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## Lawyers in a Fee Quandary: Must the Billable Hour Die?\*

Claude R. (Chip) Bowles, Jr., Joel F. Henning, William Hornsby,  
and Professor Forrest Mosten

MR. BOWLES: Thank you very much. I'm Chip Bowles. As I said, I'm a member of the law firm of Greenebaum Doll & McDonald in Louisville, Kentucky, home of the Kentucky Derby, the greatest two minutes in sports. But for purposes of this presentation, if you make sure that the preparation that you do on the tote sheets that determine the Derby winner, looking at the saddling at the paddock, the interest in post-race interviews, the presentation, it can be rounded up to four-tenths of a billing hour for purposes of your client. Assuming you have a client like that.

But here, we're here to talk about this lovely article that appeared in August of 2007 of the ABA Journal, *The Billable Hour Must Die*.<sup>1</sup> Now, it sounds like a new legal murder mystery novel, and probably would have been a very good title, but really it's a very solid call to question one of the fundamental foundations of billing and getting paid in the legal practice.<sup>2</sup> Despite what all of us have as our goals of helping people, getting paid so that you don't come to someone like me, who is a bankruptcy lawyer, is probably a very good thing.

Let me ask you, how many of your firms primarily bill on the billable hour? All right. So most people know the extent and the issue here, but Scott in his article basically raised a number of issues.<sup>3</sup> And his first issue was that the billable hour has basically become a form of serfdom, not only for the lawyers who are stuck with having to bill under something that is basically an immutable commodity, i.e., number of hours in a day, but it's also tapped into the supporting world of kings in the middle ages under the serfdom area of clients because they have to pay lawyers based on this.<sup>4</sup>

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\* This is an edited version of the transcript from the first panel at the DEPAUL BUSINESS AND COMMERCIAL LAW JOURNAL SYMPOSIUM, *Lawyers, Law Firms & the Legal Profession: An Ethical View of the Business of Law*, held on May 1, 2008.

1. Scott Turov, *The Billable Hour Must Die: It Rewards Inefficiency. It Makes Clients Suspicious. And It May Be Unethical.*, 93 A.B.A. J. 32 (2007).

2. *Id.*

3. *Id.*

4. *Id.*

You know, billable hours have a problem, as he points out, because there are only three ways to increase your earnings once you're tied to the billable hour.<sup>5</sup> One, you can work longer.<sup>6</sup> Well, there have been people who've billed more than twenty-five hours a day. Those people, if they've been caught, have been properly chastised. If they haven't been caught, their consciences should bother them. Secondly, you can move your rates up.<sup>7</sup> Well, while there are price points in every type of business, there is a certain point where moving your rates up will end up with a diminished return or even lack of business. And finally, for those of you working in large firms, there is the wonderful phrase, "more leverage."<sup>8</sup> For those of you students who are going to be associates, fear this phrase because this means you will work like galley slaves without a representative carrying a whip in working to try to increase the gross profit per partner at your firm.

These are the problems, because when you have a system where it is based on the number of hours of work, you have, from a lawyer's side, a problem in that this sort of stifles other things. In other years you might have things such as a life. For those of you who are young associates, forget that, you're not going to have that for a number of years, but you used to have more of it before you had billable hours of 2000, 2200, 2550.

Second, more importantly, you had long range productivity goals, an opportunity to interface with other lawyers, try to develop contacts, referrals, develop your skill sets, come to places like this without having to worry, oh, I'm two hours behind bogie, I'm going to miss my bonus this year.<sup>9</sup> And finally, you had something that would be allowing you to work around your hourly rate.<sup>10</sup> If you didn't have the drive on hours, your hourly rate might be tailored so that you could get a slightly greater variety of clients. But as long as you're stuck in I'm having hours times my rate, your rate is going to have to be going for what the bottom line is and many practices now, the amount you've made.

Now, this article was not a call to wholesale abandon hourly billing.<sup>11</sup> And in the article, he doesn't offer a final bullet point solution because he knows how hard it is to get away from what has been a tried and true standard for at least over forty years of determining the

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5. *Id.*

6. Turow, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Turow, *supra* note 1.

number of hours worked times the reasonable hourly rate is what you charge a client.<sup>12</sup> But he does make the point, this is slowly tearing apart the legal fabric in the work between an attorney and client, and it's tearing down the practice of law from what used to be a profession to now just basically a form of clock-in, clock-out servitude.

He also raises a couple of other issues on this. One is an ethical dilemma. He says how many of you have talked to one of your clients about the problems inherent in what I will call the Lodestar billing standard, i.e., when it's in your firm's financial incentive not to work quickly but to work at a "reasonably measured pace" where you maximize your dollars as opposed to getting the thing done for your client.<sup>13</sup> Second, he points out fee disputes among lawyers are beginning to be a greater and greater problem.<sup>14</sup> As we'll see from Joel and the other speakers here, fights over fees are getting worse and worse and you're having it become more frequent. These are not just petty matters of a few dollars, but in fact a large wholesale change in the fee structure of some firms.

Finally, you're having client revolt over the final triad of the hourly billing system, at least the large firms, the leverage portion.<sup>15</sup> More and more clients are beginning to say you're paying your first year associates more than my senior vice presidents or my senior managers make. Well, I was once a first-year associate back when we still had clay tablets, and I believe that giving a first-year associate every dollar they have is a good idea. There's going to be some point where the increasing rates—the increase in associates' salaries—is going to collapse.

These are the things that came out of Scott's article.<sup>16</sup> I, for copyright purposes, will attribute all the good ideas to him and any bad ones I screwed up in the interpretation. But now we're going to go to our panelists to talk about the issues raised here, "Must the Billable Hour Die?" First, we'll go to Joel Henning who will talk about that from a large firm and large client perspective.

MR. HENNING: Thank you very much, Chip. I'm going to apologize since the only way I can see my slides is looking away from you guys and I don't mean any offense.

I think that the real questions are as follows: First, not must the billable hour die; the first question is will it die? And I don't think any

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Turow, *supra* note 1.

of us up here are very sanguine about it dying any time soon. The second, if it is going to die, how will it die? I will at the end of my remarks suggest a fairly radical notion of one way that it might die. And how long will it take? I think most of us up here think it's going to be a long time.

I'm pretty sure it's not only an economic but also an ethical issue. If you have a law firm and you tell the associates that you don't get a bonus unless you bill 2000 hours and all of a sudden miraculously all the associates who want the bonus bill 2000 hours and they're phonying up some of those hours, that's an ethical issue. I don't think it is directly attributable to the billable hour; you just have dishonest associates or partners.

In any event, let's look first at outside counsel purchasing trends. This is a superficial view of the historical context, but you know, in the 1800's Abraham Lincoln was a lawyer and said, "A lawyer's time is his stock and trade." Honest Abe.

Up until about thirty years ago, you had close relationships between business owners and lawyers, they played golf together, they served on the board of the Art Institute together, and they went to church together. Lawyers were thought of as trusted advisors. Usually the general counsel was outside of the company in a firm, the firm did pretty much all the work, the fees were set and paid with minimal oversight, and there was very little discrimination among different kinds of legal services with regard to fees.

In fact, when I started the practice of law, which is an admission of my age, the Chicago Bar Association set minimum fee schedules. I see some heads nodding in approval. It's too early in my talk for them to be nodding because they're going to sleep, but the fact is the minimum fee schedule was another alternative which wasn't very good either.

Then from the 1970s to the late '80s you had corporations engaging multiple firms, very much increased competition. Billable hours were requested and accepted. And it is true that some of us consultants said, "Hey, lawyers in law firms, if you keep careful track of your hours, honest careful track of your hours, and you bill and collect on a very regular basis, at least monthly, you're going to make more money." And sure enough, law firms saw that to be the case and so the billable hour became relentlessly and aggressively pursued. With minimal cost pressure, there was little budgeting, the firms billed, clients paid, with little tracking and analysis of client spend. Law firms found that with tracking billable hours and charging for them, their profits really went up.

Then in the '90s general counsel were becoming more sophisticated. And the way you can see that is because they were being paid more like other senior corporate officers. In fact, now many general counsel are called chief legal officers, so there's a "C" like CIO's, COO's, CEO's, and CFO's and so on. And they are also very sophisticated. They came out of law firms. They saw a lot of the nonsense, the inefficiencies and so on. And their CEO's are apt to say, "You're a cost center, I want to see some cuts in our legal spend because it's not attributable to—it's not related to profits, it's only related to costs." So general counsel were under the gun from CEO's and CFO's, and one of the things we saw was a lot of convergence. It was started by DuPont, but we work with many companies that are reducing the number of law firms from hundreds, which just grew by historical accident, to a handful.

I was talking to a major insurance company just a few days ago that went from four hundred fifty firms to forty, and they've since reduced it to about twelve who are doing most of their major work. And that has a big influence on efficiency, management, relationships, a lot of in-depth tracking, and so on.

Most recently, the big corporate scandals, increased security, governance compliance costs, has aroused a lot of in-house disdain for the hourly rate, as Chip alluded to. E-billing systems that a lot of law departments are using now, and requiring their law firms to comply with, are very helpful. Once they're understood and once they're up and running, they're really very helpful in understanding how different firms are billing and how efficient they are.

We have seen an increase in convergence programs, economic improvements, and very tough cost controls among clients. The latest trends are reducing even further the number of preferred providers. In a desire to use firms across regions, across the country, indeed internationally, that's one of the reasons we've seen a lot of growth in large firms in Chicago and elsewhere. We have worked with a firm that was a small real estate firm that now is DLA Piper, one of the biggest firms in the world.

Now if you talk to general counsel, they'll say, "I don't hire law firms, I hire lawyers." But that's really not true. If you look at the fact that—especially with convergence programs—they're looking to get depth, breadth, efficiency, competitive costs, and prices from their law firms. So the goal, again, may be to come back to a handful of trusted advisors, not going to just one firm but a handful of firms.

So convergence is a reality. There's quality, there's efficiency, there's control, and we can see that a lot of firms can be distinguished

based on their billing rates. Some law departments are requiring discounts. We call that pay to play. “If you want to be on our preferred provider list, you’re going to give us a fifteen percent discount.” My problem with that is it doesn’t get us away from the hourly rate, and we see miraculously that when there’s a fifteen percent discount the number of hours rises by at least fifteen percent, if not more.

So although there’s a lot of fuss about the billable hour, fixed fees and other special fee arrangements are almost always the stated goal, but that goal is difficult to reach in reality. And in fact, my sense is general counsel pay only lip service to the idea of moving away from the billable hour. Few of them are willing to bite the bullet.

One client of mine, the general counsel of a major twenty-five billion dollar entertainment company, told me, and this is a direct quote, “I don’t care what the hourly rate is of the top lawyers I hire. My concern is whether I can get enough of their hours.” Now the key there is the top lawyers. They are at the top of the value pyramid.

One of the nation’s top litigating firms retained us to help them be introduced to companies they don’t already work for. And I’m not talking about a rinky-dink firm, a top litigating firm. And we have found very few general counsel that are interested in talking to them about special fee arrangements which could save them money.

From the client perspective, they don’t know what they’re going to pay with hourly billing. It discourages efficiency. The client accepts all the financial risks. And as Chip said, there is a great premium on inefficiency.

Fees often have little relationship to value. Sometimes a ten minute phone call can be more valuable than a hundred hours of work. It doesn’t account for benefits of systems and technology. From the lawyer perspective, it’s inadequately compensating them in very high value and high responsibility matters. It fails to recognize extraordinary efforts. There are obviously finite limits on billable hours. And there is no incentive to search for better ways. You know, it’s kind of a built-in, the cost plus notion, the way the Pentagon used to buy almost everything, there is a built-in incentive to be inefficient.

So the option—alternative fee arrangements—to what extent are these alternatives being used? Very little. We do a survey of law departments at Hildebrandt. Fifty-eight percent of the respondents say they use hourly standard rates in more than half of their fee arrangements with outside counsel, and that hasn’t changed since 2001. When you add in volume discounts, up to eighty-five percent of the work is based on hourly rates. Eighty-one percent of the participants in our

corporate counsel study say they never use value billing or certain kinds of fixed fees or results-based billing.

I don't want to dwell on this, but there are some advantages to the fixed fee. It forces agreement between lawyers and clients as to what service is going to be required, which obviously requires some efficiency on the part of the lawyers. Its disadvantages are obvious too. It's unprofitable if you estimate wrong. I have a law firm client that says every time we make a deal on a fixed fee we lose thirty-five percent. I said, "Doesn't that tell you something?" But a lot of law firms still have a lot of trouble budgeting, planning, and being efficient even under these convergence programs.

Contingent fees are an interesting special fee arrangement. An advantage is the client pays only when the client wins; the lawyer has skin in the game. The disadvantage is that the lawyers assume all the risk. There are carrying costs. And corporate clients, I find, often feel that when they make deals for contingent fees that at the end of the day when they win, they don't like writing that check to the lawyer. They feel that the lawyer is making too much. They'd rather live with the devil they know, which is often the hourly fee, than with the devil they don't know.

The blended hourly rate doesn't get us away at all from the whole idea of hourly fees. There are problems with that. There is some advantage, but the problem is if too much of the important work is leveraged down—again we come up with this notion of leverage—and the senior partners aren't doing the work that they should do.

So what's happening is that the legal marketplace has become mature. When I started to practice law, we were still in the days of the medieval guild when law firms were very much in control. They could maintain very high quality. They could hire as lawyers only who they wanted, and usually it was a white male Jewish or a white male Catholic or even a white male Italian Catholic. Everything was very controlled with regard to who joined law firms. It was long before we had the pluralism in the profession we have today and they charged whatever they wanted, but that's really changed. So we now have this value pyramid that I referred to before. At the top of the pyramid we have the high value, bet the company work, the middle, the mid-value expertise reputation, and at the bottom, the commodity work.

Whenever I work with law firms, I always ask, "Where is your work?" And everyone says, "Ours is mainly at the top, a little bit is in the middle." Very few law firms are willing to admit that a lot of their work—in virtually all law firms—is in the bottom of the value pyramid.



So which is the most profitable? The fact is—and again we go to something Chip mentioned—if you set yourself up right, you can do commodity work, insurance defense work, simple loan documentation for banks, patent prosecution, you could make good money. But that's setting your firm up in a very different way than if you're going for the mid-level or the high-value work. And the fact is, you know, that's the way law firms tend to pan out here.

Now, if all segments can generate significant profits, can one firm span all segments? The answer is no because you have to set up your law firm very differently if you're going to work at the bottom of the value pyramid. Can you start there and then work up with your clients? The answer is most clients say that we perceive the law firms that provide us with the low-value work as low-value providers. We may like them, we may think they do a great job, but we don't consider them for the high-value work. It just doesn't happen. So what's happening is increasing commoditization, a lot more law practice is moving down in that value pyramid.

So how do corporate clients perceive the issue? Clients are most sensitive at the bottom of the value pyramid. And that's loan documentation, insurance defense, low end employment litigation, some patent prosecution, and trademark registration. And there are a lot of other—and an increasing number—of practices that are commodity practices. This happens in all mature markets. Ask the accounting firms. But it's happening now in our profession.

As commoditization moves up the value pyramid, more legal practices will become price sensitive. I have a client in Buenos Aires, and I'm amazed that the M & A practice in Buenos Aires is a commodity practice. Very few firms make money in M & A in Buenos Aires.

It's possible that hourly billing will become less popular because of the price sensitivity down the value pyramid as commoditization of legal practice increases.

In terms of costs and resourcing, law firms are perceived by their clients as putting too little effort into efficiency and project management. Of course, a lot of that has to do with the billable hours. But my sense is that clients want to lower costs and very often it's not that they want to move away from the billable hour, they just want more efficiency, they want closer control of who is going to be on the teams that are working for a particular client, but they're not that concerned about whether it's a billable hour or it's some other alternative fee arrangement.

So how do outside counsel view all of this? In terms of their compensation, lawyers perceive that they're paid for origination and indi-

vidual productivity. It doesn't matter what compensation system there is at a law firm, that's what partners perceive they're paid for, individual productivity and originations.

And what does individual productivity mean? Hours. And that continues to hold true at most firms. The problem is that the legal marketplace is a frictionless plane. So lawyers want to demonstrate high hourly productivity as well as originations so that when they're talking to the 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.

I was talking to a firm here in Chicago just last week that is hoping to get away from pegging, formulaically, associate bonuses to specific numbers of billable hours. Because as I said before, that's where a lot of the unethical stuff is happening, where associates are miraculously billing the 2000 hours they need, even if those hours may not be chargeable or even if the clients won't pay for them.

So here's my final notion, and don't laugh, but I think it possibly takes a revolution to get away from billable hours.

Already in Australia and in the UK, outside investors are about to be able—and in fact in Australia it is already happening—to invest in law firms. Now all the major law firms in Australia and the UK and certainly all the law firms in the U.S. say it will never happen here, over my dead body. We've got an ethics expert here, you know, but the fact is an awful lot of things have happened in the legal profession that were "unethical" when I started practicing law, which wasn't that long ago, like, for example, advertising. You have advertising today, and it's made the legal profession much more profitable.

But if outside investors were focusing on share price rather than profits per partner, maybe they would invest in the firm and maybe there would be attempts to maximize the value to clients of the firm as a whole, so clients would pay more money. So the result might be billing and compensation systems that minimized individual performance and maximized team practice and firm performance.

So if you get away from the billable hour that way, that's a major adaptation of the practice of law. Many legal tasks can be discharged by smart systems and processes. The billable hour then becomes an anachronism. Drafting, researching, even some problem solving can be discharged by smart systems and processes rather than smart law-

yers. We're all smart lawyers, but there are an awful lot of processes and systems that can do a lot of what we do. Not everything, but a lot of it.

If outside investors came into the legal world, they wouldn't support the traditional business model, including hourly billing, and they bring to bear a more contemporary suite of tools and techniques for managing the delivery of legal services. They find law firms over-resourced, too many lawyers, an enormous duplication of effort, and reinvention of the wheel. And as I said, too many smart lawyers, too few smart systems.

Now, in closing, I'm sure that many of my fellow panelists will say, yeah, you know, but look at all these smart businessmen and what they do; they put us into this sub-prime mortgage mess and so on. Yeah, that's true, but then look at General Electric. Until recently, it was a model of smart business practices.

The fact is it would be very interesting to see what outside investors, smart outside investors, might do. And I think one of the things they would do would be to move us away from the billable hour.

Thank you.

MR. HORNSBY: I'm staff counsel at the American Bar Association; I'd like you all to know so that I may continue in that position, nothing I say this morning should be deemed the policies of the American Bar Association or any of its constituent entities. Any questions so far? Great. Thank you.

My PowerPoint was lost in transition and I'm happy about that because not only did I not have pyramids, but I didn't have lava lamp kind of bubbles floating down, so I would have been embarrassed to have shown that following Joel's presentation.

I want to talk about the flip side of the practice of law. I deal with consumer issues or personal legal services for people of low, moderate and middle income, not the kind of people that are served by the corporate and institutionally-oriented law firms. For that population I think the question is not, "Is the billable hour dead or do we need to kill it?" but "Is the billable hour alive?"

Let me start historically. As Joel alluded to, we used to have minimum fee schedules published by Bar Associations until 1975 when those were found to be a violation of antitrust by the Supreme Court.<sup>17</sup> The important thing to understand about minimum fee schedules is that it was unethical for a lawyer to charge less than the amount that was set out in the schedule. They weren't suggested

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17. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

amounts. Sometimes they had ranges. But if you undercut those schedules, you could be subject to disciplinary action

And that, I think, actually was an incentive for the Supreme Court to lift the ban on advertising.<sup>18</sup> I think that the minimum fee schedules contributed to an environment where there was a post World War II demand for personal legal services, enormous growth in that demand, and a failure of the legal profession to provide affordable legal services, which was the underpinning of the *Bates* decision in 1977.<sup>19</sup>

I used to ask people how many of them practiced before 1977 and then I started to look around at the audience and wonder how many of them were born before 1977, so I will ask you neither. The people who practiced are offended and don't want to show how old they are, and the people who weren't born then don't like me asking how old they are either. So at any rate, 1975 and 1977 were kind of seminal years for changes in the structure.

As we look today at the types of fees that are available for people of moderate and low incomes, we see that there are essentially three types. One type is that which does not require out-of-pocket cost to the client. The second is that which requires out-of-pocket, which includes the billable hours as well as other frameworks. The third are subsidized services, which at this point in time are starting to go beyond people at the poverty level.

Under the first type, those that are not out-of-pocket, obviously the most common is contingency fees. Contingency fees are the dominant methodology for litigation, personal injury, and workers' compensation. They're also available for certain other types of things, such as real estate tax appeals, which I've taken advantage of personally to my great satisfaction. You get postcards from lawyers as a homeowner, you sign a contract, and whatever amount that lawyer is able to save you then becomes the basis of the contingency fee. If the lawyer is unsuccessful in an appeal, then you have no obligation. It's a relatively great thing for a consumer.

Unfortunately, for personal injury, there is a substantial downside for people who couldn't afford otherwise to do that. And that is that the lawyers, to the extent that they have choices in the selection of their clients, will not take anything that is a matter of risk. This is illustrated from what lawyers who advertise on television for personal injury services have explained to me, and that is that there are two types. Basically, there's one type who runs mills and will turn the cases

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18. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (US 1977).

19. *Id.*

over relatively quickly and sometimes do so for less than full value, but because they're relatively low amounts, those are done where there is compromise with both the lawyer and the client.

The other, which I think is the dominant example, is where the advertising lawyers will skim the best cases. As one lawyer explained to me, if their advertising generates a hundred calls, half of them will be for something other than personal injury, so you throw those out. Half of the remainder will not have good liability, so you throw those out. Now you're down to twenty-five. Half of the remainder will not have insurability, so you throw those out. Now you're down to twelve and of the twelve, the remaining half will not meet an economic threshold; they won't have medical specials at anywhere between twenty and sixty thousand dollars as a lower limit threshold that's required. Of those six, three of them will sign up, so three out of a hundred people will be represented from this form of advertising.

From the lawyer's point of view, substantial financial success, I doubt—I don't know, Joel, if you have a different point of view on this—I doubt there are lawyers in the United States who are more highly compensated than the highest compensated personal injury lawyers. From that perspective, if you law students want to go for the gold, go for the high end P.I. stuff. From the consumer's perspective, it's in no way a panacea and certainly anything of risk, anything of less than significant value, will create difficulty for consumers to find lawyers for those kinds of things.

The other out-of-pocket methodology is fee shifts. Fee shifting can be unilateral, as in the case of Magnuson-Moss where if you get a lemon for a car, the manufacturer can be responsible for paying your lawyer's fees but you cannot be obligated for paying the lawyer's fees of the manufacturer—even if your lawyer is unable to demonstrate that you received a lemon.<sup>20</sup>

The other type is bilateral; fees could be shifted from one to the other and that, of course, is very risky for the consumer. If you have a consumer who is not judgment-proof, they could literally lose everything they have, so that's not a particularly good alternative. We do see it in domestic relations matters where the spouse, who has the greater income, becomes responsible for the legal costs of the spouse without an ability to pay and that's not particularly problematic. For other types of matters, the institutional client has the ability to amortize the loss whereas the individual consumer could suffer economic

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20. Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 (1975).

devastation, so that's not a particularly good methodology from the consumer's perspective.

For areas where there are out-of-fee expenses, I think there is a growth industry in set fees for what we call "routine legal matters." This, I think, overlaps a little bit with what Joel was talking about. If you're a consumer who just wants a consultation, you can go online and find sources where you can connect with a lawyer by telephone for forty dollars essentially. Some put a twenty-minute time limit on it, some have no time limit whatsoever, but no matter what your issue, it's forty dollars. That's a little different than the free consultation where lawyers invite potential clients into their office for the purpose of determining whether or not they are an appropriate client to sign up and may give them some information if they're not. These are circumstances that typically are designed to support people with very routine and simple legal matters in a pro se support and unbundled fashion. So we have that online.

We also see a good deal of form preparation that's taking place online. This is being done through institutions such as the Legal Services Corporation. Legal aid societies are providing clients, and actually providing anybody who accesses them, with online form preparation. This is also being done in some jurisdictions by the courts. In California, the California Office of the Courts has an extraordinarily elaborate methodology of obtaining online forms that can be completed online, not just downloaded, filled out and filed, but actually completed electronically.<sup>21</sup>

It's also being done in the marketplace outside of legal practices. We have companies like Legal Zoom and Complete Case which essentially sell their document preparation services.<sup>22</sup> These are typically for domestic relations matters, wills and trusts, sometimes a little bit of I.P. and incorporations—those things that are standardized that are heavily form-based. Legal Zoom and Complete Case compare the cost of their services to the cost of a lawyer's services.<sup>23</sup> Legal Zoom tells us that the cost of a lawyer-represented divorce averages two thousand dollars, and their product I think is offered for two hundred fifty dollars.<sup>24</sup>

Well, one thing they're doing is comparing apples and oranges, and they're using, I think, a pretty reckless figure for averaging what the cost is. To kind of illustrate that, Complete Case says the average cost

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21. See California Courts, The Judicial Branch of California, <http://www.courtinfo.ca.gov/>.

22. See Legal Zoom, <http://www.legalzoom.com/>; Complete Case, <http://completecase.com/>.

23. *Id.*

24. See Legal Zoom, <http://www.legalzoom.com/>.

of a lawyer is four thousand dollars.<sup>25</sup> So we're not sure exactly how one comes up with two thousand and one comes up with four thousand, but the point is that every case is different. Every fee, whether it's set hourly or set on a flat fee for domestic relations cases, is distinct.

Now, we're also seeing a dynamic that's centered on domestic relations, but it also is prevalent in many other fields of practice where there is a growth of pro se's where people are providing their own representation, and they're sometimes doing it with the assistance of lawyers. This is what Professor Mosten is going to speak to in terms of unbundling, so I'll go no further on that particular issue.

For hourly matters, I think the limitations from the consumer's perspective are fairly obvious. They don't know what they're buying, they don't know how much it will cost, they don't know what the outcome will be, and they don't know how long it will take. Can you imagine buying any other product or service like that? Well, how much is it? I don't know. Well, when can I get it? I don't know. Well, what will it be when I get it? I'm not sure. Okay, then pay me a deposit. That's a pretty hard sell, but we manage to do that with some frequency.

The real devastating part about hourly services for personal legal services, which we see with some frequency, is when there is a retainer set, the client comes up with that retainer—and it's very difficult for them to do so—and then at a point in the representation the lawyer says, "We've exhausted the retainer; I need to be paid more," and the client can't do it. They may be twenty percent into it, forty percent, eighty percent, but the point is there now has to be a decision.

Does the lawyer sell the case short and terminate it with a sub-optimal result? Does the client assume self-representation at that point with almost a certainty of sub-optimal result? Does the lawyer swallow the loss and continue the representation? Is the lawyer going to be, if it's a matter in litigation, able to get out of it? Certainly the hourly rate types of matters are very difficult and challenging for consumers, especially those who are not in the upper economic status.

Then we have subsidized representation, and that of course includes legal aid. The problem with legal aid is it reaches only about twenty percent of eligible clients, but there are other mechanisms available, including pro bono assistance that has a certain degree of penetration for—generally for the poor—but sometimes it will come up. That circumstance I was just talking about where the person runs out of money during the representation, regardless of whether the client's

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25. See Complete Case, <http://completecase.com/>.

poor (and most often they're working people and frequently not—certainly not within the government's poverty guidelines), lawyers will consider that to be pro bono, and perhaps rightly so. It's kind of difficult because we don't have a great definition of what "pro bono" is, but essentially in that circumstance the lawyer is giving it away. The problem is that that distracts from pro bono for the poor, which I think is the core of our professional obligation when providing pro bono services.

We also have something that's called low bono that is offered in a couple of different settings. One is through co-pay legal clinics where lawyers work in a non-profit setting for a relatively modest income and charge according to a sliding fee scale. Some of these clinics will accept clients up to three hundred percent of the poverty level; for a family of four the poverty level is about twenty thousand dollars a year, so three hundred percent would be up to sixty thousand dollars a year.

We also have in many jurisdictions reduced-fee panels for lawyer referral services, sometimes called "modest means panels," and they will set an hourly rate of, for example, forty dollars an hour and will frequently cap that hourly rate for people whose income qualifies for that. These are people that are making too much to qualify for legal aid, but not enough to avoid full and traditional services. They typically have income ranges for that as well.

The clients frequently are able to access legal services, but the problem is that the economic benefit is on the backs of the lawyers. In some of these modest means lawyer referral panels, the ability of the lawyer to receive a full compensation case depends on your willingness to take some modest means cases. So if you were to be in a situation where you could generate twelve, fifteen, twenty referrals a year, perhaps one or two of them would have to be from modest income.

That brings us to another emerging issue that's called unbundled legal services, sometimes called discrete task representation. Some people don't like unbundling, I'm not one of them; I think it's very descriptive and Professor Mosten will go into the details of that, but I just wanted to say that this is facilitated by a change in the ABA Model Rules of Professional Conduct.<sup>26</sup> Rule 1.2(c), which is a change that's pending in Illinois with the Illinois Supreme Court, states that, "A lawyer may limit the objectives of the representation if the client consents after consultation."<sup>27</sup> That would not apply to the example I

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26. Model Rules of Prof'l Conduct (2004).

27. Model Rules of Prof'l Conduct R. 1.2(c) (2004).



gave where the client runs out of money, and it would only apply to where it is done in the most thoughtful way. I want to stress that unbundling is in no way a second-class type of representation. It's just a model that we think will enable legal services to expand to people who are of limited means. So with that, I'll turn it over to Woody.

PROFESSOR MOSTEN: Thank you, Will. There is an entry barrier to hiring a lawyer called a retainer. Requiring a retainer means that lawyers do not trust most people to pay the fees that are billed in a full and timely matter. So lawyers demand up-front money. And in my field, as a family lawyer, the amount of unpaid bills averages about thirty percent of gross revenues nationwide. Just think if there is a CEO of a company that is not collecting on thirty percent of gross billings—that CEO might look for a different job.

I just want to compare family lawyer uncollected receivables with other professions. I'd like to introduce my wife, Dr. Jody Mosten. Jody is a clinical psychologist. And some clinical psychologists have found a way to avoid the billable hour—they call it fifty minutes and collect at the end of each session. Some of her psychiatrist colleagues have knocked it down to forty-five minutes. And some therapists have found a way to bill for a full hour, work three quarters of an hour, make people feel better about it, and then be able to get paid immediately. Our very good friend, Colleen Gowl, is an advertising executive. In that field, they have a two hundred minute hour, a forty hour day, and they get paid often with a flat fee plus continuing percentages of advertising placed. This is very different than the billable hour.

What I'd like to talk about today is how unbundling is an alternative to the traditional billable hour by reducing the number of hours the lawyer works by having clients do much more of their work themselves resulting in more people having an opportunity to get help from lawyers as opposed to doing it just themselves. This unbundling arrangement gives clients much more control and empowerment in the lawyer/client relationship.

Many of you in corporate firms know what that power is like, it's gone the other way, and Joel was very eloquent in describing that. In middle income personal legal services, it's most of the time the lawyer in the power seat. It can be quite intimidating to someone who has never seen a lawyer, which includes most citizens in our society.

One of the reasons that I speak before lawyers' groups is that many lawyers are a very dissatisfied lot. Most Bar Associations have a section or other group for stressed-out lawyers. Some of those are emotionally stressed out, some of them having problems of substance abuse, and it's because many lawyers are either overworked or under-

satisfied. And I can honestly tell you as a sole practitioner who does mediation and collaborative law (I never go to court), after thirty-five years of practice I want to run to the office every day. I enjoy it. And there are many people who do that kind of practice who feel the same way.

One of the things that you might want to think about in your own life is if you are not satisfied in your own practice—or as students as you are selecting an area of practice—do you want to have work that's consistent with your own personal life values and your personality, an area that is incredibly intellectually and personally challenging, and a chance to live out why you chose to go to law school—to actually make a difference in people's lives day after day?

One of my side jobs is working as an executive chair of the International Client Counseling Competition. Did any of you participate in that competition in law school? It is a mock simulation where law students, playing the roles of a two person lawyer team, get a chance to talk with clients.

Well, they've done studies about this, and lawyers spend seventy percent of the time talking with clients. It's not necessarily the big firms, where I thought it was brilliantly said by Chip how many people become galley slaves. In practice as a whole, most lawyers actually spend their time talking with clients and helping them, and that you can do as an unbundled attorney.

If you think about the real estate industry, at one point lawyers made one percent of every residential real estate transaction. On the West Coast, lawyers are cut out completely of house transactions. Title companies, escrow companies, and real estate brokers do it all. As you move east a little bit lawyers have a little more involvement, but nowhere near the monopoly that they did when I was a baby lawyer several years ago. And frankly, now there are no real estate lawyers on the West Coast to handle residential transactions, and that's because our price was too high, our service could be done equally or better by others and, frankly, people voted with their feet. And that can happen in other areas of practice as well.

So as a service industry, it's our job to meet the needs of the public, provide affordable products and make services available to those who need and want them. And there have been studies, the most impressive I feel is the ABA study, the Comprehensive Needs Study of 1994, and they found a number of things.<sup>28</sup> That what were the client views

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28. AMERICAN BAR ASSOCIATION, COMPREHENSIVE [CIV.] LEGAL NEEDS STUDY (1994) available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>.

of the legal system after people go to court.<sup>29</sup> The legal system was considered impersonal, intimidating, and unsympathetic to their personal and economic needs—and by the way, when they say in the legal system, we as lawyers are the point people for the justice system as a whole. More decisions are made in the law offices of this country than in all of the courts, the statutes and rules combined, by many fold. The justice system was considered unresponsive and impotent in that courts are not seen as meeting the needs of the public.<sup>30</sup>

The system is overwhelmed. In fact, sometimes I advise my clients to take a field trip down to the courthouse and see first hand how strangers in robes make decisions for people who should be able to make them for themselves.

The legal system is clearly too costly for most people. I couldn't afford my own professional hourly rate. And most working people not only can't afford it, they can't afford to take off time to come to see lawyers anyway. It takes too long. We're too inefficient. We're too adversarial. And when you add that up, it doesn't sound, as Will was saying, that we offer a product that most people would buy. But people do buy our services when they have to. Just like when you have to have surgery, you use the providers that are there out of necessity.

So let's look at what unbundling does to meet this problem. First of all, major law firms, law schools, and consumers all have been raised on expecting a full service package of legal services. This means a client comes in, pays money, and the lawyer then does all the work. That's nice.

The problem is very few people can afford this Mercedes brand of service. Too many people are having to walk or take the public bus in order to travel through the legal system. And so what the public is looking for is a nice reliable Chevy to transport them to a solution for their legal problems. But frankly, when asked, most people still want the Mercedes, but they won't walk into a fancy office knowing it's going to be three hundred, four hundred, five hundred dollars an hour for services even if there is an initial free consultation.

That's resulting in a record number of unrepresented parties flooding the courthouses today, often hurting themselves as self-representation often means having a fool for a client. The 1994 ABA study on divorce in Maricopa County in Phoenix found that it's no rose garden

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29. *Id.*

30. *Id.*

when people represent themselves in divorce matters.<sup>31</sup> Yes, they could get in the courthouse, but as self-represented litigants they receive lower awards for support, they do not receive help on tax advice, they get virtually no encouragement to utilize mediation or family counseling—they did not do as well as represented clients.<sup>32</sup>

There is also a widely held belief that lawyers have to do a perfect job. And we know that even big firm lawyers don't do a perfect job, and they don't do a full job. There are cuts made all the time as no client, individual or corporate, can afford to pay for "the perfect job." Frankly, most corporate clients know about unbundling. They go to big firms and they are able to determine the scope of what work they want done. And most professional and upper income clients, if they need a little help, they know where to get it. Middle income people don't. So they often don't go to lawyers at all.

And while a fee retainer, a deposit, is something that protects lawyers against unpaid bills, from a consumer point of view, the retainer often locks them out of the system. Chip made a very good point about defensive lawyering; it's a little like taking too many tests to protect doctors against medical malpractice.

In the same Maricopa County study, it showed that of the litigants who self-represent, half of them could afford lawyers, but they didn't want to have to pay legal fees or they didn't want lawyers mucking up their lives.<sup>33</sup> Many citizens feel that if it's bad before the lawyers get in there, it's worse after we finish.<sup>34</sup>

So trying to find a way where consumers can keep part of the control themselves and at the same time get the help they need resulted in the growth of unbundling where the client is in charge of selecting which services will be used, the extent and depth of the service, and how the communication will take place between lawyer and client.

Much of this client empowerment has come out of the mediation movement where people started using mediation without lawyers at all. And when lawyers participated in mediation, the lawyers came in and did what the client wanted. This turned the lawyer/client relationship on its head from traditional circles in which the lawyers determined strategy and the client's role was limited to making "ultimate" decisions.

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31. Bruce D. Sales, Connie J. Beck, and Richard K. Haan, *Self-Representation in Divorce Cases*, A Report Prepared for the American Bar Association Standing Committee on Delivery of Legal Services, January 1993.

32. *Id.*

33. *Id.*

34. *Id.*

If you are interested in offering unbundled services in your practice, you can do so in two major ways. First, you don't have to change your current practice at all. You can make unbundled or discrete task services available to the clients that come in to you for the services you currently offer. I actually have written about an ethical duty to offer unbundled services prior to being retained for full service. You can say to clients, "Hire me, pay me a retainer, and let me handle your case or you can do part of the work yourself and save money and have more control. For example, you can write some of the letter and I review and edit it for you. Or, you can do some of the negotiation; I could be able to prep you. And if that proves to be too hard for you in dealing with the opposing attorney, then you can convert my engagement to full service."

This gives people a chance to put their toe in the water and to use lawyers and see how hard it is dealing with people on the other side. It also lets clients see what we as lawyers do and appreciate our work and it makes it easier for them to appreciate why we deserve to be paid for our time and effort.

A second method of offering unbundling in your practice is to offer stand-alone unbundled services. In my own practice, for example, I offer legal coaching services. I never go to court in any situation. I limit my scope of representation so that everyone who comes to me knows that if it goes to court, I will bring in a litigator to handle that aspect of the case (this is a return to the solicitor-barrister model).

I've limited the scope of my services. And I thought that when I did that and I gave up court work about twelve years ago, my family would have to go sell our house and live in a tent. Actually, refusing to go to court increased my practice because in Los Angeles, litigators are littered on the streets of Wilshire Boulevard and Century City, but unbundled discrete task lawyers are at a premium.

However, for lower income clients, there is involuntary unbundling where people get coaching help because their lack of resources will not support full-service representation. In my experience as a former member of the ABA IOLTA Commission, less than one percent of people who call legal aid for help get a full service representation. Unbundled legal coaching may be the only legal help that these people can get.

In California today, attorneys are able to have court forms sanctioned by the California Judicial Council that encourages limited-scope representation. It's a way to provide business for lawyers where they otherwise wouldn't have it.

Unbundling is called client coaching, because like a football coach who doesn't get on the field, we are helping our clients on the field serving as coaches and teachers with our whistles and clipboards helping our clients do the work themselves.

Many of you probably unbundle in your current practices and haven't realized it. For example, every time you do an initial consultation, and do nothing else, that's unbundling. Every time you write a letter but you do nothing else, that's unbundling.

In 2000 there was a national unbundling conference in Maryland that drew people from all over the country and there had been a lot written about it. If tonight you Google unbundling, you'll be surprised at the number of innovative practitioners who are doing it throughout this country from the low to the high end of the income scale.

When I say high end, there is a lawyer in Washington D.C.—Thomas Collier of Steptoe & Johnson. He is a corporate lawyer who collaboratively steps in with another corporate lawyer when Fortune 500 companies are litigating. Collier limits his scope of representation to that as settlement counsel. If the matter does not settle, Collier and his firm are disqualified from the litigation; however, most of the time his efforts result in settlement. He has much more work than he can handle.

There's an article, in your materials published by the Law Practice Management Section of the ABA.<sup>35</sup> What is the Law Practice Management Section about? The main mission of this section is to help lawyers to do well by doing good. This section believes so much in unbundling as the future of law practice that it published this article as well as my book.

I look forward to hearing of efforts from many of you to pursue innovative unbundled forms of practice and please let me know of the new models that you develop in the years to come.

MR. BOWLES: Let me just finish this up and as the last speaker before our wonderful lunch speaker on the current state of the Supreme Court, I'll make my remarks necessarily brief.

As I said before, I was the Chair of the ABI's fee study.<sup>36</sup> The American Bankruptcy Institute looked at this problem and said, well, the first thing we need to do is figure out what are the problems, parameters, and how do you do that? A competent businessman would

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35. Forrest S. Mosten, *What's the Big Deal About Unbundling?*, LAW PRACTICE MGMT., July/Aug. 2003, at 32.

36. AMERICAN BANKRUPTCY INSTITUTE, CHAPTER 11 PROFESSIONAL FEE STUDY (2007) (ON FILE WITH ABI) (HEREINAFTER, "ABI FEE STUDY").

tell you go out and gather information, and that's what the ABI's fee study was.<sup>37</sup>

I have no PowerPoints, but there are materials talking about fees and fee structures and bankruptcy for those of you interested, there will also be in the Symposium a more refined set of fees from a study that I've done, a report talking about the fee study plus you could go to the ABI's website if you're interested in the fee study which deals with corporate bankruptcy and larger corporate matters. It gives you base information about the fee structure and bankruptcy.

The ABI launched into this study in 2004 to basically get information concerning the problems and concerning the issues that will be facing people when you're trying to figure out what can you do about the billable hour conundrum.<sup>38</sup> The one thing I can tell you about bankruptcy law and why this is important is this: Since the 1930s when bankruptcy referees were allowed to pay fees to bankruptcy attorneys, there has been a perceived or an actual problem with professionals getting too much money out of the pot.

In the 1930s, there was a federal court judge removed from office for selling, literally selling—there was a contract introduced at his criminal trial—the trusteeship of a Miami hotel. Why did he do this? Well, he got free room and board there for two years; the law firm got thousands of dollars worth of fees during the depression and kicked back thousands to him. Small problem.

So bankruptcy fees, because you have a client who has no great or huge incentive to keep fees down, perception is the courts and the Congress decide there should be great transparency.

For those of you who do bankruptcy law, especially debtors' law and committee law, you know that you've got one of the few times where all of your fees you're going to apply for are made public to be reviewed by a judge, U.S. Trustee, and everybody else who has a big interest in this case. Therefore, your hourly rate fees have to not only be complete, but have to be justified under the bankruptcy court. That's what the fee study wanted to see.<sup>39</sup> It wanted to see how the practice worked, how fee objections worked, how money would be allocated in these things.<sup>40</sup>

And some of the main things we found in the fee study which is still ongoing, Professor Steven Lubben who is a reporter on the study, has

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

done an excellent job and he's working on several articles related to the study.<sup>41</sup>

Some key issues come down to this: One is he's found in the commercial realm there is a large uncollected—almost thirty-five percent of the Chapter 11 cases that were done in the large sample resulted in no payments whatsoever to debtor's counsel.<sup>42</sup> That's harsh. But that does show you the risk that's interpreted bankruptcy for those who believe this is a feeding trough at a dead animal's site by pigs, well, sometimes—in fact, a lot of times there is nothing to be fed in there. So therefore, you don't have an automatic feeding trough.

Secondly, you've gotten the fees that were awarded in a bankruptcy case, ended up around four percent of the total assets and debts of the debtor.<sup>43</sup> Now, when you talk about fees in bankruptcy, they need to remember in our practices all professional fees, all legal fees, have to be approved through the bankruptcy court except for certain small ordinary course professional fees. Even fee miscalculations, these are—a vast majority of these are legal fees that the debtors would have to incur even if they were outside of bankruptcy. So even though we get heavy scrutiny, we do in fact have reasons for these fees and why we did it.

This is why the study went down there. The fee study was a large study, the interests are there and I think that shows really the first step that needs to be done in looking at the hourly rate is to find out is there a problem, and if so, how that problem should be addressed. As all the speakers have said, there is at least a perceived problem; there may be a genuine problem.

Now, here I am going to be a primitive again. Not only don't I have a PowerPoint, I have to point out to you in my materials that the hourly rate structure that has been discussed and criticized here is the rate structure of choice which Federal Courts have used in fee shifting cases. With a few exceptions of specialized services in bankruptcies, most attorneys—and I'm not talking about investment bankers who have their own interesting billing system, I'm not talking about accountants, who also have interesting ones and they're a heck of a lot more profitable, and if they were legally ethical, lawyers would probably go to them—most of them were calculated by reasonable hours expended times a reasonable hourly rate. Every Federal Court has adopted that, no Federal Court has rejected that. It's a case-by-case basis. That's in the commercial side.

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41. ABI FEE STUDY, *supra* note 36.

42. *Id.*

43. *Id.*



Briefly I want to talk about the consumer side, and we'll get you to lunch in just a couple of minutes. The consumer side in bankruptcy is the total opposite world, showing once again that lower value cases, not because it's invaluable to the individuals involved but because you simply have smaller dollars involved and more payment problems for clients, those are done ninety percent flat fees in Chapter 7s. In Chapter 13s, many of them are called flat or no look fees because that's all the debtor's attorney is going to get.

In bankruptcy, if you want more than that in Chapter 7, in your Chapter 7 debtor's attorney—except in the Ninth Circuit—you are out of luck. Your debt is a pre-petition debt and like all the other debts it will be discharged, sorry, go to the back of the line like everyone else did.

In Chapter 13, if you want more than the “no-look” fee which doesn't require court review like all the Chapter 11 fees—guess what? You need to fill out a fee application just like a Chapter 11 counsel fee. And other than filling out billing records and having my teeth pulled with inadequate Novocain, I would rather do those—just about anything else than fill out a full scale fee application in a contested 11.

What does this mean? Bankruptcy is in some respect the mine canary on the hourly fee structure. There are problems with it. Every bankruptcy judge, every client, every constituent in bankruptcy would recognize that. And there is a gargantuan financial incentive to care because every dollar you save in the process is a dollar in somebody's pocket that they won't otherwise make. But no one to date has been able to get a universal panacea that says instead of this we can in all cases, or even a significant number of those cases, totally eviscerate the system and replace it with something else.

Now does this mean you can't try? No. The American Bankruptcy Institute did this fee study for a number of reasons, to gather information was the main one, but also to provide alternatives on fees useful to people like on this panel and people out there.<sup>44</sup> So you can use the information taken there, use it in your practice and hopefully be able to refine your fee practices because there is something better out there.

But until we know what we can possibly replace it with, other than going back to the old “for services rendered ‘X’” which I would love to go back to, but I don't think the clients will, that's not going to happen.

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44. *Id.*

So on that happy note of trying to make sure you get paid, hopefully you're not going to do debtor bankruptcy work where you have to have four thousand people look at it and if your clients will be happy and well-healed, to send your bills in. Have a good lunch. On behalf of my panelists, thank you.

