourly rates in order to keep pace with competitors’ profits.²⁷ Thus, it was no big “news” in 2002 when the ABA, in its *Commission on Billable Hours Report*, proposed a total expectation of 2,300 hours of billable and non-billable time per attorney, 1,900 of which should be billable client work.²⁸ According to the most recent figures available from the National Association of Law Placement (NALP), which aggregates self-reported information by law firms with more than seven hundred attorneys, the average billable hour requirement remains a staggering 2,208 hours per year.²⁹

However astounding these statistics may have become, they actually understate the total hours dedicated by the attorney to his or her job.³⁰ According to the Yale Law School, when an attorney takes into account such considerations as commuting, lunches, continuing legal education requirements, and administrative responsibilities at the firm, a 1,832 billable hours requirement actually entails 2,420 hours of work.³¹ Based on that ratio, an attorney who bills 2,201 hours works 3,058 hours.³² As former Kirkland & Ellis LLP partner Stephen J. Harper commented, “[b]illing 2,000 hours a year isn’t easy. It typically takes fifty hours a week to bill an honest forty hours to a client. Add commuting time, bathroom breaks, lunch, holidays, an annual vacation and a little socializing, and most associates find themselves working evenings and weekends to ‘make their hours.’”³³ In the wry words of another observer, these work hours “equat[e] to the amount of time workers in industrialized countries worked in 1870”—an era characterized by sweatshops that gave rise to the American labor movement.³⁴

Under the billable-hour system, a law firm is able to generate additional profits by increasing the hourly rates that are charged to clients, increasing the billable

26. See Noam Scheiber, *The Last Days of Big Law: You Can’t Imagine the Terror when the Money Dries Up*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries#>.

27. *Id.*

28. ABA Comm. on Billable Hours, *ABA Commission on Billable Hours Report, 2001–2002*, AMERICAN BAR ASSOCIATION 1, 49–51 (2002), http://ilta.ebiz.uapps.net/productfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf.

29. Nat’l Ass’n for Law Placement, *Number of Associate Hours Worked Increases at Largest Firms*, NAT’L ASS’N FOR LAW PLACEMENT (Feb. 2012), http://www.nalp.org/billable_hours_feb2012.

30. *The Truth about the Billable Hour*, YALE LAW SCHOOL, http://www.law.yale.edu/studentlife/cdobrochureshandouts_truthaboutthebillablehour.htm (last visited Nov. 15, 2013).

31. *Id.*

32. *Id.*

33. Steven J. Harper, *The Tyranny of the Billable Hour*, N.Y. TIMES, Mar. 28, 2013, <http://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html>.

34. Theresa M. Beiner, *Sleeping and Dreaming: How Law Firms Undermine Diversity and Increase Client Costs through High Billable Hour Requirements* 25 (Aug. 17, 2011) (unpublished manuscript), http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=theresa_beiner (citing Gerhard Bosch & Steffen Lehdorff, *Working-Time Reduction and Employment: Experiences in Europe and Economic Policy Recommendations*, 25 CAMBRIDGE J. ECON. 209, 214 (2001)).

hours of the attorney, leveraging other attorneys and staff who are billed out at rates above the firm's allocable fixed and variable costs, or a combination of these methods.³⁵ Hourly rates, while subject to periodic or even regular increases, are limited by what clients are ultimately willing to pay.³⁶ Criticisms of the billable hour, and even predictions of its demise, have become *de rigueur*.³⁷ The billable hour has routinely been criticized, including by the ABA itself,³⁸ as creating incentives for lawyers to be inefficient, pitting the lawyer's financial interest against that of the client.³⁹ Even more egregious are the possible incentives to inflate or "pad" hours by billing for work in excess of what was actually done.⁴⁰

B. Abuses of the Billable Hour

These extreme billable hour requirements have led to some bizarre and notorious examples of obscenely exaggerated, even fabricated, billing, which support a growing body of empirical evidence that deceptive billing practices by lawyers are common occurrences.⁴¹ To wit, there was the lawyer from Norwich, Connecticut, who billed ninety-four hours in a single day; the lawyer from Raleigh, North Carolina, who billed 13,000 hours for a thirteen-month period; and the lawyer from Baltimore, Maryland, who, with the approval of his firm's finance committee, had the law firm's computer network automatically increase all time billed to a particular client by fifteen percent.⁴² DLA Piper, ranked in 2012 as the largest law firm in the world,⁴³ is now in the midst of a major fee dispute with a former client who is seeking over \$22 million in punitive damages over allegations of an intentional and "sweeping practice of overbilling."⁴⁴ Included in the evidence are highly incrimi-

35. See Michael Roster, *Time to Blow Up the Billable Hour Formula*, ABA LEGAL REBELS BLOG (Nov. 28, 2012, 10:10 AM), http://www.abajournal.com/legalrebels/article/time_to_blow_up_the_formula.

36. See Robert Pack, *The Tyranny of the Billable Hour*, WASHINGTON LAWYER (January 2005), http://www.dcbart.org/for_lawyers/resources/publications/washington_lawyer/january_2005/billable.cfm.

37. See generally *id.*; Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. TIMES, Jan. 29, 2009, http://www.nytimes.com/2009/01/30/business/30hours.html?pagewanted=all&_r=0; Turow, *supra* note 25.

38. See ABA COMM. ON BILLABLE HOURS, *supra* note 28.

39. *Id.* at 7, 15.

40. Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 178 (2005). One of the survey respondents who was an associate at a larger firm stated, "The 2000 billable hour requirement is an impossible task for an HONEST hard-working attorney. I am here every day at least 12 hours and NEVER take a lunch. But not everything is billable. I made my hours last year but did so only because I did not take a vacation. I HATE being an attorney! I have no life. I know that my colleagues regularly falsely elevate their time entries. They have to because they all take lunches every day and leave at 5 or 6 every night." *Id.*

41. GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 503 (5th ed. 2010). As Professor Hazard points out, these practices implicate numerous ethics rules in addition to ABA Model Rule 1.5(a), including Model Rule 8.4(c) (a lawyer must not engage in "fraud, deceit or misrepresentation") and Model Rule 7.1 (a lawyer must not make "false and misleading communications" about legal services). *Id.*

42. Michael Downey, *Ethics and Time-Based Billing*, L. PRAC. TODAY (Jan. 2006), <http://apps.americanbar.org/lpm/lpt/articles/mgt01064.html>.

43. The distinction was based on number of attorneys. *Law360 ranks DLA Piper first in firm size*, DLA PIPER (Feb. 15, 2012), <http://www.dlapiper.com/law360-news/>.

44. Peter Lattman, *Suit Offers a Peek at the Practice of Inflating a Legal Bill*, N.Y. TIMES, March 25, 2013, http://dealbook.nytimes.com/2013/03/25/suit-offers-a-peek-at-the-practice-of-padding-a-legal-bill/?_r=0.

nating internal emails, which include such inflammatory statements by DLA Piper partners as “[we have our lawyers] working full time on random research projects in standard ‘churn that bill, baby!’ mode. That bill shall know no limits.”⁴⁵ DLA Piper is not the first renowned law firm to be involved in a major billing controversy.⁴⁶ At Chapman & Cutler LLP, a respected Chicago firm, a partner billed 6,000 hours in one year, which comes to a jaw-dropping 16.5 hours for each of the 365 days in the calendar year.⁴⁷ Neither have esteemed individuals been immune from temptation.⁴⁸ Webster Hubbell, a former Arkansas Supreme Court Justice⁴⁹ and Associate Attorney General in the Clinton Administration, was convicted of and ultimately went to prison for fraudulently billing clients for time he never worked while a partner at the Rose Law Firm in Little Rock.⁵⁰

C. Attempts to Address Billable Hour Abuses: ABA Formal Opinion 93-379

Attempts to address abuses that arise out of the billable hour system go back to at least the early 1990s, when the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 93-379, *Billing for Professional Fees, Disbursements and Other Expenses*.⁵¹ This opinion addressed several billing-related issues, including the inappropriateness of charging or passing through various overhead expenses—generally associated with properly maintaining a staff and equipping an office—or adding handling fees or mark-ups in connection with services provided by third parties,⁵² such as court reporters, travel agents, or expert witnesses.⁵³ The authors of Formal Opinion 93-379 noted that “[I]t is a common perception that pressure on lawyers to bill a minimum number of hours and on law firms to maintain or improve profits may have led some lawyers to engage in problematic billing practices.”⁵⁴

One scenario addressed by the ABA in Formal Opinion 93-379 involves an attorney who bills more than one client for the same hours spent.⁵⁵ Such a situation can arise when, for example, an attorney is flying cross-country to attend a deposi-

45. *Id.*

46. See Veronica Anderson, *Damage Control Shifts Into High Gear at Chapman A Quiet Law Firm in Spotlight of Legal Scandal*, CRAIN’S CHICAGO BUS., May 30, 1994, <http://www.chicagobusiness.com/article/19940528/ISSUE01/100012025/damage-control-shifts-to-high-gear-at-chapman-a-quiet-firm-in-spotlight-of-legal-scandal>.

47. *Id.*

48. See Bob Franken, *Hubbell pleads guilty as part of deal with Starr*, CNN (June 30, 1999), <http://www.cnn.com/ALLPOLITICS/stories/1999/06/30/hubbell/>.

49. Al Kamen, *CATCHING UP WITH . . . Webb Hubbell*, WASHINGTON POST, June 25, 2012, http://www.washingtonpost.com/blogs/in-the-loop/post/catching-up-with---webb-hubbell/2012/06/25/gJQAfpf51V_blog.html.

50. See Franken *supra*, note 48.

51. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-379, (1993).

52. *Id.* at 1. This prohibition does not apply where the lawyer “incurs costs additional to the direct cost of the third-party services.” *Id.*

53. ABA Comm. on Ethics & Prof’l Responsibility, *supra* note 51, at 1.

54. *Id.*

55. *Id.* at 3–6.

tion on behalf of one client, and during the flight works on a draft of a motion on behalf of another client.⁵⁶ Can the attorney bill time for both the travel time and the work on the plane, and effectively “double bill”?⁵⁷ Categorically, the ABA opined in the negative,⁵⁸ arguing that such a practice would constitute an unreasonable billing practice in violation of Section 1.5 of the ABA Rules of Professional Conduct⁵⁹ and the Model Code of Professional Responsibility, DR 2-106.⁶⁰ Specifically, 1.5(a)(1) makes reference to the reasonableness of the “time and labor” required.⁶¹ Citing the Comment to Section 1.5, Formal Opinion 93-379 states that “[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures;”⁶² in other words, the “goal” should be “solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client.”⁶³ In this context, the operative phrases or concepts utilized by the ABA are: lawyer efforts “expended” and fees “earned.” As the authors of Formal Opinion 93-379 plainly stated:

A lawyer, who flies [on an airplane] for six hours for one client, while working for five hours on behalf of another, has not *earned* eleven billable hours . . . Rather than looking to profit from . . . the desire to get work done rather than watch a movie, . . . the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the *earning* of an unreasonable fee, therefore is contrary to the mandate of . . . [Model Rule 1.5].⁶⁴

56. *Id.* at 4.

57. *See id.*

58. *Id.*

59. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 1.5 (1983). Rule 1.5 states:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 (3) the fee customarily charged in the locality for similar legal services;
 (4) the amount involved and the results obtained;
 (5) the time limitations imposed by the client or by the circumstances;
 (6) the nature and length of the professional relationship with the client;
 (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 (8) whether the fee is fixed or contingent

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. *Id.*

60. *See* ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 51, at 6 n. 2 (stating “DR 2-106 contains substantially the same factors listed in Rule 1.5 to determine reasonableness, but does not require that the basis of the fee be communicated to the client ‘preferably in writing’ as Rule 1.5 does.”).

61. MODEL RULES OF PROF'L CONDUCT R. 1.5, *supra* note 59.

62. ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 51, at 3.

63. *Id.* (citing Ethical Considerations 2-17 of the Model Code of Professional Responsibility) (“The determination of a proper fee requires consideration of the interests of both [the] client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights.”).

64. ABA Comm. On Ethics & Prof'l Responsibility, *supra* note 51 (emphasis added).

“Continuous toil on or overstaffing of a project, for the purpose of churning out hours” is likewise considered an improper basis for charging fees.⁶⁵ The ABA cited Model Rule 3.2,⁶⁶ noting that “[the] job of the lawyer is to expedite the legal process.”⁶⁷ The ABA concludes this way, again focusing on the time and effort expended by the attorney:

It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually *expended*. If a lawyer has agreed to charge the client on this basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually *expended* on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client, not give rise to an opportunity to bill [a] client phantom hours.⁶⁸

But is this an entirely logical outcome? Respecting the airplane travel scenario described in Formal Opinion 93-379, another commentator has observed that each client has a different set of expectations and bargains with the respective tasks in mind.⁶⁹ One client’s expectation is for the attorney to travel to a deposition, while the other client’s “bargain” is for the attorney to spend her time preparing the motion. Assuming the motion is of acceptable quality and there was no prior agreement with the other client not to charge for travel time, a credible argument can be made that each client has received independent economic value—one client has received value in the attorney’s travel to the deposition, the other for written work product.⁷⁰ It is, of course, desirable from the first client’s perspective that the attorney prepare for the deposition during the flight thereby maximizing the utility of the time spent on the airplane—time for which the client is already paying. But “the fact that [the attorney] is not so efficient, however, does not render her conduct unethical.”⁷¹ As the ABA recognized, as long as the attorney’s conduct is disclosed, there is no ethical limitation or constraint of professional responsibility that would preclude the attorney from suggesting to the client “additional compensation” for “particularly efficient or outstanding” work.⁷²

IV. THE BILLABLE HOUR IN THE CONTEXT OF RECENT DEVELOPMENTS IN THE LEGAL MARKET

65. *Id.*

66. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.2 (1983) (“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”).

67. ABA Comm. on Ethics & Professional Responsibility, *supra* note 51.

68. *Id.* (emphasis added).

69. Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 231 (2007).

70. *Id.*

71. *Id.*

72. ABA Comm. on Ethics & Professional Responsibility, *supra* note 51.

As a method for compensating lawyers for “services rendered,” the billable hour is an object of growing criticism, even attack.⁷³ Yet for large segments of the legal market, despite growing competitive pressures on attorneys, the billable hour remains the predominant method in which attorney fees are calculated.⁷⁴ It remains a lucrative method as well—a recent authoritative compensation survey of partners and major U.S. law firms showed that the billable hour rates of partners surveyed actually went up from 2010 to 2012 in nine of the twelve markets that were measured.⁷⁵

A. The Loss of Attorney Jobs Due to a Weak Global Economy

Yet as the billable hour remains central to the economics of the delivery of legal services, tens of thousands of law firm jobs have been lost since at least the beginning of the Great Recession in late 2008, with more junior and entry-level attorneys bearing the biggest brunt of these increased pressures.⁷⁶ The loss of these attorney jobs has impacted all segments of the bar, including some of America’s most elite law firms,⁷⁷ as exemplified by the bankruptcy in 2012 of Dewey & LeBoeuf LLP.⁷⁸ This firm had roots over a century old and at its peak employed 1,400 lawyers in twenty-six offices across the globe.⁷⁹ Dewey’s bankruptcy was preceded by other notorious collapses of major global law firms, notably San Francisco-based Heller Ehrman LLP in 2008, and Washington D.C.-based Howrey LLP in 2011.⁸⁰

Even before the financial meltdown and subsequent layoffs, between the period of March 2004 and March 2008, U.S. law firms had already shed close to

73. See Harper, *Billable Hour Endures*, *supra* note 17; Evan R. Chesler, *Kill the Billable Hour*, FORBES (Dec. 25, 2008), <http://www.forbes.com/forbes/2009/0112/026.html>; Katherine L. Brown & Kristin A. Mendoza, *Ending the Tyranny of the Billable Hour: A Mandate for Change for the 21st Century Law Firm*, 51 N.H. BAR JOURNAL 66 (2010), <http://www.nhbar.org/uploads/pdf/BJ-Summer2010-Vol51-No1-Pg66.pdf>.

74. Robert Hirshon, *The Billable Hour Is Dead. Long Live...?*, 30 GPSOLO 1 (2013), http://www.americanbar.org/publications/gp_solo/2013/january_february/billable_hour_dead_long_live.html.

75. Jeffrey A. Lowe, *2012 Partnership Compensation Survey*, MAJOR, LINDSEY & AFRICA 1, 8 (2012), <http://www.mlglobal.com/partner-compensation-survey/2012/FullReport.pdf>. Only two of the twelve markets measured (Los Angeles and Philadelphia) showed declines in billing rates from 2010 to 2012, and those declines were imperceptibly small (Los Angeles going from an average billing rate of \$587 per hour in 2010 to \$584 in 2012 and Philadelphia declining \$5 per hour from \$516 to \$511). *Id.* at 68. All the other markets for which there was data reported healthy increases. *Id.* For example, during the applicable period, New York average rates went from \$700 to \$760; Dallas grew from \$529 to \$602; and Atlanta jumped from \$458 to \$560 per hour. *Id.*

76. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all>.

77. Even Weil, Gotshal & Manges LLP, one of the most financially-sound Wall Street law firms, “with a roster of blue chip clients such as General Electric and General Motors”, announced in late June 2013 that the firm would be “slashing the pay”—in some cases by as much as hundreds of thousands of dollars—of dozens of its partners and laying off about 170 younger attorneys and support staff.” See Ashby Jones & Joe Palazzolo, *Law-Firm Slowdown Fuels Cuts at Weil Gotshal*, WALL ST. J., June 24, 2013, <http://online.wsj.com/article/SB10001424127887323683504578565383059487410.html>.

78. See Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, N.Y. TIMES DEALBOOK (May 28, 2012, 10:21 PM), <http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/>.

79. *Id.*

80. *Id.* See also Scheiber, *supra* note 26.

20,000 high-paying attorney positions.⁸¹ Some of the high-profile layoffs and bankruptcies were widely reported, but there were also “stealth layoff[s],” in which lawyers—who the firm could not supply with enough work—were asked to leave for “performance issues,” where the attorneys were not being fully utilized.⁸²

Not unexpectedly, a sense of gloom has begun to settle on the profession, with notable books predicting a burst of the “lawyer bubble”⁸³ and describing overall declining prospects for lawyers.⁸⁴ Their authors are not merely modern-day Cassandra. Their voices are backed by hard data, like a prediction from the U.S. Bureau of Labor Statistics, for example, that between 2010 and 2020 the legal industry will add a mere 21,800 jobs each year for the 44,000 students who graduate law school annually.⁸⁵ It is no wonder that law schools saw a 13.4 percent decline in applications for the 2013-2014 school year.⁸⁶

B. Increased Competitive Pressures, Including the Deregulation of the Legal Market

These unprecedented stresses, felt most acutely by large law firms, emanate not only from a weak economy, but also from greater sophistication of clients and increased global competition. The stresses due to the sophistication of clients relate to the ascendance of in-house corporate counsels, whose primary focus is often to wring out as much cost from external legal expenditures as possible.⁸⁷ Increased

81. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, A.B.A. J. (July 1, 2011), http://www.abajournal.com/magazine/article/paradigm_shift/.

82. Joyce S. Sterling & Nancy Reichman, So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World, 78 *FORDHAM L. REV.* 2289, 2298 (2010).

83. See generally Steven J. Harper, *The Lawyer Bubble: A Profession in Crisis* (2013).

84. See generally Michael H. Trotter, *Declining Prospects: How Extraordinary Competition and Compensation are Changing America’s Major Law Firms* (2012).

85. Chris Fletcher, *A Message to Aspiring Lawyers: Caveat Emptor*, WALL ST. J., Jan. 2, 2013, <http://online.wsj.com/article/SB10001424127887323320404578213223967518096.html> (citing BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *Occupational Outlook Handbook, 2012-2013 Edition available at* <http://www.bls.gov/ooh/legal/lawyers.htm#tab-6>); see also Scheiber, *supra* note 26 (“Five years ago, during a recession, American law schools produced 43,600 graduates and 75 percent had positions as lawyers within nine months. Last year, the numbers were 46,500 and 64 percent. In addition to the emotional toll unemployment exacts, it is often financially ruinous. The average law student graduates \$100,000 in debt.”).

86. Catherine Ho, *Law school applications continue to slide*, WASH. POST, June 2, 2013, http://www.washingtonpost.com/business/capitalbusiness/law-school-applications-continue-to-slide/2013/06/02/db4929b0-c93f-11e2-9245-773c0123c027_story.html (“Last fall, George Washington University Law School cut its number of first-year law students from 474 to 398, the smallest in a decade and the second year in a row the school reduced its class size.”).

87. See Sue Reisinger, *AIG Overhauls Global Legal Operations*, CORPORATE COUNSEL (October 7, 2013), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202622241239&AIG_Overhauls_Global_Legal_Operations.

global competition stresses include broader trends towards deregulation of the market for legal services.⁸⁸

Many countries have addressed these stresses by taking steps toward deregulation.⁸⁹ The United Kingdom, for example, has led the way with the creation of so-called Alternative Business Structures (“ABS”), which allow for non-lawyers to partner with lawyers in the ownership and operation of law firms.⁹⁰ Some critics have observed that ABS firms will allow companies like Wal-Mart, Costco (on the pure retail side), MetLife, or CitiBank (on the financial services/insurance side) to set up retail law firms. Critics have argued that these arrangements would pose ethical problems if non-attorney investors attempt to interfere with the independence and judgment of an attorney or otherwise influence the lawyer–client relationship.⁹¹ As a consequence of the deregulation of the legal services market in the United Kingdom, one national law firm, Irwin Mitchell LLP, hired an investment bank and announced it was considering raising external capital through the sale of its shares to the public.⁹² Irwin Mitchell LLP would have been the first law firm in the United Kingdom to raise external capital this way, but it later elected to put off that decision for an indefinite period.⁹³

Trends towards deregulation also exist in the United States.⁹⁴ In May 2011, the personal injury firm Jacoby & Meyers LLC filed lawsuits challenging state laws in New York, New Jersey, and Connecticut that prohibited non-attorney ownership of law firms.⁹⁵ Contesting what it characterized as the out-dated “prohibition on non-[attorney] investment in law firms,” the complaint averred that such restrictions precluded Jacoby & Meyers’s ability to raise the capital necessary to pay for improvements in technology and infrastructure, to expand its offices, and to hire

88. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 804 (2010). For a representative application of the dynamics around the greater roles of in-house counsels, see the “Value Challenge” of the Association of Corporate Counsel (ACC), the largest bar association of in-house lawyers in the world. *About-Association of Corporate Counsel*, ASS’N OF CORPORATE COUNSEL, <http://www.acc.com/valuechallenge/about/> (last visited Nov. 15, 2013). The ACC describes the Value Challenge on its website as “an initiative to reconnect the value and the cost of legal services . . . based on the concept that law departments can use management practices that enhance the value of legal service spending; and that law firms can reduce their costs to corporate clients and still maintain strong profitability.” *Id.* In terms of the execution of the Value Challenge, the ACC provides a range of information about specific law firm billing practices and a community forum for in-house counsels to share information about law firm billing rates, thereby increasing transparency and information in the marketplace. *Id.*

89. *Id.*

90. The Legal Services Act, 2007, c. 29, (U.K.) available at http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf.

91. See MODEL RULES OF PROF’L CONDUCT R. 5.4(b) (2010). See generally Sara Kellogg, *The Transformation of Legal Education*, WASH. LAWYER (May 2011), http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/may_2011/legal_education.cfm.

92. See Sam Chadderton, *Irwin Mitchell puts flotation plans on a backburner*, LAWYER (Feb. 11, 2013), <http://www.thelawyer.com/irwin-mitchell-puts-flotation-plans-on-a-backburner/3000783.article>.

93. Neil Rose, *Lawyers are right to be cautious about going public*, GUARDIAN (May 5, 2011), <http://www.guardian.co.uk/law/2011/may/05/lawyers-public-companies-rewards-hurdles>; see also Chadderton, *supra* note 92.

94. See, e.g., *Jacoby & Meyers, LLP v. Presiding Justices*, 847 F. Supp. 2d 590 (S.D.N.Y. 2012), *vacated*, 488 F. App’x 526 (2d Cir. 2012).

95. See *id.*

additional personnel.⁹⁶ The Jacoby & Meyers lawsuit highlighted the fact that more traditional sources of capital for law firms, such as personal contributions of partners and retained earnings on fees generated and collected, are insufficient.⁹⁷ Also, the lawsuit established that commercial bank loans are no longer sufficient to support a law firm in a competitive global marketplace.⁹⁸ “[W]hile the theories supporting these claims rest heavily on constitutional arguments such as First Amendment (free speech and free association) and due process rationale, the broader message is that limiting access to outside capital reduces the opportunities for attorney representation of clients, which in turn reduces access to justice.”⁹⁹ In New York, there have been reasons for advocates of this new model to be hopeful. After the Federal District Court dismissed Jacoby & Meyers’s suit on standing grounds, the U.S. Court of Appeals for the Second Circuit remanded the case for a determination of the constitutionality of New York Rule of Professional Conduct 5.4,¹⁰⁰ which addresses non-lawyer investment in law firms. ,¹⁰¹ The Second Circuit specifically cites concerns about the First Amendment, Fourteenth Amendment, and Dormant

96. Brief & Special Appendix for Plaintiffs-Appellants, Jacob & Meyers Law Offices, LLP v. Presiding Justices, 488 F. App’x 526 (2d Cir. 2012) (No. 12-1377-CV) 2012 WL 2089570 at *6.

97. *Jacoby & Meyers, LLP*, 847 F. Supp. 2d at 592.

98. *Id.*

99. Stuart L. Pardau, *Alternative Litigation Financing: Perils and Opportunities*, 12 U.C. DAVIS BUS. L.J. 65, 86 (2011) (“Each day in our courthouses we see the fallout from the economic downturn reflected in dockets surging with new foreclosure, eviction, family offense, consumer debt and criminal cases. This flood of cases carries with it the future of millions of New Yorkers . . . all seeking justice and often fighting for life’s most basic needs, people who have nowhere else to turn to but the courts to protect their fundamental rights.” (citations omitted) (quoting Chief Judge Jonathan Lippman of New York in his 2011 State of the Judiciary Speech)).

100. *Jacoby & Meyers, LLP v. Presiding Justices*, 488 F. App’x 526, 526 (2d Cir. 2012).

101. N.Y. RULES OF PROF’L. CONDUCT, § 5.4 (McKinney 2013). Rule 5.4 reads as follows:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
- (1) an agreement by a lawyer with the lawyer’s firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
 - (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and
 - (3) a lawyer or law firm may compensate a nonlawyer employee or include a non-lawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer’s professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer’s duty to maintain the confidential information of the client under Rule 1.6.
- (d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:
- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
 - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer. *Id.*

Commerce Clause, breathing life into the possibility of non-attorney investment in a law firm.¹⁰² Indeed, in 2012, the ABA 20/20 Commission on Legal Ethics determined that it would not consider any further changes or further revisions to the broad prohibitions on non-attorney ownership of law firms.¹⁰³

Independent of the Jacoby & Meyers case, a bill was introduced in 2011 in the North Carolina legislature that allowed for non-attorney ownership of professional law corporations.¹⁰⁴ While the District of Columbia is a notable exception,¹⁰⁵ the ABA Model Rules, which sets the standard for the vast majority of jurisdictions, contains a blanket prohibition on non-attorney investment in a law firm.¹⁰⁶

In addition to increased global competition, the push for deregulation is also seen by some commentators as being driven by disruptions emanating from rapid changes in technology,¹⁰⁷ particularly the proliferation and wider dissemination of legal information and products. These products include contract forms,¹⁰⁸ automated advice created on software applications,¹⁰⁹ and the full suite of litigation support products.¹¹⁰

C. While the Licensure System Is Unlikely to be Modified, It Is Coming Under Greater Scrutiny

Another area where scholars have called for the deregulation of the U.S. legal market is the licensure system. In order to become an attorney, a person must obtain a license, typically from a state supreme court, which, in the vast majority of states, requires a Juris Doctor graduate degree from an ABA accredited law

102. *Jacoby & Meyers, LLP v. Presiding Justices*, 488 F. App'x 526, 527 (2d Cir. 2013); *see also* David Glovin & Don Jeffrey, *Jacoby & Meyers Wins Round in Nonlawyer-Investor Dispute*, BLOOMBERG (Jan. 9, 2013, 1:38 PM), <http://www.bloomberg.com/news/2013-01-09/jacoby-meyers-wins-round-in-nonlawyer-investor-dispute.html>.

103. James Podgers, *Nonlawyer Ownership Interests in Law Firms Remains an Unsettled Issue for Ethics 20/20 Commission*, ABA J. (Feb. 3, 2012, 7:21 PM), http://www.abajournal.com/news/article/nonlawyer_ownership_interests_in_law_firms_remains_an_unsettled_issue/.

104. S.B. 254, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

105. Rule 5.4(b) of the D.C. Rules of Professional Conduct states in relevant part: "A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to client, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; [and] (2) All persons having such managerial authority or holding a financial interest undertake to abide by these rules of Professional Conduct." D.C. RULES OF PROFESSIONAL CONDUCT R. 5.4(b) (2013).

106. MODEL RULES OF PROFESSIONAL CONDUCT R. 5.4 (2011).

107. Sharon Driscoll, *A Positive Disruption: The Transformation of Law Through Technology*, STAN. LAW. (June 4, 2013), <http://stanfordlawyer.law.stanford.edu/2013/06/a-positive-disruption/>.

108. An example of a firm that offers these alternative legal services is LegalZoom.com, an online company that sells simple, "do-it-yourself," legal documents. LegalZoom.com was the subject of a class action lawsuit filed in Missouri, alleging the unauthorized practice of law, although the case settled before going to trial. Mike Holter, *LegalZoom Reaches Class Action Lawsuit Settlement*, TOP CLASS ACTIONS (Sept. 16, 2011, 1:00 AM), <http://www.topclassactions.com/lawsuit-settlements/lawsuit-news/1371-legalzoom-reaches-class-action-lawsuit-settlement>.

109. *See, e.g.*, LEGAL ADVICE.COM, <http://www.legaladvice.com> (last visited Nov. 15, 2013).

110. Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1198-99 (2011).

school¹¹¹ and successful passage of the state's bar examination.¹¹² The ABA has long played a central role in setting licensure standards. Beginning in the early 1920s, the ABA first attempted to include accreditation of law schools as part of the state's occupational licensing, adopting a set of minimum standards required of law schools and publishing a list of those institutions that complied with those standards.¹¹³ It took time, however, for state legislatures to adopt or to be significantly influenced by these standards; for years following the ABA's first publication of the educational standards, not one state made graduation from an ABA-accredited law school a requirement for admission to its state bar.¹¹⁴ By the 1950's, however, approximately half of the states required a person to graduate from an ABA-accredited law school in order to be admitted to the state's bar.¹¹⁵

Scholars argue that state bars and the ABA place unnecessary roadblocks and constraints on competition in the legal industry, thereby reducing the quality and choices of legal services and increasing the cost to consumers.¹¹⁶ Specifically, these scholars contend that the licensure regimes imposed by the various state bars artificially restrict the supply of lawyers, enabling lawyers to extract an "earnings premium."¹¹⁷ The hourly billable rates lawyers are able to charge as a result of this system of licensure reflect this "premium," and otherwise distort market rates.¹¹⁸

111. Alabama, California, Connecticut, Massachusetts, West Virginia, and Tennessee allow individuals to take the bar exam upon graduation from law schools approved by state bodies but not accredited by the American Bar Association. AL. R. ADMIS. Rule II.; CAL. ST. RULES OF STATE BAR R. 4.26; CT. ST. § 51-81; MA. ST. 221 § 37; TN. R. S. CT. Rule 8, R.P.C. 8.1; W.V. ST. § 30-2-1. In California, for example, certain law schools are registered with the Committee of Bar Examiners ("CBE") of the State Bar of California. Such schools are authorized to grant the J.D. law degree. Students at these schools must take and pass the First-Year Law Students' Examination (commonly referred to as the "Baby Bar") administered by the CBE. *The Purpose and Importance of the California Baby Bar Exam*, CAL. S. UNIV., <http://www.calsouthern.edu/online-law-degrees/baby-bar-exam/> (last visited Nov. 15, 2013). Upon successful passing of the "Baby Bar," those students may continue with their law studies to obtain their J.D. degree. CAL. ST. RULES OF STATE BAR Rule 4.26. In addition, subject to strict limitations, California, Vermont, Virginia, and Washington allow an applicant who attended law school to take the bar exam after study under a judge or practicing attorney for an extended period of time. CAL. ST. RULES OF THE STATE BAR Rule 4.29; VT. R. BAR ADMIS. § 6; VA. ST. § 54.1-3926; WA. R. ADMIS. A.P.R. 5 (amended 2013). This method is known as "reading law" or "reading the law." New York requires that applicants who are reading the law have at least one year of law school study. N.Y. R. A. CT. § 520.4 (Maine allows students with two years of law school to serve an apprenticeship in lieu of completing their third year. ME. ST. T. 4, § 803 (2013)).

112. See generally *Requirements for Graduation & Bar Admission*, UNIV. OF WIS. L. SCH., <http://law.wisc.edu/current/rtf/04.0.html> (last visited Nov. 15, 2013) (The District of Columbia and all states (except Wisconsin) have as a requirement for licensure to take and successfully pass the state bar exam. Wisconsin allows graduates of the University of Wisconsin Law School to practice law without passing a bar examination, which is known as the so-called "Diploma Privilege.").

113. See CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, *THE FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 2* (2011).

114. *Id.* at 3.

115. *Id.* (According to Milton Friedman, the only reason more states did not adopt the ABA-accreditation requirements was that, at the time, many state legislators themselves were graduates of unaccredited schools. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 152 (1962)).

116. See WINSTON, *supra* note 113.

117. *Id.* at 6-7.

118. *Id.*

V. WHERE DO WE GO FROM HERE? ALTERNATIVE FEE
ARRANGEMENTS?

Given the external pressures by clients to hold down legal expenses and the internal dissatisfaction among lawyers at firms with the mounting pressures of billing more hours, alternative fee arrangements (“AFA”) have gained in popularity.¹¹⁹ As one observer noted, the billable hour is “a dying business model . . . because it focuses on selling the wrong thing. . . . [N]o client in the history of the planet has ever wanted to buy time. . . . [I]t’s *what you can do for them during that time*.”¹²⁰ Or as others have observed, it is not that clients object to billable hours *per se*, but rather, perhaps, that they seek greater efficiencies and desire to reduce costs.¹²¹ According to the late Larry Ribstein, because the future delivery of legal services will largely involve what he termed “legal information products,” (the desire for greater efficiency and reduced costs encourages firms to use commoditized services or large-scale technological solutions, such as the digitization of much of the discovery process) there will still be the need for “customized” legal services¹²² and advice, especially on complex matters.¹²³ Ironically, observed Ribstein, these customized legal services are precisely the services that are likely to be priced by the hour.¹²⁴ “One promising explanation is that the hourly fee is a function of the law firm’s reputational capital. . . . [G]iven the risk of law firm cheating from over-billing hours, only firms with substantial reputations can get away with charging by the hour. At the same time, these firms attract more complex work for which the number of hours required may be substantial”¹²⁵

But there remain practical business reasons why the billable hour, or some variant of it, will remain.¹²⁶ “Time”—in this case, the billable hour, or a fraction thereof—is the standard measure of internal and external output for many types of businesses.¹²⁷ Even most AFA’s contain within them some billable hour compo-

119. See *Perdue v. Kenny A.*, 559 U.S. 542, 551–54 (2010).

120. Jay Shepherd, *Small Firms, Big Lawyers: Blade Runner and the Future of Law*, ABOVE THE LAW (Apr. 24, 2011, 3:39 PM), <http://abovethelaw.com/2011/04/small-firms-big-lawyers-blade-runner-and-the-future-of-law/> (emphasis added).

121. Claude R. Bowles, et al., *Lawyers, Law Firms & the Legal Profession: An Ethical View of the Business of Law*, 6 DEPAUL BUS. & COM. L.J. 487, 494 (2008).

122. See generally RICHARD SUSSKIND, THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES (2008) (There are also what British scholar Richard Susskind has termed as “bespoke” services.).

123. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 758 (2010).

124. See *id.*

125. *Id.* at 769.

126. The United States Supreme Court has weighed in on this, even if only tangentially. See *Perdue*, 559 U.S. at 551–52 (holding that the “lodestar” method of fee calculations—hours worked x prevailing hour rates—was the preferred method for calculating attorney fee awards); for a discussion on why billable hours remain see generally ABA COMM. ON BILLABLE HOURS, *supra* note 28.

127. See comments of Joel F. Henning regarding the notion that “time,” specifically “billable time,” is the currency by which lawyers are measured: “[L]awyers want to demonstrate high hourly productivity as well as originations so that when they’re talking to a head hunter or when they’re talking to the firm in the next building they can say, ‘Oh, yeah, I billed 2100 hours, and I’ve got two million dollars worth of practice and that’s why you should hire me and pay me more than my current firm.’ High billable hours are highly valued by lawyers driving law firm profitability. Hourly billing correlates to compensation as well as to fees. Even associates today are paid bonuses for meeting certain thresholds of chargeable hours.” Bowles et al., *supra* note 121, at 495.

ment.¹²⁸ For example, “blended rates are simply . . . mathematical variation[s] of hourly charge[s], and most fixed fee arrangements are based on a [law] firm’s estimate of the number of hours . . . required to handle a client matter”; these arrangements are tantamount to an *a priori* fixing or agreement on an hourly price.¹²⁹

Lastly, some of the ethical dilemmas for lawyers in private practice presented by the billable hour will very likely persist, even if AFA’s become the predominant method for charging clients. One commentator has identified numerous factors which are causes of concern, and which would be present with or without the billable hour, including:

the ever-present desire to maximize profits; the gradual realization that attorneys could make more money from the labor of others than they could from their own labor; . . . [and] the pressure[s] on managing partners to make firms profitable, which mean[s] that associates [have] to produce income equal to roughly three times their salary.”¹³⁰

Likewise, others have observed that lawyers may “overbill” based on any number of motivations, including: (1) ignorance of acceptable standards of conduct; (2) professional insecurity; (3) the absence of a meaningful bond with the firm; (4) lawyers’ competitiveness; (5) compensation systems that directly reward a high number of hours billed; (6) an almost adversarial approach to dealings with clients; (7) “greed and envy”; and even (8) “mental illness . . . and substance abuse”.¹³¹ In further support of this view, one survey review of the literature also revealed that unethical conduct by attorneys is not a function of any particular fee arrangement, but rather is correlated to issues such as “marginality of practice, client pressures, practice context . . . and the social context of a particular law firm”; in this regard, fee arrangements might influence the specific nature of the lawyer’s unethical behavior, but not the likelihood of the unethical behavior itself.¹³²

Nevertheless, given the sense of increased competition, law firms will continue to feel obliged to consider AFA’s, if only because their clients continue to demand it.¹³³ The litigation boutique Bartlit Beck Herman Palenchar & Scott LLP exclusively utilizes AFA’s, most frequently involving a “flat monthly [retainer] that fluctuates [based] on the stage of the litigation, [with] the most expensive fees

128. See Bowles et al., *supra* note 121, at 493.

129. See Ken Swenson, *The Exaggerated Demise of the Billable Hour*, LOS ANGELES LAWYER (Nov. 2011), <http://www.lacba.org/Files/LAL/Vol34No8/2870.pdf>. As the author points out, “a true contingency fee based solely on a percentage of a damage award” would be outside this billable hour, or even quasi-billable hour, regime; however, few such fee arrangements are feasible beyond a narrow set of practice areas such as personal injury, and are expressly prohibited in other areas such as domestic relations and criminal defense. See Bowles et al., *supra* note 118, at 493; see also MODEL RULES OF PROF’L CONDUCT R. 1.5(d)(1), (2) (2013).

130. Joseph E. La Rue, Note, *Redeeming the Lawyer’s Time: A Proposal for a Shift in How Attorneys Think About—and Utilize—Time*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 473, 483 (2006).

131. Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C.L. REV. 63, 70, 81–99 (2008).

132. Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1979–80 (2002).

133. See Hirshon, *supra* note 74.

billed at trial.”¹³⁴ But Bartlit Beck remains an outlier, with the vast majority of law firms using AFA’s in a limited capacity without fully eroding the core billable hour method.¹³⁵ Thus, as one commentator put it, while AFA’s “are being increasingly used by more and more law firms . . . clearly the billable hour no longer rules the kingdom alone. Whether it fades . . . into oblivion, however, is not yet a certainty.”¹³⁶

VI. CONCLUSION

In a broad sense, we are living in a brave new world. The initial shock of the global financial collapse of 2008 eventually gave way to traditional American hopes that “this too shall pass,” that things would turn around, as they always have. But recovery has been modest, and as the economy has continued to languish, these hopes have, in some ways, been deferred. Certainly, globalization and the outsourcing of activities long delegated to associates pose challenges for old ways of doing law firm business. In the coming years, law firms, like their clients, will evolve or die, and the firms best suited for survival will have no sacred cows—the billable hour not excepted.

But is there really a better way? Lincoln’s observation remains true today. A lawyer still trades in advice and time, even if the complexities inherent in the delivery of value to the client have increased dramatically in the last century and a half. It is hard to imagine a world where lawyers, at least on the defense side, are not in some way “billing” for “hours.” But law firms, as businesses, are subject to the demand for increased efficiency that comes with increased scarcity of resources. At the future’s successful firms, the lawyer’s hour will go further, and questions about the impediment that traditional billable hour regimes pose for this goal are justified. Nevertheless, no wholesale alternative has emerged to date, and the billable hour, even as it has always been known, is proving resilient.

134. *Id.*

135. *Id.*

136. *Id.* For an argument, written in response to Scheiber’s New Republic piece (*see supra* note 26) that the demise of the large law firm has been overstated, *see* Mark Obbie, *The Fascinating Vampire Squids of Law*, SLATE (July 24, 2013, 5:52 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/death_of_big_law_new_republic_s_claim_is_grossly_exaggerated.html (“All along, corporate legal officers—the clients (and often former partners) of the law firms—have vowed to clamp down on extravagant hourly fees and legal bills that outstrip any business rationale. For some reason, though, they never reach the client-driven nirvana that Scheiber touts, of outsourced research and dramatically pruned invoices, simply because legal bills, compared at least to banker fees, amount to rounding errors when corporations need outside counsel to do their deals and defend them in bet-the-company litigation. In both flush times or crises, the fees flow.”).