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THE APPS FOR JUSTICE PROJECT: EMPLOYING DESIGN THINKING TO NARROW THE ACCESS TO JUSTICE GAP

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INTRODUCTION

Lawyers cost money. Typically, a lot of money. As of 2012, the average billing rate for attorneys nationwide was $295 per hour.[1] That number stands in contrast to the recent statistic that almost fourteen percent of United States citizens live at or below the poverty line.[2] While a small minority of the poor can engage an attorney to help them with their law-related problems and navigate the justice system, a significant segment of people facing income constraints do not have access to professional legal assistance for civil law matters.[3] Even for middle-income Americans, a legal problem requiring more than a few hours of a lawyer's time can quickly destroy a household budget, devour savings, and lead to over-indebtedness and financial distress.[4] The Legal Services Corporation, the independent nonprofit established by Congress to provide financial support to legal services organizations, has observed that nearly one million low-income people who seek help for civil legal problems are turned away because of the lack of adequate resources.[5] A 2007 study of U.S. legal aid programs revealed that, in aggregate, there was one attorney available for every 6415 low-income clients.[6] The United States is in

1. Dan Gustafson et al., *Pro Se Litigation and the Costs of Access to Justice*, 39 WM. MITCHELL L. REV. 32, 32 (2012).

2. BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015 CURRENT POPULATION REPORTS 13 tbl.3 (2016), https://www.census.gov/library/publications/2016/demo/p60-256.html [https://perma.cc/8D7R-79SS] (revealing that 13.5% of individuals surveyed were below the poverty line in 2015). For more details on how poverty is calculated in the survey, see *id.* at 43.

3. Luz E. Herrera, *Encouraging the Development of "Low Bono" Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 1 (2014).

4. *See id.* at 2–3.

5. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [https://perma.cc/UK4X-UEGN].

6. *Id.* at 21. The income threshold used in this study was at or below 125% of the federal poverty guidelines in 2009. *Id.* at 20.

the midst of an access-to-civil-justice crisis, and ranks fiftieth out of sixty-six developed nations in providing affordable access.[7]

A consequence of the dearth of legal aid and other *pro bono* resources is that many individuals end up representing themselves,[8] a process known as *pro se* representation.[9] In Maine, a Supreme Court Justice estimated that between seventy-five and eighty percent of people who appear before a judge on non-criminal matters represent themselves.[10] *Pro se* representation can have wide-ranging consequences, for both the unrepresented individual and the legal system. An individual unfamiliar with the legal system in the United States is likely to find it bewilderingly complex. Moreover, when

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7. Herrera, *supra* note 3, at 1–2 (quoting Mark David Agrast et al., *Rule of Law Index*, THE WORLD JUSTICE PROJECT 21, 103 (2011) ("Access to civil justice requires that the system be affordable, effective, impartial, and culturally competent.")).

8. AMERICAN BAR ASS'N COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (2010), https://www.americanbar.org/content/dam/aba/publishing/abanews/1279030087coalition_for_justice_report_on_survey.authcheckdam.pdf [https://perma.cc/2XQM-TF4Z] (showing a steady rise in the number of *pro se* litigants); N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, STATE OF N.H. JUDICIAL BRANCH, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS 2 (2004), https://www.courts.state.nh.us/supreme/docs/prosereport.pdf [https://perma.cc/83P7-Z7Q3] ("One party is *pro se* in 85% of all civil cases in the district court and 48% of all civil cases in the superior court."). Sixty percent of the judges surveyed said that fewer litigants were being represented by counsel. JUDICIAL COUNCIL OF CAL., CALIFORNIA STATEWIDE ACTION PLAN FOR SELF-REPRESENTED LITIGANTS 11 (2004), http://www.courts.ca.gov/documents/selfreplitsrept.pdf [https://perma.cc/49FJ-FLFF] ("Over 4.3 million of California's court users are self-represented.").

9. *Pro se* ("for oneself") representation is common in courts that address legal issues typically faced by low-income individuals, including landlord-tenant issues, probate, and family law. *See generally* NAT'L. CTR. FOR STATE COURTS, PRO SE STATISTICS (2006), https://www.nacmnet.org/sites/default/files/04Greacen_ProSeStatisticsSummary.pdf [https://perma.cc/QC4Z-WLDG].

10. *See* Judy Harrison, *Lawyers to be Stationed in Libraries Across State to Offer Free Legal Advice,* BANGOR DAILY NEWS (Apr. 29, 2013, 9:25 AM), http://bangordailynews.com/2013/04/28/news/state/lawyers-to-be-stationed-in-libraries-across-state-to-offer-free-legal-advice/ [https://perma.cc/2C3H-R7HN]. A recent study commissioned by the Justice Action Group in Maine found that Maine's civil legal aid organizations' statewide monetary impacts associated with direct professional legal aid services totaled an estimated $37 million. *See* TODD GABE, JUSTICE MAINE, ECONOMIC IMPACT OF CIVIL LEGAL AID IN MAINE 1 (2016), http://www.justicemaine.org/wp-content/uploads/Gabe-Report-Submitted-November-14-2016.pdf [https://perma.cc/8NQB-2WME] ("this includes a mixture of one-time and reoccurring payments; as well as a combination of federal dollars received (and their associated multiplier effects), other monetary awards (e.g., child support), cost savings to Maine communities (e.g., avoided costs of General Assistance), and higher incomes for workers in Maine.").

surveyed, sixty-two percent of judges report that outcomes for *pro se* litigants were less likely to be successful.[11] *Pro se* litigants also slow down an already clogged civil court system, putting a greater burden on judicial resources, because of their lack of familiarity with both procedural and substantive law.[12] Without the benefit of professional legal advice or other helpful resources, individuals may not know when they can do something to prevent a small legal problem from escalating.

This is particularly important because much of the emphasis on the delivery of legal services that have been historically available for low-income individuals and families are *ex post* and litigation-focused.[13] Even if a low-income person is able to access professional assistance, that person will likely contact a lawyer after the problem arises, when it is too late to take preventative measures. At that point, resolution of the problem typically involves adjudication, which is adversarial by nature.

Many legal needs are *ex ante* and transactional, such as credit repair, tenant rights, and public benefits, to name a few. A failure to address a legal need *ex ante* can cause collateral consequences *ex post*. An improperly completed form requesting reasonable accommodations can result in summary eviction litigation when a disabled individual cannot pay rent, for example.[14] This failure disproportionally affects the most disadvantaged and vulnerable communities, including women, children, minorities, and immigrant

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11. AM. BAR ASS'N COAL. FOR JUSTICE, *supra* note 8, at 10. The Coalition for Justice linked representation type with case outcomes and concluded that the absence of professional legal representation hurts a litigant's odds for success. *Id.* at 3.

12. *Id.* at 12. The report also noted an increase in *pro se* litigants who did not qualify for legal aid, but likely could not afford an attorney to represent them in court. *Id.* at 5.

13. *See What is Legal Aid*, LEGAL SERVS. CORP., https://www.lsc.gov/what-legal-aid [https://perma.cc/85H2-E8MH] (listing the types of programs funded by the Legal Services Corporation and indicating that most are litigation-focused).

14. *See* U.S. Dep't of Hous. & Urb. Dev., Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act (May 14, 2004), https://www.justice.gov/crt/us-department-housing-and-urban-development [https://perma.cc/XC73-YPT6] ("[H]aving formal procedures may aid individuals with disabilities in making requests for reasonable accommodations and may aid housing providers in assessing those requests so that there are no misunderstandings as to the nature of the request, and, in the event of later disputes, provide records . . . .").

populations.[15] This systemic issue implicates an urgent need to develop new strategies and tools to address both exigent legal problems, as well as law-related concerns, before they rise to the crisis level.

In addition to developing new means to address *ex ante* legal issues, strategies and tools designed to increase access to justice must also reflect the fact that poor individuals and families approach legal problems differently from the non-poor, as a direct result of their poverty.[16] Poverty captures and monopolizes an individual's attention, resulting in reduced productivity and a diminished ability to process new information.[17] People living in poverty direct a tunnel-like focus on the scarcity they experience and its immediate consequences, which alters the way they perceive the world.[18] This *tunneling* (as it is called) on the scarcity is involuntary; one's attention is diverted to what is lacking.[19] Preoccupation with the scarcity is consuming and often overwhelming, leaving less mental bandwidth to attend to other matters.[20] It is not that the poor do not have less mental bandwidth to begin with, but rather that the "experience of poverty" reduces the available bandwidth, and in so doing imposes additional barriers to effective self-help.[21]

Moreover, when a person is facing a legal problem or crisis, it is often accompanied by feelings of anxiety and uncertainty.[22] These feelings may trigger performance-minimizing mental states that curb the person's effective deployment of information that may otherwise be helpful.[23] As the poor spend more time managing their scarcity and navigating the public programs with which they must interact, they also suffer from a pure time deficit.[24] This deficit, coupled with an understandable preoccupation with compelling short-term problems, leaves little cognitive bandwidth to engage in long-term

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15. *See* Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf [https://perma.cc/Y4HY-JRBP].

16. SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 63 (2013).

17. *Id.* at 27.

18. *Id.* at 29.

19. *Id.* at 34.

20. *Id.* at 13.

21. *Id.*

22. D. James Greiner et al., *Self-Help Reimagined*, 92 IND. L.J. 1119, 1129 (2017).

23. *See id.* at 1128.

24. *Id.*

planning, thus compromising good decision-making.[25] Therefore, in order to be able to effectively deploy available helpful information, such as information about legal rights or self-help guides, the organization deploying the information must help the affected person to overcome their negative crippling emotions.[26]

The lack of available resources to make civil justice available to all, coupled with the fact that existing strategies fail to account for the research on cognitive capacity and other deployment challenges faced by the poor, explains in large part why a high percentage of low-income individuals facing legal problems fail to take action to respond to them.[27] Such a failure to respond in a timely fashion to a nascent legal problem can lead to an escalation of the initial problem and the emergence of new ones.[28]

The access-to-justice community has begun to respond to this intensifying crisis in ever-more creative and innovative ways. Recent years have seen an expanding array of both technology and non-technology-based tools designed with the purpose of helping people who cannot afford market-rate lawyers.[29] Such innovations have recently led to adjustments in funding for legal aid programs[30] and in advancements in self-help and assisted-self-help tools.[31] These advancements include online client intake systems,[32] self-help triage programs,[33] legal diagnostic tools,[34] robot lawyer chat systems,[35] and

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25. *Id.*

26. *Id.* at 1129–30.

27. Many do nothing even when the legal system proposes to intrude forcibly into their lives. For example, in the United States, there is at least an eighty percent default rate in debt collection actions. *Id.* at 1138 n.83.

28. *Id.* at 1126 n.25.

29. *See, e.g.*, *Fill Out Legal Forms Faster*, LAWHELP INTERACTIVE, https://lawhelpinteractive.org/ [https://perma.cc/73HL-JJZV]; *Resources for Self-Represented Litigants*, ILL. SUP. CT., http://www.illinoiscourts.gov/CivilJustice/Resources/Self-Represented_Litigants/self-represented.asp [https://perma.cc/9JQ2-PTXQ].

30. *See Technology Initiative Grant Program*, LEGAL SERVS. CORP., http://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig [https://perma.cc/4Y7P-UEFF].

31. Although legal expert systems have grown in popularity, an underlying question of determinacy remains. Are most consumer-oriented legal issues definite enough to systematize? Can the legal analysis process be reduced to a series of logic expressions? *See generally* Harry Surden, *The Variable Determinacy Thesis*, 12 COLUM. SCI. & TECH. L. REV. 1 (2011).

32. *See, e.g.*, *Online Intake and Online Screen Systems*, LEGAL SERVS. NAT'L TECH. ASSISTANCE PROJECT (Mar. 2012), https://lsntap.org/content/online-intake-and-online-screen-systems-0 [https://perma.cc/A462-NGHR].

33. *See, e.g.*, *SRLN Brief: Examples of Legal Aid Online Intake and Triage Projects*, SELF-REPRESENTED LITIG. NETWORK (Aug. 30, 2017),

legal expert system applications.[36] These tools have the potential to be scaled to serve millions more people and make possible a system that provides effective legal help to everyone who needs it, when they need it, and in a form they can use.

The Apps for Justice Project ("Apps for Justice" or the "Project") has focused on the development of one such solution to the access-to-justice crisis. Launched in 2016 and funded with a grant from the Maine Economic Improvement Fund, Apps for Justice has developed practical, technology-based tools (applications, or "apps") that enable low- and moderate-income residents to address their legal and law-related problems. The apps, written at a fourth-grade reading level to best serve the widest audience, use plain language rather than legal jargon.[37] Additionally, drawing on the literature from distance education, public health, behavioral economics, experimental psychology, cognitive psychology, and sociology, each app includes links to positive self-affirmation exercises and employs psychologically affirming language.

This article describes both the evolution and development process of the project and proceeds in four parts. Part I discusses the legal technology ecosystem, including the emerging prominence of legal expert systems. Part II describes the origin of, and motivation for, the Apps for Justice Project at Maine Law School. Part III describes the human-centered design thinking process used to develop the Rights of Tenants in Maine app ("RTM") and the Maine Family Law Helper app ("MFLH"). Part IV assesses the legal and ethical questions surrounding the use of algorithms to supplant the role traditionally reserved for legal service providers. Finally, this article concludes with a discussion of how the Apps for Justice Project will continue in its efforts to provide legal help for low-income individuals and makes some predictions for the future of technology's role in bridging the access-to-justice gap.

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https://www.srln.org/node/458/srln-brief-examples-legal-aid-line-intake-and-triage-projects-srln-2015 [https://perma.cc/9F3E-ZFPT].

34. *See, e.g.*, *Triage Diagnostic Tool to Assess Potential for Self-Representation in New Mexico*, ACCESS & CT. INNOVATION, http://legaltechdesign.com/access-innovation/triage-diagnostic-tool-to-assess-potential-for-self-representation/ [https://perma.cc/NDW4-DQMX].

35. *See, e.g.*, DONOTPAY, https://donotpay-search-master.herokuapp.com/ [https://perma.cc/P7A6-2HUU].

36. *See, e.g.*, *id.*

37. *See* Greiner et al., *supra* note 22, at 1156.

I. THE LEGAL TECHNOLOGY ECOSYSTEM AND ACCESS TO JUSTICE

The universe of consumer-facing legal technology is in a period of exponential growth. While legal research databases have been around for many years, in recent years there has been a fundamental shift in the types of legal technologies brought to market.[38] Legal expert systems are one of the tools that have been gaining increasing popularity and acceptance.[39]

Legal expert systems have been described as "systems that contain representations of knowledge which can be deployed in the solving of given problems."[40] They can address complex problems by using logic maps and conditional statement (e.g., if-then) rules to mimic human expert decision-making.[41] By harnessing the power of

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38. *See* Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet*, N.Y. TIMES (Mar. 19, 2017), https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html [https://nyti.ms/2np9ybO].

39. *See id.*

40. Richard Susskind, *Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning*, 49 MOD. L. REV. 168, 172 (1986) (examining previous work on expert systems in a variety of fields, the application of expert system design and use to legal analysis, and the possible impacts on future legal practice). Such expert systems have the potential to augment practitioner knowledge, and in some cases, preserve that knowledge to aid clients when the practitioner is no longer able. *Id.* at 175. Susskind predicted that legal expert systems would be the next logical step forward from computer-aided legal instruction, distinguishing true expert functions from document retrieval used in Lexis-like systems. *Id.* at 176–77. Susskind offers examples of expert systems from the fields of chemistry, geology, and medicine that performed analytical tasks more efficiently than a human being. *Id.* at 174.

41. *See, e.g.*, *Neota Logic Announces the Launch of Compliance HR Joint Venture with Littler Mendelson*, NEOTALOGIC (May 6, 2015), http://www.neotalogic.com/2015/05/06/neota-logic-announces-the-launch-of-compliancehr-joint-venture-with-littler-mendelson/ [https://perma.cc/FUJ9-65XS]. Neota Logic (the platform chosen by the Apps for Justice Project team) has worked with a number of global law firms to produce expert systems to be used by attorneys and even directly by clients. *Id.* To illustrate, Neota collaborated with the employment and labor law firm Littler Mendelson to create ComplianceHR, a suite of applications to help answer routine employment questions. *Id.* One product in this suite, Navigator IC, interviews an employee to help determine whether they should be classified as an employee or independent contractor. *Id.* The system tailors questions to evaluate each scenario under legal tests such as the Internal Revenue Service's 20 Factor Test and the Fair Labor Standards Act Economic Realities Test. *Id.* At the end of the interview process, NavigatorIC produces a risk assessment with a summary of applicable state and federal employment law, and rates each individual on the likelihood of classification as an employee versus an independent contractor. *Id.* Such a rating system helps human resources professionals prioritize which individuals should be subject to employee protections. *Id.*

artificial intelligence ("AI"), these systems process volumes of unstructured information inputs to yield useful outputs.[42]

Consumers are using expert systems in various fields, one of which is tax preparation. TurboTax, a tax return preparation software product, offers a useful illustration of a developed expert system.[43] TurboTax democratized income tax return preparation by compiling voluminous tax rules and employing internal logic, reducing the consumer's burden to answering a sequence of simply-phrased questions.[44] Legal expert systems similarly have the potential to democratize legal problem solving by simulating the logical reasoning of attorneys to produce answers to consumers' common law-related questions.[45]

Legal expert systems can also be used to increase law practice efficiencies by taking over rote tasks typically performed by lawyers and legal assistants and by reducing variability in the quality of legal services.[46] The growing market opportunity for the use of machine intelligence in law has the potential to help lawyers deliver low-cost legal services to a larger market, pairing the need for legal help

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42. ROSS Intelligence, software built upon the IBM Watson development platform, is an example of a successful legal expert system in the private sector. *See Products*, IBM WATSON, https://www.ibm.com/watson/products.html [https://perma.cc/BCS9-JZCW]; ROSS INTELLIGENCE, http://www.rossintelligence.com [https://perma.cc/2XVL-TG2F]; Karen Turner, *Meet 'Ross,' the Newly Hired Legal Robot,* WASH. POST (May 16, 2016), https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot [https://perma.cc/T9QK-YNG7]; *Watson Takes The Stand*, THE ATLANTIC, http://www.theatlantic.com/sponsored/ibm-transformation-of-business/watson-takes-the-stand/283/ [https://perma.cc/U2Y8-9S5W]. The result of "hiring" ROSS been a 30.3% reduction in research time, 42.9% increase in relevant authorities retrieved in the research process, an estimated $8,466 to $13,067 increase in annual revenue per attorney, and a 176.4% to 544.5% overall return on investment. David Houlihan, *ROSS Intelligence and Artificial Intelligence in Legal Research*, BLUE HILL RES. (Jan. 2017), http://bluehillresearch.com/wp-content/uploads/2017/01/RT-A0280-ROSS-BR-AIBank-DH1.pdf [https://perma.cc/7BEG-ZCKB].

43. *See* TURBO TAX, http://www.turbotax.com [https://perma.cc/S3B4-7Q5J].

44. *See* Tim Gray, *Taking Tax Software for a Walk*, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/business/yourtaxes/tax-software-is-put-through-the-paces-review.html [https://nyti.ms/2mFqTKD].

45. *See* Lorelei Laird, *Expert Systems Turn Legal Expertise into Digitized Decision-making*, A.B.A. J. (Mar. 17, 2016), http://www.abajournal.com/news/article/expert_systems_turn_legal_expertise_into_digitized_decision_making [https://perma.cc/6SB6-ULCH].

46. *See* Frederick L. Trilling, *The Strategic Application of Business Methods to the Practice of Law*, 38 WASHBURN L.J. 13, 70–71 (1998) (emphasizing the importance of technologies that can provide the greatest efficiency for the lowest cost, with a focus on improvement, rather than duplication, of existing processes).

among low- and middle-income Americans with automation.[47] Indeed, Legal Services Corporation has identified legal expert systems as one of the key tools that can be used by legal aid organizations and state and national bar associations to close the access-to-justice gap.[48] For example, the Florida Legal Access Gateway ("FLAG"), a collaborative project between the Florida Bar and state public service organizations, has developed legal expert systems that connect users with educational information about divorce and eviction.[49] FLAG offers its systems not only on the web, but also on kiosks installed in state courthouses.[50] Apart from education, the applications offer clients the option of accessing self-help forms or completing an eligibility screener to determine whether they qualify for free or reduced-cost legal aid.[51]

Legal services providers have also developed conversational user interfaces, or chatbots, which engage users in a written or spoken problem-solving dialog. One such tool for developing chatbots is GuideClearly.[52] GuideClearly allows non-technically trained

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47. John O. McGinnis, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3042 (2014); *see also* Michael Chiu et al., *Four Fundamentals of Workplace Automation*, MCKINSEY Q. (Nov. 2015), http://www.mckinsey.com/business-functions/business-technology/our-insights/four-fundamentals-of-workplace-automation [https://perma.cc/QJ8P-NTQ2]. Not just low-level occupations are ripe for automation; higher-level occupations like attorneys and business executives have significant numbers of functions that can be automated. The theory is that such automation will allow those attorneys and executives to pursue creative work and interpersonal client service, tasks that a machine cannot perform. Expert systems are simply one tool that will enable greater amounts of higher-level workplace automation.

48. LEGAL SERVS. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE 1 (2013) (listing top targets as "(1) document assembly for self-represented litigants; (2) better 'triage'—that is, identification of the most appropriate form of service for clients in light of the totality of their circumstances; (3) mobile technologies; (4) remote service delivery; (5) expert systems and checklists; and (6) unbundled services").

49. *See Welcome to the Florida Legal Access Gateway (FLAG)*, FLA. LEGAL ACCESS GATEWAY, http://applications.neotalogic.com/a/floridatriage-production [https://perma.cc/8UZT-8839].

50. *See* Dara Kam, *Kiosks Could Help Floridians Get Access to Legal Aid*, CBSMIAMI.COM (May 15, 2015, 9:41 PM), http://miami.cbslocal.com/2015/05/15/kiosks-could-help-floridians-get-access-to-legal-aid/ [https://perma.cc/2RSX-2HVD].

51. *Id.*

52. *See* Cosima Mielke, *Conversational Interfaces: Where Are We Today? Where Are We Heading?*, SMASHING MAG. (July 18, 2016), https://www.smashingmagazine.com/2016/07/conversational-interfaces-where-are-we-today-where-are-we-heading/ [https://perma.cc/7GZP-F3PD]; *see also Chat Bot*,

individuals to develop functional applications, using a drag-and-drop interface.[53] Pine Tree Legal Assistance, a legal services organization in Maine, used GuideClearly to develop an eligibility screener to help individuals determine whether they are eligible for assistance under Section 17 of MaineCare, a state benefits program for individuals with certain mental health disorders.[54] Although there are 124 questions in the eligibility screener, and 216 unique paths for users to follow, the complex decision tree is invisible to the individual user, who only sees one question at a time.[55] The answer provided by the user determines the nature of each subsequent question.[56] As soon as the user provides an answer that would make them ineligible for services under Section 17, the chatbot informs the user of their ineligibility and offers them other resources.[57]

Another innovative non-profit organization, JustFix.nyc, has developed an app that provides a platform for tenants to document their rental housing conditions and then connect with a professional working at a local tenants' rights organization.[58] The tenant gathers and uploads evidence and then the application uses that evidence to file court forms and prepare for legal action.[59] Tenants can also use the tool to track responses from landlords and ongoing case developments.[60] Without the framework provided by the AI driving JustFix.nyc, tenants or legal aid attorneys could easily overlook some aspect of the case history or make mistakes filling out a housing form manually.[61] JustFix.nyc's mission is to use technology tools to augment, but not replace, the existing non-profit tenants' rights organizational ecosystem.[62]

WEBOPEDIA http://www.webopedia.com/TERM/C/chat_bot.html [https://perma.cc/M28S-DA88].

53. GUIDECLEARLY, http://www.guideclearly.com [https://perma.cc/323R-3N96].

54. *See MaineCare Section 17: What's Really Going On?*, PINE TREE LEGAL ASSISTANCE (Sept. 2017), http://ptla.org/mainecare-section-17-eligibility [https://perma.cc/WKF5-2U6T].

55. Jack Haycock, *MaineCare Section 17: Using GuideClearly*, https://schd.ws/hosted_files/2017tigconference/b5/MaineCare%20Section%2017%20-%20Using%20GuideClearly.pdf [https://perma.cc/VSP6-FNN9].

56. *Id.*

57. *MaineCare Section 17*, *supra* note 54.

58. *Product and Services*, JUSTFIX.NYC, https://www.justfix.nyc/about/product-and-services [https://perma.cc/L8S3-S7S8].

59. *Id.*

60. *Id.*

61. *See id.*

62. *Our Mission*, JUSTFIX.NYC, https://www.justfix.nyc/our-mission [https://perma.cc/Z5KS-3NP2].

These examples demonstrate just a few of the ways technology is being used to help provide information and services to people who need legal assistance. Further, they predict that the future of legal expert systems will mirror the direction that the field of medicine is headed—computers and experts working in tandem.[63] For example, in the field of radiology, a 2016 study compared the error rate of human physicians against AI when diagnosing slide images of lymph node cells for signs of metastatic breast cancer.[64] The error rate for the AI alone was 7.5%, and 3.5% for the physician alone.[65] However, when the physician's review was combined with the AI, the error rate was reduced to just 0.5%.[66] A similar combined human and AI diagnostic approach could be applied to more efficiently and cost-effectively help low income individuals who encounter legal problems.

II. THE APPS FOR JUSTICE PROJECT AT MAINE LAW

Maine is a poor state[67] with an aging[68] and geographically dispersed population.[69] The recession of 2007 had a severe impact on the

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63. *See generally* Jim Guszcza, Harvey Lewis & Peter Evans-Greenwood, *Cognitive Collaboration: Why Humans and Computers Think Better Together*, DELOITTE INSIGHTS (Jan. 23, 2017), https://dupress.deloitte.com/dup-us-en/deloitte-review/issue-20/augmented-intelligence-human-computer-collaboration.html [https://perma.cc/E4G3-YT3M] (describing how more contemporary examples of AI are designed to create a symbiotic relationship between humans and the technology—using human knowledge to improve on AI design, and AI logic to improve on human decision-making).

64. EXEC. OFFICE OF THE PRESIDENT, NAT'L SCI. & TECH. COUNCIL COMM. ON TECH., PREPARING FOR THE FUTURE OF ARTIFICIAL INTELLIGENCE 20–21 (2016) (referencing Dayong Wang, *Deep Learning for Identifying Metastatic Breast Cancer*, ARXIV (June 18, 2016), https://arxiv.org/pdf/1606.05718v1.pdf [https://perma.cc/J8YG-47AF]).

65. *Id.*

66. *Id.*

67. *See Maine*, SPOTLIGHT ON POVERTY & OPPORTUNITY, https://spotlightonpoverty.org/states/maine/ [https://perma.cc/K4CW-SWHK].

68. *See* AGING & DISABILITY SERVS., ME. DEP'T. OF HEALTH & HUMAN SERVS., MAINE'S STATE PLAN ON AGING 2016-2020, 10 (2016), http://www.maine.gov/dhhs/oads/trainings-resources/documents/STATEPLANONAGING2016-2020DRAFT.pdf [https://perma.cc/5PEQ-B3AH].

69. Some Maine residents would need to drive over two hours to reach the nearest civil legal services office. According to Google Maps, a resident of Jackman, near the Quebec border, would need to drive 108 miles or approximately two hours and nine minutes to reach the closest Pine Tree Legal Assistance office in Augusta. *See* Driving Directions from Jackman, Maine to Pine Tree Legal Assistance Office in Augusta, Maine, GOOGLE MAPS,

already tenuous economic health of the State, which has seen a wave of closings of paper mills, shoe manufacturers, and other factories, and has led to a painfully slow economic recovery.[70] As a consequence, employment rates have been adversely affected, leaving many people with basic needs unmet in the areas of housing, healthcare, personal safety, and economic security.

There is also a pressing need for affordable legal services in the state. Legal services organizations in Maine have never had the resources to address the needs of all who come through the door.[71] Maine lawyers historically have had a relatively high rate of participation in *pro bono* practice, but despite these efforts, significant numbers of litigants arrive in court without representation.[72] On average, over fifty percent of Maine residents seeking protection from abuse orders arrive at court without attorney representation.[73]

Out of this access-to-justice crisis grew the Apps for Justice Project. The goals of the Project are to: (1) create practical, technology-based tools that will enable low- and moderate-income consumers to address their legal and law-related problems, independent of, and in tandem with, professional assistance; and (2) assist solo and small firm practitioners in handling a larger volume of these clients,

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https://www.google.com/maps/dir/Jackman,+Maine+04945/Pine+Tree+Legal+Assistance+Inc,+Green+Street,+Augusta,+ME/ [https://perma.cc/5DZ9-EWGS].

70. *See*, *e.g.*, Darren Fishell, *Here's Another Sign of Maine's Slow Economic Recovery*, BANGOR DAILY NEWS (Aug. 18, 2016), http://thelevel.bangordailynews.com/2016/08/18/economy/heres-another-sign-of-maines-slow-economic-recovery/ [https://perma.cc/SEN6-8GBY]; Edward D. Murphy, *Economic Growth in Maine Stagnant, 47th in Nation, Report Says*, PORTLAND PRESS HERALD (June 10, 2015), http://www.pressherald.com/2015/06/10/report-economic-growth-in-maine-stagnant-lowest-in-new-england/ [https://perma.cc/V7PL-4JZY].

71. *Cf.* Kevin Hancock & Nan Heald, *Maine Voices: Civil Legal Aid Programs Extend 'Justice for All' to Maine's Most Vulnerable*, PORTLAND PRESS HERALD (June 5, 2017), http://www.pressherald.com/2017/06/05/maine-voices-civil-legal-aid-programs-extend-justice-for-all-to-maines-most-vulnerable/ [https://perma.cc/GWW9-R9FJ] (describing the current threats to Pine Tree Legal Assistance funding sources and the desperate need for civil legal aid in Maine). *See generally* PINE TREE LEGAL ASSISTANCE, DONOR IMPACT REPORT (2015), https://ptla.org/sites/default/files/2015_Annual_Report_Web.pdf [https://perma.cc/YF2D-9DRV] (documenting Pine Tree Legal Assistance's impressive work with limited funding while noting there is always more work to be done).

72. *See* Scott Dolan, *For Portland Attorney, Donated Legal Work Gets Its Just Reward*, PORTLAND PRESS HERALD (June 30, 2015), http://www.pressherald.com/2015/06/29/award-winning-portland-lawyer-says-her-unpaid-work-brings-other-rewards/ [https://perma.cc/Z4GZ-RRJV].

73. *Id.*

increasing automation, and shifting some of the more rote work from the attorney to an algorithm.

In order to achieve these goals, the Project decided to develop apps under two service models: self-help internet resources for *pro se* litigants and tools for pro-bono and low-bono practitioners, including solo attorneys, legal services organizations, institutional clinics, and attorneys offering alternative representation methods such as unbundled legal services. For each model, the initial goals included: (i) the development of working partnerships with low- and moderate-income consumer legal services providers in order to identify the need; (ii) the identification of a market for the distribution of these apps; (iii) the development of prototype apps to prove out the utility of this project; and (iv) the development of proposed business models for the potential monetization of these apps. Apps for Justice received funding from the Maine Economic Improvement Fund for the first phase of the Project.[74]

III. EMPLOYMENT OF DESIGN THINKING

The Apps for Justice Project was launched by mapping the Project tasks in accord with the design thinking process. Design thinking forced the Project to address the fundamental question of how human-centered design can solve problems, uncover new ideas, and make law more accessible, usable, and engaging.[75] The Project team used a five-step framework to tailor the design of the proposed tools to effectively and efficiently serve its audience: (i) discovering the context and need for the product or system, (ii) synthesizing the information discovered, (iii) building a prototype product based upon the information discovered, (iv) testing the prototype with potential product users, and (v) revising and improving the evolving product prototype.

A. Discovery

The first step in this design process was one of discovery. Discovery involves the development of a thorough and nuanced

74. The Apps for Justice Project Phase II is currently in development. The Project expects to expand the concept into a course offering, where six to eight students a semester will partner with legal services providers to identify common and compelling legal problems faced by consumers and use design thinking and technology tools to address these problems.

75. *See* LEGAL DESIGN LAB, http://www.legaltechdesign.com/ [https://perma.cc/H838-6PTW].

understanding of the problem and the stakeholders.[76] The Project team started the process of discovery by visiting the state courthouse in Portland, Maine, in order to observe the types of civil proceedings and the number of *pro se* parties appearing. The team then held a series of meetings with private attorneys, legal services providers, and clinic staff attorneys in order to understand the common legal problems faced by them and their clients and began to identify target areas where a legal expert system could offer an effective intervention. The Project team engaged these attorneys in both free flowing conversations and more structured interviews. Interviews included questions about process, communication, client access to technology, and client emotional and psychological concerns.[77]

The team gathered much useful information from these visits, conversations, and interviews. For example, the Project team discovered that client intake for legal services and low-bono attorney service providers in the family law field was particularly time consuming and inefficient.[78] Further, Maine's own judicial data from

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76. *See generally* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988).

77. Example guided interview questions included: (1) What are the biggest process challenges you face in your practice (intake, document requests, record keeping, communication, getting clients to show up for meetings, etc.)? (2) What are the biggest substantive challenges in your practice (getting client background information/getting client's story/ getting clients to follow your advice)? (3) When (in what context) do you find yourself re-inventing the wheel (e.g. power of attorney forms, health care directives)? (4) How do you communicate with your clients (paper letters, emails, calling, texting)? (5) What communication challenges do your clients have? How do you stay in contact with your clients (internet cut-off, unpaid cell phone bill, moving a lot – assisted housing to assisted housing)? (6) What is the work that you put off? What is the work that you dread doing? In what situations do you tend to procrastinate? Have you thought about how technology can address this? (7) What are your clients' biggest complaints/concerns about dealings with your office? Your staff's complaints? Your complaints? (8) What percentage of your client base has access to a computer? A smart phone? (9) How much do you know about the people who you don't or can't serve? Do you know what happens when they leave your office? (10) Do you have a sense of the unmet need for legal services in your area/town? Have you seen many *pro se* parties when you are in court? (11) What non-legal problems do your clients (or prospective clients) present? How, if at all, do you deal with their non-legal problems? (12) Describe the typical mental state of a client during your first meeting/conversation (distraught/stressed, etc.). (13) When you have a stressed out/distraught client, tell me how you go about dealing with them and their stress (ignore it, deal with substance/problem/referral/address it/ reassure client, etc.).

78. One attorney who has been practicing criminal and family law for eighteen years expressed that it would be beneficial for her family law clients to receive intake materials before the first meeting, given that her typical intake process, coupled with filling out the divorce forms, takes approximately forty-five minutes at a fee of $200 per hour. Interview with Solo Practitioner in Oxford Cty., Me. (July 17, 2016) (notes

cases filed in 2016 indicate that, 78% of cases had one unrepresented party, while both parties went unrepresented in 56% of cases.[79]

When asked about the possible utility of an automated client intake and document assembly system, one attorney mused:

> We spend over an hour in the first client meeting gathering preliminary information and filling out forms, when we could cut it down to 30 minutes or less. [An intake expert system] . . . would allow us to serve more clients, and save our clients time and money. The first client meeting for family law cases takes 50-75% longer than it should, because of time spent determining the client's background information, and filling out court forms. Clients are spending more money than they need to, and our attorneys are restricted from taking on more clients by spending this time gathering information and filling out paperwork.[80]

Another lawyer observed that such a system could reduce the error rate in completing the needed financial disclosures required by their intake process, and thus reduce the amount of effort spent fixing the errors.[81] A public-interest immigration lawyer further observed that his clients are frequently dealing with other legal and non-legal issues, in addition to immigration issues, such as how to access public benefits, pay or contest a speeding ticket, report crimes of domestic violence, enroll in English language classes, or press a neglectful landlord to provide sufficient heat in the winter.[82] This attorney lamented that due to limited resources, his firm typically is unable to advise the clients on these matters and is forced to refer them to other public interest organizations—which may or may not have the resources to provide assistance.[83]

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on file with authors). During these intake meetings, the attorney spends a good deal of time teaching her client about family law terminology. *Id.* This process is made more difficult because many of her clients faced literacy and cognitive challenges. *Id.*

79. FAMILY DIV., ADMIN. OFFICE OF THE COURTS, REPORT TO THE JOINT STANDING COMMITTEE ON JUDICIARY OF THE 128TH LEGISLATURE AND THE MAINE SUPREME JUDICIAL COURT ON CASES HANDLED BY THE FAMILY DIVISION OF THE MAINE DISTRICT COURT 4 (2017), http://www.courts.maine.gov/reports_pubs/reports/pdf/fd_report_2016.pdf [https://perma.cc/RL6P-KTPS].

80. *See* Interview with Solo Practitioner, *supra* note 78 and accompanying text.

81. The director of a legal incubator specializing in family law and business planning went on to express frustration with the process of getting a client's background information, especially for clients with limited representation agreements. Interview with Dir. of Legal Incubator, Portland, Me. (Feb. 24, 2016) (notes on file with authors).

82. Interview of Attorney with Public Service Organization Specializing in Immigration Law, Cumberland Cty., Me. (Feb. 29, 2016) (notes on file with authors).

83. *Id.*

The discovery phase of the Apps for Justice Project affirmed several points: (i) there is an excess of underrepresented clients in the state, particularly presenting family law and tenant problems; (ii) the majority of clients have access to a computer, either at home, at a relative's home, or at a local library; and (iii) the majority of clients have access to a smartphone.[84] Based on the results of these and other interviews, the Project team decided to focus its app-building attention on a tenant's rights app and a family-law intake app.[85]

B. Synthesizing the Results of Discovery: Defining the Mission and Mapping the User's Problems

In developing the tenants' rights app (Rights of Tenants in Maine or "RTM"), the Project team determined that the most compelling and common tenant concerns were derelict living conditions, issues respecting utility delivery and payment, security deposit returns, and eviction and threats of eviction.[86] The law is clear in outlining the respective rights of landlords and tenants with respect to these

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84. *Id.*

85. *See* ME. ADMIN. OFFICE OF THE COURTS, MAINE STATE COURT CASELOAD 5 YEAR TREND, http://www.courts.maine.gov/news_reference/stats/pdf/year-trend/statewide.pdf [https://perma.cc/G7NA-V6K5]. There are a significant number of cases in these areas of law filed each year in the Maine courts. *Id.* Forcible entry and detainer cases represented twenty-two percent of all Maine non-family civil actions in 2015. *Id.* Family cases numbered over 22,000 in 2015. *Id.*

86. Instances of low-income tenants presenting complaints about their rental unit conditions are particularly common in Maine. *See* Leslie Bridgers, *Super-tight Apartment Market Torments Renters, Redefines Parts of City*, PORTLAND PRESS HERALD (Nov. 15, 2015), http://www.pressherald.com/2015/11/15/super-tight-apartment-market-torments-renters-redefines-parts-city/ [https://perma.cc/7CX7-LQBN]. Exemplifying Maine's aged housing stock and acute under-supply of rental units, Maine's largest city, Portland, is in the midst of an unprecedented housing development boom, with market rate condos displacing what was once affordable rental housing. *See* Tux Turkel, *No Vacancy: Landlords Capitalize on 'Insane' Market*, PORTLAND PRESS HERALD (Nov. 15, 2015), http://www.pressherald.com/2015/11/15/landlords-use-power-hot-market-charge-pick-best-tenants-upgrade-properties-sometimes-neglect/ [https://perma.cc/8FX9-AT2W]; *see also* Leslie Bridgers, *Influx of Affluence a Two-edged Sword, but End Result is Neighborhood Transformed*, PORTLAND PRESS HERALD (Nov. 15, 2015), http://www.pressherald.com/2015/11/15/influx-affluence-two-edged-sword-end-result-neighborhood-transformed/ [https://perma.cc/5WT4-MZZP]. Many remaining rental units are in a state of disrepair, with renters having little leverage to make demands of landlords. *See* Tux Turkel, *Some Buildings Neglected as City Attempts to Strengthen Enforcement of Housing Codes*, PORTLAND PRESS HERALD (Nov. 15, 2015), http://www.pressherald.com/2015/11/15/spotty-inspections-gaps-records-diverse-causes-violations-impede-enforcement-housing-codes/ [https://perma.cc/AAT6-K4S5].

issues,[87] and the Project team determined that each concern could be manageably addressed by an app (or "by a well-designed app").

It was more challenging to synthesize the information that was gathered about the needs of users seeking help in the realm of family law. Because of resource constraints (including time and grant funds) the Project determined that the Family Law Helper app would be limited to addressing users with or without children who were seeking a divorce. After developing multiple iterations of problem identification and solution maps, the Project Team determined that both apps should address their guidance to a typical user in crisis, both acknowledging how common their problems are, and recognizing their distressed emotional state.

1. Diagnosis

In an effort to mimic the thought process of lawyers, the Team brainstormed ways to retrieve the user's information that would help the system diagnose the problem.[88] Diagnosis typically relies on a series of answers to questions in order to bring information about the situation into the expert system for analysis.[89] These questions are designed to secure a user's attention and keep them engaged so they will stick with the task until they reach the "action plan" screen.

The Project team also recognized that it needed to progress from ill-structured problems to well-structured ones.[90] Many of the problems presented by individuals in the legal context are ill-

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87. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 6021-A (2017) (treatment of bedbug infestation); ME. REV. STAT. ANN. tit. 14, § 6033 (2017) (return of security deposit); ME. REV. STAT. ANN. tit. 14, § 6021 (2017) (implied warranty and covenant of habitability).

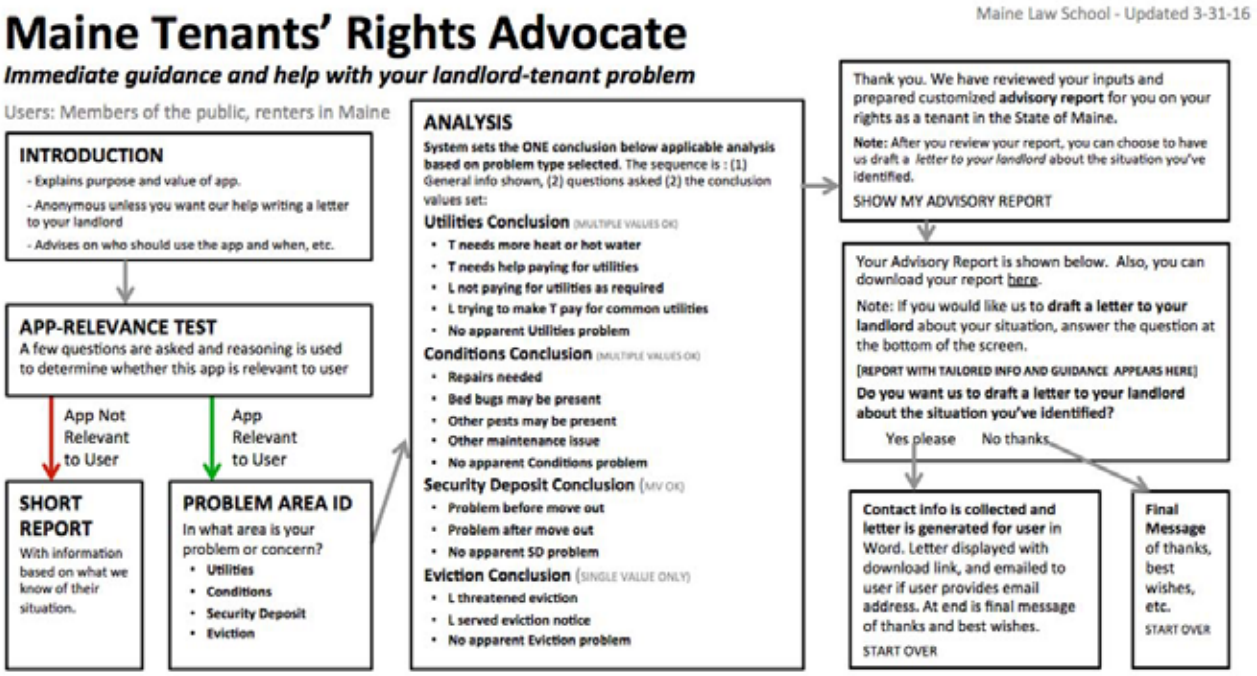
88. *See generally* ABBOTT, *supra* note 76.

89. *See* JOHN R. ANDERSON, COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS 307 (6th ed. 2005) (noting that because of the importance of structuring the problem, problem decomposition is an extremely important element of instruction).

90. *See generally* Herbert Simon, *The Structure of Ill Structured Problems*, 4 ARTIFICIAL INTELLIGENCE 181 (1973), http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=33783 [https://perma.cc/P6TW-3V2L]. Simon assesses whether "ill-structured problems" ("ISPs") are inherently inscrutable to AI problem solving methods in ways that "well-structured problems" ("WSPs") are not. *Id.* Problems of individuals in the "real world" are ISPs, but they are transformed into WSPs when prepared and formalized for a problem solver. *Id.* at 186. In the examples provided, the ISP can be transformed into a series of much smaller WSPs. The process can be modeled as alternating between solving problems in a well-structured subspace and modifying the broader problem space. *Id.* at 192. Accordingly, even if the original problem space is not defined, it is still possible to apply general problem solving techniques to an ISP.

structured problems, meaning that there is no clear and obvious solution to them.[91] An example of an ill-structured problem is a tenant's living situation causing them extreme stress. This ill-structured problem needs to be transformed into a well-structured problem—one that can yield an effective solution through the application of an appropriate algorithm—by the discovery of the source of the stress (for example, a bedbug infestation).[92] To accomplish this, the Team identified and simplified the universe of sources of a tenant's stress. Once the four primary sources of tenant stress were identified,[93] each was broken down into discrete sub-issues. When a user identifies a particular sub-issue as their problem, the app is designed to lead them to a tailored solution.[94]

Figure 1. Logic Map



91. *See id.* at 181.

92. *See id.* at 182.

93. The four primary sources of tenant stress that the Project team identified were: (1) habitability and condition of the rental unit; (2) issues with utility charges and payments; (3) return of security deposit; and (4) eviction.

94. *See* ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING 810 (1972) (explaining that problem-solving is a process of search to get from an initial state to a goal state via a set of operators, which provide the actions that can be taken to move away from the present state towards the goal state).

2. Inference & Treatment

Once ill-structured problems are transformed into well-structured problems, a user can be asked a series of clear diagnostic questions. The user's answers can then be matched with stored schemas, which lead to a "diagnosis" and then a "treatment." This process is similar to the inference an attorney follows when interviewing a client and forming a legal strategy.[95] To infer is to navigate between the diagnosis and treatment, which requires the evaluation of possible treatments, the rational assessment of their likelihoods of success, and the sorting between possibilities based on the facts of the situation, legal convention, and professional judgment.[96]

To illustrate, an app could diagnose that an eligible tenant is living in an unheated unit, and the system would make an inference that the landlord may be violating the law. The app could match this inference to a treatment plan in the form of a demand letter to the landlord notifying the landlord that the tenant is aware of her rights, ideally curbing the need to resort to costly legal process.[97] Conditional logic controls the user's path through the app toward treatment, narrowing the number of possible paths, which are strung together into decision trees and if-then tables to provide what appears to be intuitive navigation through complex reasoning.[98]

3. Human-centered Tools for Confronting Complex and Emotional Topics

The key to the application of design theory is to make the design of systems human-centered.[99] The team knew that the app needed to speak to potential users in a language that was readily understood, communicating through a visual and verbal dialog that is low-text and

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95. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 348–55, 391–96 (1995) (arguing that the primary function of lawyers is as decision-makers and problem-solvers who can recognize patterns that allow them to match the current set of circumstances with a stored problem schema or import other problem schema by analogy).

96. *Id.*

97. *See generally* NILS J. NILLSON, PRINCIPLES OF ARTIFICIAL INTELLIGENCE (1980); ELAINE RICH & KEVIN KNIGHT, ARTIFICIAL INTELLIGENCE. (2d ed. 1991); PATRICK H. WINSTON, ARTIFICIAL INTELLIGENCE (1984) (reviewing the basic principles of AI, describing the contours of the field in terms of the search through the problem space and the use of heuristics to narrow the number of possible paths from the initial state to the goal state).

98. *See generally* NILLSON, *supra* note 97.

99. *See* MARGARET HAGAN, USER-CENTERED LEGAL DESIGN 1 (2015), http://www.courts.ca.gov/documents/BTB_23_PRECON_Usable_1.pdf [https://perma.cc/CA8K-TFMH].

relies instead on expressive graphics. Further, the team recognized that addressing a person's mental state when that person is faced with a high-stakes legal problem is also essential to the app's utility.

As the Project team began to map the user's path through the expert system, the team designed and included regular content overviews in the form of lists, outlines, and headings. The goals of these overviews are to provide the user with a clear map of the app's content, facilitating both reading comprehension and subject-matter recall, as well as to ensure that the user is aware of where they have been and where they are going.[100] A heading can also serve a signaling function, identifying the topic at hand as distinct, and indicating that in the author's judgment, the topic is important.[101] The use of topic headings can reduce the processing burden imposed by transitions between issues, which would otherwise require a reader to suppress their focus on the current topic and fit the new topic into context.[102] Finally, headings emotionally prepare the user for the task ahead, providing readers with the context required to integrate the new information.[103] Headings are especially effective when the content is less structured and when users have lower levels of reading ability.[104]

The apps also liberally use simple graphics and match text with thematic illustrations.[105] Graphic communication has been found to appeal to users with lower reading ability, solidifying understanding of complex concepts, clarifying natural textual ambiguities, and providing a secondary source of information that the reader can use

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100. *See* Percy W. Marland & Ronald E. Store, *Some Instruction Strategies for Improved Learning from Distance Teaching Materials*, *in* DISTANCE EDUCATION: NEW PERSPECTIVES 137–56 (Keith Harry et al. eds., 1993).

101. *See generally* Robert F. Lorch & Elizabeth P. Lorch, *Effects of Headings on Text Recall and Summary*, 21 CONTEMP. EDUC. PSYCHOL. 261 (1996). A study revealed that topic headings increased the number of topics that university students recalled and improved the speed with which they processed topic sentences. *See generally id.*

102. *See generally* Jukka Hyona & Robert F. Lorch, *Effects of Topic Headings on Text Processing: Evidence from Adult Readers' Eye Fixation Patterns*, 14 LEARNING & INSTRUCTION 131, 132–33 (2004).

103. *See generally* JAMES HARTLEY, DESIGNING INSTRUCTIONAL AND INFORMATIONAL TEXT (3d ed. 1994).

104. *See* GARY R. MORRISON ET AL, DESIGNING EFFECTIVE INSTRUCTION 84 (6th ed. 2011).

105. *See generally* Erlijn van Genuchten et al., *Examining Learning from Text and Pictures for Different Task Types: Does the Multimedia Effect Differ for Conceptual, Causal, and Procedural Tasks?*, 28 COMPUTERS IN HUMAN BEHAV. 2209 (2012).

to verify comprehension.[106] In numerous studies comparing illustrated text with non-illustrated text, reading comprehension of illustrated text information was far greater.[107]

It is not enough, however, to simply pair text with imagery; the nature of the imagery should have a direct correlation to learning outcomes.[108] The Project used simple and self-explanatory imagery in its apps based on findings that cartoon and stick drawings led to the greatest reader comprehension.[109] The pairing of simple pictures with difficult text also helps to assuage anxiety by demystifying what may first appear to be mysterious subject matter.[110]

Apart from imagery, the Project team focused its attention on the types of language used. Most "plain language" material written for consumers is presented at a far higher reading level than the audience for whom it is intended.[111] It has been estimated that twenty percent of the U.S. adult population read below the fourth grade level, and less than half read above a tenth grade level.[112] However, the team incorporated a number of strategies for making written materials more readable, even when addressing technical subject matter.[113] The Project team found that adults learn better when written explanations are concise, include few words,[114] and use the active voice, strong verbs, and plain words.[115] In addition, reading materials

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106. *See generally* W. Howard Levie & Richard Lentz, *Effects of Text Illustrations: A Review of Research*, 30 EDUC. TECH. RES. & DEV. 195 (1982).

107. *Id* at 198.

108. *See generally id.*

109. In 1986, a physician examined how different types of pictorial representations influence patient understanding of a booklet on osteoarthritis. *See generally* JMH Moll, *Doctor-patient Communication in Rheumatology: Studies of Visual and Verbal Perception Using Educational Booklets and Other Graphic Material*, 45 ANNALS RHEUMATIC DISEASES 202 (1986).

110. *See generally id.*

111. Susan B. Bastable et al., *Literacy in the Adult Population*, *in* NURSE AS EDUCATOR: PRINCIPLES OF TEACHING AND LEARNING FOR NURSING PRACTICE 189, 206 (Susan B. Bastable ed., 2d ed. 2003).

112. *Id.* at 216. To that end, if the audience's reading level has not been tested, materials should be written at the fifth grade level, as the average reading level in the general population lies between the fifth and eighth grade levels. *Id.* at 207.

113. *See generally id.*

114. Another study focused on the use of plain language in legal communication to members of the general public. Subjects were asked to choose their preferred passage in multiple pairs of passages. In each pair, one passage was written in plain language and the other in technical language. The overwhelming majority of the subjects, regardless of education level, preferred the plain language versions. *See* Christopher Trudeau, *The Public Speaks: An Empirical Study of Legal Communication*, 14 SCRIBES J. LEGAL WRITING 121, 121 (2011–2012).

115. *See generally id.*

should be written in a conversational style and in the present tense, with any technical terms explained, and limiting the use of transition phrases, such as "however" or "regardless."[116]

Beyond reading difficulty, language tone and emotional content have a strong impact on whether the reader will be spurred into taking problem-solving action.[117] Affirming language that acknowledges the difficulty of the user's problem and reinforces the user's rights and self-image, serves to reduce stress reactions.[118] The order of threatening and affirming language may also be relevant to a client's mental state.[119] Materials that emphasize the threatening information before the coping information leave readers more energized to act than materials that placed the coping information first.[120] Thus, in the design and construction of both apps, the Project team sought to balance these factors and to place the content to best maximize the likelihood of thoughtful, constructive action on the part of the user.

C. The Development of Prototype Apps

After defining the Project's mission, mapping the problem, identifying potential treatments, and brainstorming the most effective communication strategies, the team began the first iterations of apps. After reviewing a number of platform options, including available training materials, the Project decided to use the Neota Logic platform to build these expert systems. Neota has a commitment to, and track record of, supporting *pro bono* practice and legal aid.[121]

As noted above, the Project developed two different models of apps: one designed to be used directly by consumers as a self-help assistance tool and the other designed to be used by legal services or low-bono lawyers, allowing them to leverage their ability to provide more efficient and cost-effective representation. This section

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116. Bastable et al., *supra* note 111, at 217–18.

117. *See generally* Crystal Celestine Hall, Decisions Under Poverty: A Behavioral Perspective on the Decision-making of the Poor (June 2008) (unpublished Ph.D. dissertation, Princeton University).

118. *Id.*

119. Steven Prentice-Dunn et al., *Effects of Persuasive Message Order on Coping with Breast Cancer Information*, 16 HEALTH EDUC. RES. 81, 81 (2001).

120. *Id.*

121. *See* Hyona & Lorch, *supra* note 102; *see also Neota Logic and Pro Bono*, NEOTA LOGIC, http://www.neotalogic.com/pro-bono/ [https://perma.cc/W9GR-SPQP]. Neota Logic has a developing pro bono initiative, licensing its platform to law schools and public interest law organizations. *Id.*

describes the features and functionality of the two prototype apps: (1) Rights of Tenants in Maine and (2) Maine Family Law Helper.

1. Rights of Tenants in Maine

RTM is designed to be used by self-represented tenants in Maine. The app guides a tenant through a series of interview questions to isolate the problems the tenant is facing with their living conditions. This analysis separates legitimate problems the landlord may be required to remedy from concerns that may not be recognized under Maine law. After identifying each concern, RTM helps the tenant craft a demand letter to the tenant's landlord, and provides a path for escalation if the attempts to remedy the living conditions fail. RTM opens with an introductory page, informing users of what the app is designed to do and providing an introduction to the type of help the app can offer. The most fulsome information is available for current tenants living in Maine in private housing with no public subsidy.[122]

After a disclaimer noting that what is being provided is not legal advice but helpful information,[123] the app begins by asking a series of eligibility questions, designed to identify and diagnose the user's concerns and transform them into well-structured problems. Using conditional logic, RTM interacts with the user, narrowing their concerns and developing an action plan. In the process, the app provides education so that the tenant better understands his or her rights and the steps he or she will need to take to exercise them.

To illustrate, if a user identifies a problem with the condition of their apartment, she selects "Condition" and she is then guided to the "Conditions" path. On this path, she is asked to further identify the

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122. If a user is renting in another state, they are off-boarded to the Legal Services Corporation website, so they can find the contact information of legal assistance resources in their state. If the user is living in public housing or is using a rent subsidy program, they are guided to the Maine State Housing Authority website. If the user is considering renting a unit but has not yet rented one, they are led to a "treatment" that identifies the issues to think about when considering entering into a lease.

123. The disclaimer reads:

> We have tried to make this app as accurate as possible. It is up to date as of May 2016. Laws, however, can change from time to time, and we cannot promise that this information will always be up to date and fully correct. This information is not legal advice. The authors of this app are not acting as your lawyer. Your use of this system does not form an attorney-client relationship with any party. Rather, this system is designed to give you information about your rights and responsibilities as a tenant in Maine so you can make better decisions for yourself.

Rights of Tenants in Maine: Disclaimer, APPS FOR JUST. PROJECT, U. ME. SCH. L., http://umaine.neotalogic.com/a/rtm-demo [https://perma.cc/SY9T-QATS].

specific problem or problems s/he is facing. The user is then presented with a sequence of questions regarding the physical state of his/her home. These questions read:

(1) Does your apartment have bedbugs? (yes/no)

(2) Does your home have rodents, roaches, or other pests? (yes/no)

(3) Is there a problem with the common areas of your building? (yes/no)

(4) Is there a problem with your hot water? (yes/no)

(5) Do you have enough heat in the winter? (yes/no)

(6) Do you have a problem with your electricity? (yes/no)

(7) Is there a problem with your toilet or other bathroom fixtures? (yes/no)

(8) Is there a problem with your kitchen appliances? (yes/no)

(9) Does your apartment or rental house currently require any of the following specific repairs? (select those that apply)

a. holes in the walls

b. broken windows

c. broken doors

d. broken locks

e. a leaky roof

f. mold

g. leaky pipes

h. leaky faucets

i. leaky radiators

If, for example, the tenant's apartment has insufficient heat and suffers from a pest infestation, her action plan will be tailored to those specific problems. The action plan begins by restating the user's problems and then educates her about their rights under the law. It then guides her through the steps she can take herself to seek redress before requiring a lawyer's assistance.

The first step in the action plan is "call your landlord." To help a tenant who may be intimidated by the confrontation, the action plan provides a script. The script prompts the tenant to ask the landlord, in a civil and professional manner, to fix the heat and call the exterminator and provides the tenant with language to assert their legal rights. Second, the app strongly suggests a follow-up letter to the landlord that repeats the call for assistance and restates anything the landlord agreed to do during the tenant's call. Third, if the landlord still has not addressed the problem, RTM provides a script

that can be used to call the local code enforcement officer. Finally, if the problem remains unresolved, the action plan provides links to other legal resources.

After setting forth the action plan and providing downloadable copies of the call guidance, RTM offers the tenant help drafting the follow-up landlord letter. With the goal of generating a positive and proactive response by the landlord, the tenant is given the option of a "polite letter" or a "polite but more assertive letter." In this example, the tenant would explain in her own words, or by selecting from the preset prompts, that her heater is unable to heat her apartment above fifty-five degrees and that she had spotted evidence of roaches, as well as identify when the problems started and list any steps she already took to attempt to fix them. RTM then generates a letter composed in plain (but professional) language, in an active voice, with minimal legal terminology and a clear request for timely assistance from the landlord. Finally, after RTM generates the draft letter (downloadable in either PDF or MS Word formats), the app gives the tenant instructions for mailing the letter via first class mail.[124]

In addition to downloading the call scripts and the letter to her landlord, the tenant can download or print the action plan itself for later reference. Similar tools (scripts and letter generation) are provided in the utilities and security deposit paths of RTM. The eviction path provides a slightly different set of resources with more information about the steps the landlord will be required to take in a legal eviction.[125] It also provides a letter generation tool to propose an accommodation for any unpaid rent, and a script for a follow-up phone call to the landlord. In each situation RTM follows the same structure: first, diagnosing and framing the particular problem; then, informing the tenant about her relevant rights and pertinent resources; and finally, helping the tenant communicate her polite and professional request to their landlord. If the request is successful, both the landlord and the tenant will benefit by minimizing conflict and reducing transaction costs. Even if the tenant's request is not successful and matters grow more litigious or fraught, she is then able

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124. "Mail the letter - BUT - don't just put a stamp on the letter. Take your letter to a U.S. Post Office and ask for a first class stamp and a tracking number. A tracking number will give you proof your letter was delivered." *Rights of Tenants in Maine: Your Polite but More Assertive Letter Is Ready*, APPS FOR JUST. PROJECT, U. ME. SCH. L., http://umaine.neotalogic.com/a/rtm-demo [https://perma.cc/3ESU-6SP4].

125. *See generally Rights of Tenants in Maine: Issue: Eviction*, APPS FOR JUST. PROJECT, U. ME. SCH. L., http://umaine.neotalogic.com/a/rtm-demo [https://perma.cc/3ESU-6SP4].

to show that s/he made reasonable and civil efforts at resolving the conflict.

The language used in the app was tested using the Flesch-Kincaid Grade Level Readability Formula to confirm that it was understandable by the largest possible segment of the population.[126] There are headers and overviews to guide the user through the app, keeping the user focused on the task at hand. Simple drawings are used to illustrate concepts, thus increasing user comprehension.[127]

The app and scripts also include a number of affirmations, designed to encourage self-agency and promote self-care. These affirmations are timed to provide the tenant with additional support in coping with the anxiety generated by learning more about their legal situation, and to provide positive encouragement after they take each incremental action.

The app also includes explicit stress reduction tools, such as deep breathing and emotion-balancing exercises, throughout all issue paths of RTM. These tools are provided to help the tenant overcome any predisposition towards *tunneling* or otherwise limiting her cognitive bandwidth.[128] Thus, these deceptively simple exercises can increase the tenant's chance to effectively process and deploy the information provided by the app. Moreover, these exercises can be incorporated into the tenant's problem-solving technique on an ongoing basis, whether dealing with the tenancy concerns at hand, or when tackling any other problem, legal or otherwise, that may develop in the future.

2. Maine Family Law Helper

The Maine Family Law Helper app ("MFLH") is designed to be used by the clients of legal services organizations and private sector low-bono legal service providers. The app guides a new client through the initial intake process in a divorce action. Through the interview process, MFLH captures the data necessary to complete the complaint and summary sheet for a divorce action in Maine. The interview process is also designed to be distinct from the questions listed in the court forms—MFLH is not simply an electronic version

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126. *See generally The Flesch Grade Level Readability Formula*, READABILITYFORMULAS.COM, http://www.readabilityformulas.com/flesch-grade-level-readability-formula.php [https://perma.cc/2ZS3-ZNA6].

127. Due to budget limitations, the Project was unable to hire an artist, and had to make do with clip art. In the future, the Project hopes to be able to illustrate apps using a uniform graphic style.

128. *Tunneling* and cognitive bandwidth limitations are previously explained in detail. *See supra* Introduction.

of those forms, which do not always present information in a manner and with language that is intuitive for a *pro se* litigant to follow.[129] Instead, MFLH asks questions in a logical flow based on distinct topics.

Further, MFLH uses conditional logic to streamline the intake process. For example, MFLH asks the user if they have any children. If the user responds "no," then no further questions about children are asked during the interview process. But if the user responds "yes," then MFLH seeks to determine how many children the user has and generates distinct sets of questions for each child, depending on the number provided by the user.

At the end of the interview process, the app auto-fills a set of forms, relying on the data gathered during the interactive intake process. The app then emails the court forms to the lawyer. Using MFLH means that a lawyer can spend less time manually filling out forms for the client, resulting in increased efficiency for the service provider, and lower legal costs for the client.

The interview process in MFLH is divided into multiple topics: contact information, eligibility, problem type, history, plaintiff data, defendant data, child data, and feedback for attorney. MFLH begins the interview by capturing the user's contact information and then proceeds to basic eligibility questions, including whether the user meets the residency requirement in the state of Maine.[130]

Once the user passes the eligibility threshold, the app proceeds into data collection. MFLH first asks about whether the user has children from their marriage. The answer determines whether the user is engaging in a divorce with or without children, each of which includes separate complaint forms. Next, MFLH seeks to gather information about the user's history, such as whether the client or the client's

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129. A *pro se* litigant is not likely to be familiar with many terms in this court form, such as plaintiff, defendant, title to real estate, and jurisdiction, and the form does not include any accompanying definitions. Further, the form references parental rights and responsibilities, but does not distinguish that this procedure is only intended for unmarried couples with children, as opposed to married couples seeking a divorce. *See FM-004 Complaint for Divorce with Children*, ST. ME. JUD. BRANCH, http://www.courts.maine.gov/fees_forms/forms/pdf_forms/fm/FM-004,%20Rev.06.16Divorce%20with%20Children%20Approved.6.7.16.pdf [https://perma.cc/CZL8-6Z3L].

130. Residency options include: I have lived in Maine for the last six months; I have lived in Maine for the last six months AND my spouse and I were married in Maine; I have lived in Maine for the last six months AND my spouse and I were living in Maine when we decided to get divorced; my spouse has lived in Maine for the last six months; and none of these options apply to me. *See* ME. REV. STAT. ANN. tit. 19-A, § 901(1) (2017).

spouse has ever filed for divorce from the other, and if so, the status of that action. MFLH proceeds to determine the reasons for why the user is filing for divorce, and offers a default explanation of the most common reason, irreconcilable differences.[131] MFLH then gathers personal information that will inform the court forms, such as married and maiden names, physical and mailing address, and marriage location and date. This section includes a related question of whether the user would like to change their name, a common procedure that is tangentially related to the divorce process. Finally, the section includes the ability to choose the court in which the action will be filed by linking to a list of corresponding towns and courthouses in the state of Maine. The next section, regarding questions about the spouse, features parallel questions.

If the user previously selected that she had one or more children from the marriage, MFLH will ask a series of questions about the children, separating out answers for each child. These questions include past addresses for the children over the last five years, and information about any other court cases involving the children, any other people who may have custody of the children, and whether any of the children are on public assistance.

At the end of each section MFLH displays a completion screen, which serves several purposes. The screen motivates the user to keep moving through the app with supportive language. Further, the screen serves to track the user's progress and help her to estimate how much time she has spent in the app so far and how much time is remaining. This is designed to encourage users not to quit the interview process prematurely. Finally, the completion screen screen-prints the answers to the questions in order to give the user the opportunity to return to previous screens and correct any inaccurate information.

Finally, after the data collection process is complete, MFLH generates a PDF document for each court form, auto-completes the court forms using the data input by the user, and sends an email to the attorney with the auto-completed court forms attached. The attorney can then edit the forms as needed or contact the client for clarification.

During the design process, the Project Team considered whether it would be more efficient for clients to electronically fill out the PDF

131. For the statutory basis of permissible reasons for granting divorce, see ME. REV. STAT. ANN. tit. 19-A, § 902 (2017). Reasons include adultery, impotence, extreme cruelty, desertion for three consecutive years, alcohol or drug abuse, neglecting to provide support, and cruel and abusive treatment. *Id.*

forms directly. The Project team ultimately determined that although this would be technically feasible,[132] the risk of user error was high because the structure and wording of the court forms is not aligned to varying reading levels. The chance of the user filling out the wrong forms, or misinterpreting the forms' contents is high[133] as the official forms are not designed to be completed by a litigant, independent of professional assistance—they are structured in such a way that all of the questions appear at once, presenting a more psychologically demanding scenario than an app that can meter out questions a few at a time, in logical groupings.[134]

D. User Experience Testing

1. Rights of Tenants in Maine

Ninety-six potential app users located in the halls and common spaces of seven state courthouses were offered a $10 gift card to test a beta version of RTM in July and August of 2016.[135] Each user was provided with a guided tour through the RTM, which was displayed on a tablet. The users were then asked to answer a series of survey questions, in order to elicit the users' general impressions of the app, its usability and design, as well as to learn more about the interactions users have with both the legal system and technology.[136]

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132. *See Court Forms*, ST. ME. JUD. BRANCH, http://www.courts.maine.gov/fees_forms/forms/#fm [https://perma.cc/XL7L-V3T2].

133. *See, e.g.*, *FM-004 Complaint for Divorce with Children*, *supra* note 129. The usage of "[i]rreconcilable marital differences exist between the parties" without any explanation of what this means may lead to misinterpretation or even a user utilizing the wrong forms.

134. *See, e.g.*, *FM-006 Complaint for Determination of Parentage, Parental Rights & Responsibilities, Child Support*, ST. ME. JUD. BRANCH, http://www.courts.maine.gov/fees_forms/forms/pdf_forms/fm/FM-006,%20Rev.%2006.16Complaint%20for%20PRR.FINAL6.29.16.pdf [https://perma.cc/W462-WZBH].

135. User testing was conducted in the state District Courthouses in Rumford, Bridgton, York, Biddeford, Springvale, Lewiston, and Portland, Maine.

136. Sample Questions from the court survey included: (1) OK, now that you've tried it out, please tell me your general impressions of the app. (2) And how about someone who isn't as good with this kind of thing as you are, how would they do with this app? (3) What kinds of rent problems have you ever worried about? (Have you ever had any of the kinds of problems the app shows?) (4) So, something brought you here today. What did you do to prepare for coming here? What did you do to deal with that problem, who did you try to get help from? (5) What did you do or find out then? Did it help you? How (Why not)? (6) Have you ever felt helpless by an overwhelming legal problem? (7) What kept you from taking action? (8) What got you to finally take action? (9) What has been the hardest part of addressing your legal problems without a lawyer? (10) Do you have access to a smartphone? (11) Do

Of the test users interviewed, over 55% (54) had previously encountered a "worrying" legal problem.[137] Many explained that they were unable to take action because of a lack of money, a lack of knowledge about how to find legal help, a distrust of lawyers based on previous experience, or anxiety-induced paralysis.[138] Several reported only taking action when they had no other choice, such as once the "court papers were delivered."[139] Others were more proactive, but had compassion for why many may not be: "I did take action but people are afraid they may be evicted if they say something. Landlords are formidable."[140]

Almost 33% (32) of respondents had experience with landlord-tenant legal disputes in the past and 15% (15) were actively concerned that they would have problems with their landlord in the near future.[141] Among respondents that had experienced how courts adjudicate landlord-tenant claims, either *pro se* or represented, the majority believed that *pro se* litigants would be hamstrung by a lack of knowledge of the law and procedure.[142] When asked what had been (or would be) the hardest part of addressing their legal problems without a lawyer, many respondents focused on the confusing requirements of legal procedure. "Procedural [s]tuff – I don't know who to talk to, when to talk, what to do in court, where to go, what the process is once I'm in the courtroom."[143] Others felt impugned by their lack of resources: "[n]ot having the money to do it. It all being new. I don't think of myself as a criminal, but [in this process] I feel like one."[144] Many simply felt bewildered: "I don't know what's going on. No one tells me anything . . . [you] need someone to speak for you that knows the system[]."[145]

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you have access to a computer? (14) Did the app ask the right questions, did it work for you the way you thought it would? (15) Did the questions make sense to you (were they understandable)? (16) In what ways do you think the app would help you feel less stress? (17) In what ways do you think the app would help you solve your legal problems? (19) How likely are you to read the action plan again after you've created it? (20) If you could improve one thing in this app, what would it be?

137. Rights of Tenants in Maine Test User Survey, Apps for Justice Project, Univ. of Me. Sch. of Law [hereinafter Survey] (on file with authors).

138. *Id.* at 5.

139. Test User Responses, Apps for Justice Project, Univ. of Me. Sch. of Law [hereinafter Responses] (on file with authors).

140. *Id.*

141. Survey, *supra* note 137, at 6.

142. *Id.* at 6–7.

143. Responses, *supra* note 139.

144. *Id.*

145. Survey, *supra* note 137, at 7.

Many participants reported bad behavior by landlords as one of the most stressful parts of the process. "Landlords can pull one over on you. They aren't always right. They threaten you, make you feel bad. You listen to a landlord, but he says whatever he wants because we don't know what's right."[146] "With the landlords here, they don't work with you. Don't talk with you and try to solve issues. [I'm a]fraid to deal with them."[147] Indeed, one participant was interrupted in the middle of testing RTM and was unable to finish providing feedback because they had received a text from their building manager informing them that their utilities were about to be cut off because the landlord's attempt at eviction had been dismissed by the court.[148]

Further, many respondents believed that *pro se* litigants would have trouble establishing legitimacy and being treated fairly.[149] As one put it, the challenge was "[g]etting my side heard respectfully and being regarded as a human being. It is cold hearted."[150] Others felt that lawyers "take advantage[] of being here [in court] every day and knowing the law."[151] Moreover, there was a strong appetite for a third party to explain the law: "I am not quite sure about my responsibilities and the landlord's responsibilities. Something written by someone such as the law school, who is not a landlord, would be reliable."[152]

Most users did not specifically respond to the explicit stress mitigation and affirmation exercises, but those that did found them helpful and grounding.[153] "[I l]ike the deep breathing exercises – it helped, [] came at the right time and didn't make you feel like an idiot."[154] "I really liked the deep breathing exercises. It [r]eally [w]orks. It was thoughtful to put in. People in these situations are looking for a little compassion."[155] While the majority of users reported that using the app would make them feel less stressed, most credit it to the increase in their knowledge and in gaining new "options."[156] That said, 17% (16) of users reported that the emotional

146. Responses, *supra* note 139.
147. *Id.*
148. *Id.*
149. Survey, *supra* note 137, at 7.
150. *Id.*
151. Responses, *supra* note 139.
152. *Id.*
153. Survey, *supra* note 137, at 13.
154. *Id.*
155. Responses, *supra* note 139.
156. Survey, *supra* note 137, at 12.

support aspect of the apps were the most helpful component.[157] As one user put it: "I would use it in stressful times. I like that it's like your mother[, e]ncouraging."[158] Others framed their feedback more pointedly: "[i]t helped instead of just talking at you."[159]

Turning to the technology needed to leverage RTM, the vast majority of users reported having access to a computer or smartphone: 82% (80) reported access to a smartphone and 84% (82) reported having access to a computer at home, at work, or at the local library.[160] Of test users with access to both, 39% (38) used their smartphone more[161] and 28% suggested that they would be more likely to use the app if their access to technology improved (both in terms of devices and internet speeds).[162] Others suggested that RTM or an equivalent app should be available at kiosks at the courthouse "so you could use it right here."[163] What is apparent from the access statistics is that while smart phones are generally ascendant, many of the target users do still access the internet through computers. As such, RTM and similar apps need to be designed with enough flexibility to accommodate the spectrum of devices used by the client base and optimized to use the lowest possible amount of bandwidth to allow reliable access across the spectrum of devices—from a fully functional library or home laptop with a direct internet connection, to a low-cost smart phone running on a discount carrier.

Of the users surveyed, 43% (42) found the step-by-step landlord contact and escalation instructions of the action plan to be the most helpful aspect of RTM.[164] Another 33% (32) found the letter generation tool and call scripts to be the app's most valuable component because it could help them communicate in an appropriate and effective way.[165] "This would be helpful for starting a conversation with the landlord, a reasonable one."[166] Further, "the letter made me feel smart—not everyone can write like that."[167] Several commented on how the letter and scripts would help in

157. *Id.* at 18.
158. Responses, *supra* note 139.
159. *Id.*
160. Survey, *supra* note 137, at 7–8.
161. *Id.* at 9.
162. *Id.* at 17.
163. Responses, *supra* note 139.
164. Survey, *supra* note 137, at 18.
165. *Id.*
166. Responses, *supra* note 139.
167. *Id.*

keeping things civil with their landlord because often "[t]hey are hostile, and it is hard not to be hostile back."[168]

Although the majority of the qualitative responses to the app itself were positive, the most useful feedback for iterative development, and for the Apps for Justice project moving forward, was the constructively critical feedback. A number of test users desired a more polished and professionally designed interface with more developed help features, such as live chat and search functionality.[169] This included requests for "bolder letters and colors"[170] as well as "[a] little more flash . . . [because i]t looked like a Wikipedia page—well maybe better than that, but not much."[171] Several users brought up the importance of expanding the design to provide text-to-speech functionality to provide access "[f]or the learning disabled, for those who cannot read, or are illiterate."[172] Given the low capital investment in RTM's design, this feedback is not unexpected and it reinforces the Project's understanding of how important, and expected, design has become as a signal of quality in all segments of the marketplace, not just among high-end products and services.

Many users expressed concerns about the density and presentation of information, particularly in the action plan, which was perceived as too long.[173] As one tester put it "[t]he only thing I didn't understand was the real big page [the action plan]. It was too much stuff."[174] Conversely, some users felt that despite the length, "[t]he app isn't 'lawyerly' at all—doesn't use a lot of legal words that could be confusing."[175] Such feedback should be of particular note to attorneys (a species not known for its brevity) that get involved in application development.

Despite concerns of information overload, 61% of users wanted more information on additional topics, such as housing discrimination and how "[l]andlords make [harassment and discrimination] look like something else . . . [m]ost people learn to live with it because they don't want to cause ripples."[176] Similarly users asked for more information or dedicated apps addressing lease terms, public and

168. *Id.*
169. Survey, *supra* note 137, at 14, 16–17.
170. *Id.* at 1.
171. *Id.* at 14.
172. Responses, *supra* note 139.
173. Survey, *supra* note 137, at 15–17.
174. Responses, *supra* note 139.
175. *Id.*
176. Survey, *supra* note 137, at 1, 14.

subsidized housing, courtroom and legal procedure, resources for immigrants, and additional tools to use for seeking other forms of help, such as more links to local charities, aid organizations, and state agencies.[177] Notwithstanding the helpful criticisms, over 86% (84) of the test users reported that they would use RTM if facing a housing crisis.[178]

One test user, a landlord, expressed frustration that legal aid organizations do not provide help to them, and requested that a version of the app be crafted to provide landlords with guidance on their rights and responsibilities.[179] This brings up a number of important concerns and issues beyond the mandate of RTM, which are worth exploring. Landlords are a diverse group, and many do not fit into the archetypes that dominate the depictions of landlord in the media or popular imagination (be it the aristocratic patrician, the money-grubbing slum lord, or otherwise). Indeed, the Project team's observation of forcible entry and detainer proceedings at the Cumberland County Courthouse was peppered with *pro se* landlords.[180] These ranged from some landlords that were clearly proficient in the eviction process, while others were as intimidated by the experience as the tenants they were attempting to evict. As such, the question must be asked: is some percentage of landlord misbehavior arising out a lack of understanding of the rules? Moreover, would everyone involved benefit from a clearer understanding of their obligations under the law?

2. Maine Family Law Helper User Testing

Completing user testing with MFLH was a greater challenge than for Rights of Tenants in Maine due to the absence of client data tracking by lawyers, the lack of a technology ecosystem in Maine, and the potential testers' law practices' high client volume and limited time availability.

First, the low-bono law practices with which the Project engaged did not track the types of specific issues presented by their family law

177. *Id.* at 14–17.

178. *Id.*

179. Responses, *supra* note 139.

180. Lois R. Lupica and Sage M. Friedman attended a Cumberland County Courthouse housing proceeding on Nov. 10, 2016 (notes on file with authors). Similarly, a report from 1998 observed that in Massachusetts Northeast Housing Court, over half of the landlords appearing in court for summary eviction cases represented themselves. BOS. BAR ASS'N, REPORT ON PRO SE LITIGATION 16 (1998), https://www.bostonbar.org/prs/reports/unrepresented0898.pdf [https://perma.cc/W8CA-8UWJ].

clients or at what point in the process clients sought professional legal assistance. In hindsight, the Project should have gathered data on the types of clients that engage each firm (such as divorce, parental rights, and post-judgment modification), and more importantly, *when* they engage the firm during their divorce actions. The team assumed incorrectly that during a divorce action, the majority of clients retain an attorney at the beginning of the process, before filing an action in court. Instead, the Project learned from its testing partner firms that most of their clients engage an attorney after attempting to take legal action on their own. The clients typically file for divorce, become overwhelmed by procedural challenges, and then engage a lawyer to untangle the knot.

Second, many of the Maine lawyers the team spoke to were not familiar with the ascendance of new law practice technologies. Maine is home to only one legal technology startup[181] and very few non-legal technology startups.[182] As a result, the proposal to test the app was often greeted with skepticism, which the team speculates was born out of unfamiliarity with the nascent law practice and technology movement.

Third and finally, the Project's testing partners were small law firms with fewer than five attorneys, engaged in volume-based practices.[183] Often juggling six days per week of client meetings, the attorneys had little time to arrange application testing for their clients. However, given the research findings on the impact of expert systems on law,[184] the Project team speculates that it is likely that expert systems would improve efficiencies for these attorneys.[185]

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181. *X2X*, ANGELLIST, http://www.angel.co/x2x-community [https://perma.cc/VR7L-5MVJ].

182. AngelList is a popular directory website for startup companies and the investors who fund them. AngelList only features 205 startup companies in Maine, and only one of those is a legal technology company. In contrast, AngelList features 359 startup companies in New Hampshire. *Compare Maine Startups*, ANGELLIST, http://www.angel.co/maine [https://perma.cc/DQG4-WC8U], *with New Hampshire Startups*, ANGELLIST, https://angel.co/new-hampshire [https://perma.cc/E88H-XQZJ].

183. The recent Legal Trends Report from the practice management software company Clio highlighted that on average, small firms only bill twenty-eight percent of hours worked in a given day. *Legal Trends Report*, CLIO (Sept. 19, 2016), http://www.clio.com/blog/legal-trends-report/ [https://perma.cc/2LBZ-97H7]. Assuming an eight-hour workday, that amounts to 2.2 billable hours.

184. *See* Trilling, *supra* note 46, at 70–71; *see also* McGinnis *supra* note 47, at 3042.

185. Initially, the project team identified two attorneys who would identify clients to test MFLH directly and provide feedback to the team. The first attorney operates a legal incubator in Cumberland County, Maine, and the second attorney operates a general practice with a focus on family and criminal law in Oxford County, Maine.

E. Revising and Improving the Evolving Product Prototype

Upon consideration of user feedback for RTM, the team worked to revise the app to try to minimize the text and further simplify the language. This led to the review of a number of aesthetic design choices, including decisions about color, font size, and style. The team continues to propose improved versions of the app and may continue to engage in user experience testing with both potential users and legal professionals.

Both attorneys were motivated to participate in testing based on potential time-savings for the attorney, and cost-savings for the client.

Feedback form questions for the attorney included:

1. What were your/your clients' general impressions of the website?
   a. Generally positive
   b. Generally negative
   c. Neutral
2. Did clients approach you with any of these problems: (check all that apply)
   a. Could not log into the website
   b. Did not understand the questions
   c. Confused by the flow of the questions
   d. Not enough time to complete the questions
   e. Encountered a bug that prevented them from completing the questions.
3. On average, how much time did you save per client by using this website?
   a. More than 1 hour
   b. 1 hour
   c. Less than 1 hour
   d. I saved no substantial amount of time
   e. I spent more time than I saved assisting clients with the website

Feedback form questions for the client included:

1. When you first saw the website, what did you think it was supposed to do?
2. To what extent did the questions make sense to you?
   a. All of the questions made sense.
   b. Most of the questions made sense.
   c. Some of the questions made sense.
   d. Most of the questions did not make sense.
   e. None of the questions made sense.
3. Did your stress level change after using the website?
   a. Yes, I felt less stressed.
   b. Yes, I felt more stressed.
   c. No, my stress level did not change.
4. If you struggled with the website, how did you seek help?
   a. I did not struggle with the website.
   b. I contacted my attorney.
   c. I contacted a friend or family member.
   d. I browsed another legal website.
   e. I stopped using the website entirely.

Feedback for the presentation of Maine Family Law Helper was similar to that received in response to the RTM app. As with RTM, the team plans to continue minimizing text and improving the design aesthetic, but also wants to improve the prototype for MFLH through more extensive user testing. From the initial attempts at MFLH user testing, the team learned to build in sufficient time to form a working relationship with each partner law firm. Based on the ever-changing nature of those practices, extensive time may be required to ensure that the Project can identify the ideal client testers for MFLH. Moreover, with software designed for low-bono law firms white label products would be required.[186] The Project team worked with each of its law firm partners to create customized white label versions of MFLH for each firm. This was in part to ensure consistent branding for the clients, but also to avoid client confusion that could arise from asking clients to contact the law firm and complete intake procedures through an apparent third-party.

IV. THE UNAUTHORIZED PRACTICE OF LAW?

The use of technology-based tools to deliver legal information and legal assistance raises the issue of whether these tools implicate (or should implicate) the rules prohibiting the unauthorized practice of law ("UPL").[187] In light of the rapidly changed and changing legal profession, it is not at all clear what activities and service provision models constitute the "practice of law."[188] For example, a number of jurisdictions have noted that "[t]he focus of the inquiry is, in fact,

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186. *See White Label Product*, INVESTOPEDIA, http://www.investopedia.com/terms/w/white-label-product.asp [https://perma.cc/8V5U-5T39] ("A white label product is manufactured by one company and packaged and sold by other companies under various brand names. The end product appears as though it has been manufactured by the marketer. The benefit for the manufacturer and the marketer is that the manufacturer can concentrate on making the product or service and focus on cost savings, and the marketer can invest in marketing and selling the product."). In this context, a white label product would be a version of MFLH that appeared to be the individual service of each partner law firm.

187. Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 710–11 (2012) (Originally targeted at real estate agents and others with the potential for infringing upon the domain of licensed attorneys, and ostensibly designed to protect the public, almost every jurisdiction (except Arizona) has adopted rules prohibiting the unauthorized practice of law. Most of the unauthorized practice rules were adopted prior to emergence of the proliferation of technology-based self-help tools).

188. *See generally* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

'whether the activity in question require[s] legal knowledge and skill in order to apply legal principles and precedent.'"[189] Going beyond courtroom appearances, a few jurisdictions have included "the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity" in their "law practice" definition.[190] The fact is that the contours of the definition of UPL remain ill-defined in most jurisdictions when technology-based tools are providing legal information and services.

An early case discussing the scope of "unauthorized law practice" addressed the question of whether a self-help book providing information to consumers about will and trust preparation constituted law practice.[191] In ultimately deciding that the book should not be enjoined from being published, the New York Court of Appeals noted that when there is no "personal contact or relationship with a particular individual," nor the "relation of confidence of trust so necessary to the status of attorney and client," there is no "practice of law."[192] This and other decisions addressing self-help books have informed how regulators have thought of, and are thinking about,

189. Bd. of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1193 (Me. 2001) (defining the "[t]he term 'practice of law'" as a "term of art connoting much more than merely working with legally-related matters") (internal citation omitted); Att'y Grievance Comm'n of Md. v. Shaw, 732 A.2d 876, 882 (Md. 1999) (noting that the practice of law includes "utilizing legal education, training, and experience [to apply] the special analysis of the profession to a client's problem") (internal citations omitted). The *Shaw* court further noted that "the Hallmark of the practicing lawyer is responsibility to clients regarding their affairs, whether as advisor, advocate, negotiator, as intermediary 'between clients, or as evaluator by examining a client's legal affairs." *Id.* at 883 (quoting *In re* Application of R.G.S., 541 A.2d 977, 980 (Md. 1988)).

190. *Shaw*, 732 A.2d at 883 (quoting Lukas v. Bar Ass'n of Montgomery Cty., 371 A.2d 669, 673, *cert. denied*, 280 Md. 733 (1977)). In *Shaw*, the court noted that the practice of law includes "'utilizing legal education, training, and experience [to apply] the special analysis of the profession to a client's problem.'" *Id.* at 882 (quoting Kennedy v. Bar Ass'n of Montgomery Cty., 561 A.2d 200, 208 (Md. 1989)).

191. *See generally* NORMAN F. DACEY, HOW TO AVOID PROBATE (1990). The book sold over 600,000 copies in its first two years of publication. *See also* New York Cty. Lawyers' Ass'n v. Dacey, 54 Misc.2d 564 (N.Y. Sup. Ct. 1967), *affd in part, modified in part*, 28 A.D.2d 161 (N.Y. App. Div. 1967), *rev'd sub nom.*, 21 N.Y.2d 694 (N.Y. 1967) (reversing the state trial court and appellate division's determination that the book constituted UPL).

192. *See Dacey*, 21 N.Y.2d at 694 (finding similarly that because there was no client interaction or connection, the court held that the developer of a "do-it-yourself-divorce-kit" was not engaged in the unauthorized practice of law); *see also* State v. Winder, 42 A.D.2d 1039, 1039 (N.Y. App. Div. 1973).

whether technology-based self-help tools violate UPL rules.[193] Like do-it-yourself books, legal apps provide legal and law-related information to consumers. Most legal apps, however, are more interactive than books, although the interaction is between a consumer and a computer, rather than a consumer and a lawyer. For example, apps typically include algorithms that guide users through a series of questions and decision-trees, diagnose law-related problems, and ultimately offer law-based information, action plans, or legal forms.[194] Moreover, as technology becomes more advanced, computer programs will make greater use of artificial intelligence and

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193. *See, e.g.*, Grievance Comm. of Bar v. Dacey, 222 A.2d 339, 348–49 (Conn. 1966) (drawing a line between providing information and drafting legal documents); Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1191 (Fla. 1978) (noting that "courts have prohibited all personal contact between the service providing such [self-help] forms and the customer, in the nature of consultation, explanation, recommendation, advice, or other assistance in selecting particular forms, in filling out any part of the forms, suggesting or advising how the forms should be used in solving the particular problems."); *see also* Janson v. LegalZoom.com, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011) (finding the unauthorized practice of law because LegalZoom tools went beyond that "of a notary or public stenographer."); Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 210–13 (2014).

194. In the context of law-related technology, the few courts and bar associations that have addressed the scope of the UPL rule have come to a variety of conclusions. In some cases, the analysis and conclusion turned on the specific type of law-related technology at issue. For example, most jurisdictions have found that a program that provides a consumer with general information about legal rights and processes, or provides users with blank forms for them to complete is not the "practice of law." *See, e.g.*, State v. Despain, 460 S.E.2d 576, 578 n.2 (S.C. 1995) (noting that the sale of blank legal forms does not constitute unauthorized practice of law); *see also In re* Thompson, 574 S.W.2d 365, 366 (Mo. 1978). In contrast, programs that offer a series of online questions, and based on the answers given, provide tailored information or advice, have been deemed by some states (for example, Pennsylvania, Ohio, and Connecticut) to violate the UPL rules. *See, e.g.*, Pa. Bar Ass'n Unauthorized Practice of Law Comm., Formal Op. 2010-01, 7 (2010) (concluding that "the offering or providing of [in Pennsylvania] of legal document preparation services . . . [beyond the supply of preprinted forms] either online or at a site in Pennsylvania is the unauthorized practice of law and thus prohibited."); *see also* Lowry v. LegalZoom.com, No. 4:11CV02259., 2012 WL 2953109 at *1 (N.D. Ohio July 19, 2012); Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 CONN. L. REV. 303, 304 (2004). Litigation, however, has led to the approval of law-technology tools in a number of jurisdictions (South Carolina, Missouri, Washington, and California). *See generally* Medlock v. LegalZoom.com, No. 2012-208067, 2013 BL 367583 (S.C. Oct. 18, 2013); Janson v. LegalZoom.com, 802 F. Supp. 2d 1053 (W.D. Mo. 2011); Webster v. LegalZoom.com, B240129, 2014 WL 4908639 (Cal. Ct. App. Oct. 1, 2014) (settlement agreement available at http://www.ldalitigation.com/docs/Settlement_Agreement.pdf [https://perma.cc/XA3B-DQQE]); Assurance of Discontinuance, *In re* LegalZoom.com (Wash. Sup. Ct. Sept. 15, 2010), http://www.keytlaw.com/blog/wp-content/uploads/2010/09/Assurance-of-Discontinuance.pdf [https://perma.cc/UC5N-WPSU].

become more "human-like" in their problem-solving ability, further blurring the line between the provision of information and the "application of legal principles to [complex] problems."[195]

In light of the demand for these tools created to address the unmet need for legal services, the self-governing legal profession must reconsider the definition of the unauthorized practice of law to account for creative solutions being developed to expand access to civil justice. State bar associations and courts should consider the adoption of safe harbors for interactive legal software under UPL rules. Engaging in semantic gymnastics as to whether a computer program goes beyond the provision of scrivener services[196] fails to address a fundamental problem in our legal system: most individuals cannot afford a lawyer to address their legal issues.[197]

CONCLUSION

As the Project's term was coming to an end,[198] the concern was how best to finalize the prototype apps, maintain them, and continue to develop legal expert systems addressing other areas of the law. The Project decided to submit a proposal for a course offering at Maine Law, the Apps for Justice Lab, which would create regular classes of law students that could continue building and maintaining legal expert systems. The course was recently approved, and starting in Spring 2018, the first cohort of students will work in teams to (i) collaborate with a legal services provider to identify a legal or law-related problem commonly faced by low- and moderate-income consumers, (ii) research and develop skills to deconstruct law and non-law related solutions to a specific legal problem, (iii) develop design and algorithmic thinking skills to map out multiple versions of the identified solutions, (iv) create a user-friendly app, able to be effectively used by the target population, and (v) engage in user testing and revision of the app. The Project team expects that the Apps for Justice Lab will provide a rigorous educational experience that will prepare students to practice law using twenty-first century technology.

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195. *Shaw*, 732 A.2d at 883.

196. *See, e.g.*, *Janson*, 802 F. Supp. 2d at 1064 (finding the unauthorized practice of law because LegalZoom tools went beyond that "of a notary or public stenographer").

197. *See generally* Cynthia L. Fountaine, *When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment,* 71 U. CIN. L. REV. 147 (2002).

198. The grant term was for a period of eighteen months.

Several law schools are already offering similar courses. Georgetown Law School offers a course on legal expert system design using the tools A2J Author and Neota Logic to develop their own systems.[199] Over the course of a semester, groups of collaborating students design, develop, and present an expert system to a panel of legal community members for evaluation.[200] The course begins with an overview of the logic behind a legal problem and then continues into the mechanics of how to analyze that problem with expert system software.[201] When reflecting on lessons learned in offering this course, the professors noted that the process of building these apps pushed students to think from the perspective of their clients in a much more in-depth manner than a typical intake interview.[202]

Likewise, Chicago-Kent offers an expert system practicum in which the professors emphasize the process of thinking like the client, instead of like the typical attorney.[203] The course curriculum begins with exercises on the construction of plain language instead of legal language, continues with a direct contact phase in which students shadow *pro se* litigants through their court hearings, and concludes with the construction of a legal expert system.[204]

The Project team hopes to build on the experience of these and other course offerings, but to more pointedly incorporate the design thinking process, including learning about how to relay information to people who are under extreme performance minimizing stress. The measurable results of the Apps for Justice Lab will be a cohort of law

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199. *See generally* Tanina Rostain, *Thinking Like a Lawyer, Designing Like an Architect: Preparing Students for the 21st Century Practice*, 88 CHI.-KENT L. REV. 743 (2013); Roger Skalbeck, *Tech Innovation in the Legal Academy*, THE NEW LIBRARIAN (2012), http://www.aallnet.org/mm/publications/products/aall-ilta-white-paper/tech-innovation.pdf [https://perma.cc/545F-YGAH]. At Vanderbilt in 2016, students have developed apps for immigration, Medicare, and foreclosure assistance; and at Georgetown in 2015, students developed apps addressing various areas of law such as disability rights, child welfare, and government benefits. *See Technology in Legal Practice*, VAND. L. SCH., http://law.vanderbilt.edu/courses/340 [https://perma.cc/NQJ5-GE3W]; https://law2050.com/2016/04/21/vanderbilt-law-students-building-apps-for-access-to-justice/ [https://perma.cc/9HNX-Y7KE]; *Vanderbilt Law Students Build Apps for Access to Justice,* LAW 2050, https://law2050.com/2015/04/15/vanderbilt-law-students-build-apps-for-access-to-justice/ [https://perma.cc/C98K-V2H3].

200. *See* Rostain, *supra* note 199.

201. *Id.*

202. *Id.*

203. *See* Ronald W. Staudt, *Access to Justice and Technology Clinics: A 4% Solution*, 88 CHI.-KENT L. REV. 695, 712 (2013) ("While the law school curriculum effectively can teach law students to write for other lawyers, rarely is there any focus on teaching students to communicate complicated legal concepts to clients.")

204. *Id.*

graduates with greatly increased understanding of, exposure to, and experience with using twenty-first century legal tools. Another measureable outcome will be the design and development of original technology-based applications that will be available to address both *ex post* and *ex ante* legal problems and concerns. These technology-based apps will have great potential to improve the effectiveness and efficiencies of legal problem-solving as well as the practice of law.

With respect to the issue of how to disseminate the finalized apps so they are widely available and thus used, there are a number of options: (i) license them to non-profit law-related organizations, for no fee or a low fee, (ii) license them to low-bono law firms to be used in connection with client representation, (iii) provide them to the court system so that they can be offered to unrepresented litigants, or (iv) license apps that address non-consumer issues to small business start-ups or incubators to facilitate economic and business development. The Access to Justice Lab will also provide training for law students interested in opening their own practices, or taking over a retiring solo practitioner's practice.

The Apps for Justice Project is but one example of how to approach the development of legal expert systems that address the law-related challenges faced by those experiencing scarcity and external threats that lead to inertia. There are many more legal expert systems in the process of development across the globe.[205] The momentum that is building around this and similar projects shows that the legal community increasingly recognizes that there are now ways to scale legal assistance so that even without lawyers, a greater number of low-income people are able to be helped as they address their legal problems. This growing enthusiasm is inspiring and reflects a trend that the Project team is hopeful will only continue to accelerate as attorneys embrace design thinking and legal technology.

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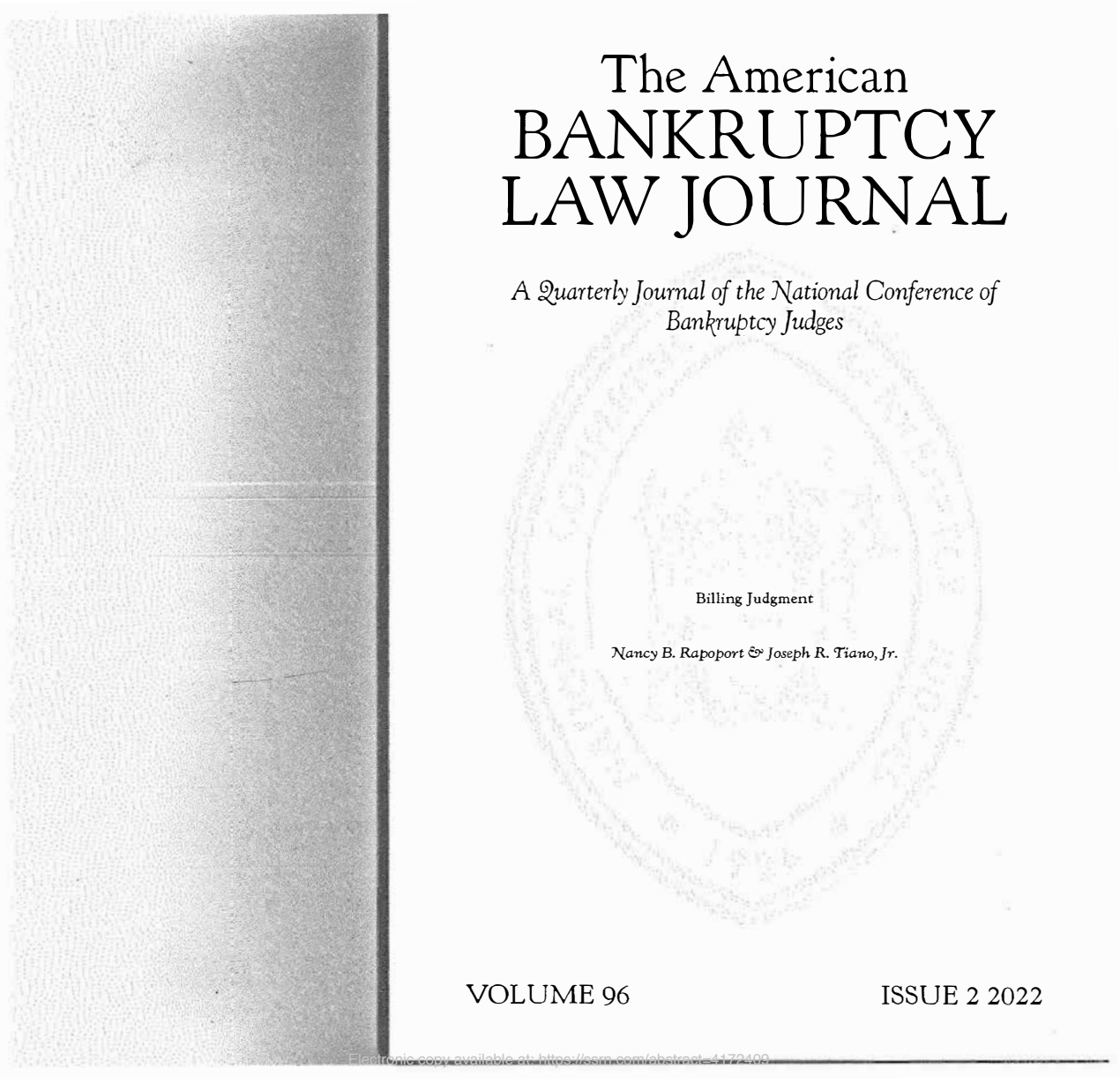
205. *See, e.g.*, DONOTPAY, https://donotpay-search-master.herokuapp.com/ [https://perma.cc/6HAN-LWBD] (showing a chatbot created to dispute parking tickets in the U.K., now operating in the United States and addressing many other issues, including suing Equifax and providing free legal guidance to refugees); *see also Robot Lawyer*, ROBOT LAWYERS PTY LTD, https://www.robot-lawyers.com.au/terms-of-use [https://perma.cc/W2ZL-XD54] ("[h]elping unrepresented people tell their story," an Australian legal expert system provides guidance on entering a guilty pleas for traffic offenses, assault charges, DUI charges, drug charges, and theft charges.); *Robot Lawyer Lisa*, AI TECH SUPPORT LTD, http://robotlawyerlisa.com/ [https://perma.cc/JF4L-TKUW] (noting that AI created NDAs and contracts assisting small businesses in the U.K.).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Billing Judgment

by

*Nancy B. Rapoport & Joseph R. Tiano, Jr.**

Abstract

In most situations, when a lawyer sends a bill to a client, the client pays the fees. When the client believes that a fee or expense is unreasonable, the client will ask for reductions. Conscientious lawyers review a bill before sending it to the client, exercising judgment in terms of what fees and expenses are reasonable. But in bankruptcy cases, the estate pays the court-appointed professionals' fees and expenses out of unsecured funds or from a cash collateral carve-out. Thus, the responsibility for scrutinizing the fees and expenses falls not to a particular client, but to the court, per 11 U.S.C. § 330. The debtor-in-possession isn't particularly motivated to pay attention to line items on a bill, especially in a bet-the-company case. Moreover, most debtors in possession aren't sure what activities are necessary or which level of professional should be performing which tasks. Creditors might pay attention to the overall burn rate of fees, but often, the cost of objecting to a fee application outweighs the potential benefit in filing the objection. The United States Trustee or a fee examiner can evaluate line-item entries, raising issues about reasonableness; however, those parties question line items months after the time has been recorded. That Monday-morning quarterbacking is not nearly as efficient as is exercising judgment at the time that the professional is doing the actual work. Time written off is time that a professional can't redeploy. We argue that developing a mindset that focuses on billing judgment at the time of performing the work, whether for a bankrupt estate or a solvent client, is better for the bankruptcy estate or client and better for the professionals themselves. The trick lies in how to deploy data and social science to nudge people into developing a better billing judgment mindset.

 We have so many people to thank for their help on this article, including Professor George Kuney, Judge Timothy A. Barnes, and Judge Terrence L. Michael, our superstar librarians Youngwoo Bae, Jeanne Price, and James Rich, the lawyers who gave us comments on earlier drafts (J. Scott Bovitz, Randy Gordon, Bill Rochelle, and Dwayne Hermes), our research assistants, Brandon Bean and John Ito, our intrepid editor, Judge Bonnie Clair, and of course the two people who keep us sane, edit our work, and love us even when they disagree with us (Meredith Tiano and Jeff Van Niel).

INTRODUCTION

> How many attorneys does it take to change a light bulb? Let's see. One to check the socket. Another to order the bulb. Three or four to do research on how to change a bulb. Another to write a memo about how to do it. And still another to proof-read the memo. One to twist in the bulb. Somebody to advise the bulb twister. Two more to serve as witnesses. Another to stand by if needed. And one or two to write a memo to file[ ] about the operation. Or, as some frustrated clients might complain, as many as the attorneys can persuade the client to pay for.[1]

Why are the two of us obsessed about improving professionals' billing judgment—of lawyers in particular, but also of other estate-paid professionals—in bankruptcy cases? One of us serves as a fee examiner, and the other one of us has a company whose software analyzes time-entry data in several large bankruptcy cases. Both of us write in the areas of professional responsibility and legal operations. That explains some of our interest in the topic. But there's another reason: We practiced law before changing careers, and we find the legal industry's economic model both fascinating and distressing. The economic model fascinates us because it gives legal professionals broad discretion to charge for tasks with sometimes dubious value. It's distressing because we know that uncompensated billed time is lost forever.

The legal industry's economic model, at least when it comes to BigLaw,[2] handsomely compensates extraordinarily talented, highly intelligent individuals to handle what, at times, are complex tasks. The twist? They handle those complex tasks at the same price that they charge for mundane and routine tasks. The legal industry uses an hourly rate metric as a rough proxy for "value," but that proxy is imprecise: It treats all of a professional's hours, and all tasks performed during each of those hours, as equally valuable. This, of course, is fallacious. Some hours provide enormous value and are well worth a senior attorney's four-digit hourly price tag, but others are actually worth just a fraction of a high-priced partner's hourly rate because the task undertaken or service delivered is inherently less valuable.[3]

Moreover, the legal industry's hourly billing model can compensate a legal professional despite that professional's inefficiency.[4] Clients often use inefficiency as ammunition to avoid paying a bill in full, creating a host of knock-on problems for attorneys.[5] Under a perfectly equitable system, an attorney with legitimate, but unrecoverable, time could travel to the past in a WABAC Machine[6] and rebill that time to some other matter. But WABAC machines don't exist, and nobody else will be paying for that "lost" time.

We hate that type of inefficiency and economic loss, too.[7] Most lawyers work far too hard, and many lawyers make far too many personal sacrifices, to forgo compensation because of bad decisions resulting from the legal industry's typical hourly-rate economic model.[8] Those bad decisions have serious negative implications,[9] demonstrating that professionals' billing judgment—either good or bad—lies at the heart of the economic results achieved by outside counsel.

Section I of this article discusses what we mean by "billing judgment" and why billing judgment is important. Section II addresses how billing judgment plays into the typical bankruptcy case. Section III discusses the interplay between billing judgment and "budgeting judgment." Section IV proposes an approach that can encourage both billing judgment and budgeting judgment. And Section V posits some logical next steps and challenges to overcome.

[1] William G. Ross, The Honest Hour: The Ethics of Time-Based Billing By Attorneys 99 (1996).

[2] Although the definition of BigLaw is fuzzy at the margins, generally speaking, the term refers to firms of 1,000 or more lawyers with a full-service, many-sectored practice. *See, e.g., Law Firm*, Wikipedia, https://en.wikipedia.org/wiki/Law_firm#cite_ref-21 (last visited April 28, 2022).

[3] For example, in the Pacific Gas & Electric bankruptcy case, the average hourly rate for partners at the five firms with the highest billing rates ranged from $1,027 per hour to $1,334 per hour.

[4] Even fellow lawyers recognize this problem. *See, e.g.*, Rachel Barnett, *Down With the Billable Hour*, 3 Md. Bar J. 62, 62 (June 2021) ("Let's face it, the billable hour is archaic. It creates the wrong incentives, drives inefficiencies, and no one likes it, no one."); Jarrod F. Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 Vill. L. Rev. 361, 384 (2020) ("[The billable hour systems rewards unproductivity and inefficiency."); David E. Higgins, *Hourly Rate Billing: An Unnecessary Evil*, W. Va. Law. 26, 27 (July/Sept. 2010) ("In my opinion the two biggest distortions produced by blind adherence to the hourly rate billing system are that it rewards inefficiency and can result in the lawyer being grossly under-compensated for his or her services."); Theda D. Snyder, *Incentive Legal Billing in Litigated Cases*, 31 Beverly Hills Bar Ass'n J. 31, 31 (1997) ("Using the hourly billing system, the inefficient, slow attorney makes more money than the knowledgeable, high-tech attorney who can turn out quality product quickly.")

[5] These knock-on problems include realization challenges, cash flow constraints and collection issues, to name just a few.

[6] Yes, we're showing our age. Learn more in Keith Scott, The Moose That Roared: The Story of Jay Ward, Bill Schott, a Flying Squirrel, and a Talking Moose (2001). And yes, you should go back and watch *The Adventures of Rocky and Bullwinkle and Friends*.

[7] Neither of us takes any joy in labeling certain time entries as unreasonable or only partially compensable.

[8] That bad economic model results in mistakes that include overpaying for lateral talent, raising rates or salaries too much, discounting fees too much, overbilling clients, or committing outright billing fraud.

[9] Just ask some of the former partners in law firms like Brobeck, Pfleger & Harrison LLP or Dewey & LeBoeuf LLP.

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I. WHAT IS BILLING JUDGMENT, AND WHY IS IT IMPORTANT?

We'll start by explaining what we mean by "billing judgment" and how it affects the way that most lawyers do business. Billing judgment is a by-product of the legal industry's economic model. In nearly all seller-buyer relationships, there is little variability in pricing. Typically, sellers set a certain price based on known, predictable factors like demand, cost of goods, and profit margin, and buyers pay that price to receive goods or services. The seller-buyer relationship in the legal industry, however, presents a less predictable character, mostly due to its "rate times hours" pricing model.

Several drivers generate uncertainty in today's law firm pricing model, particularly surrounding its "hours" component. First, disruptive third-party forces have triggered pricing uncertainty. Innovative technologies—like e-discovery, digital signatures, virtual data rooms, computer-assisted initial contract drafting, automated legal research, and data analytics platforms—have changed the time that it takes to analyze an issue or handle a task.[10] Alternative legal service providers ("ALSPs") have entered the market, focusing only on their own compartmentalized aspect of legal services, delivered in a high-volume, process-driven manner. ALSPs have left traditional lawyers scrambling to deliver services of identical quality in the same amount of time.[11] But when computers can do in nanoseconds what humans can only do in days or weeks, lawyers can't deliver the identical quality in that shortened time.[12] Second, even without the faster results of computer-assisted work, pricing uncertainty also stems from the inherently fluid nature of the law. New caselaw or statutes, unanticipated court rulings, indecisive clients, and uncooperative counterparties can transform easy and predictable tasks into one-of-a-kind endeavors. Finally, pricing uncertainty can result from a lawyer's lack of experience in pricing or from an overall lack of competence.

The net result of pricing uncertainty is that charging and getting paid for legal services is not as simple as scanning a bar code on the side of a product

[10]For a quick discussion of the brave new world of artificial intelligence in law services, *see, e.g.*, Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases*, 28 AM. BANKR. INST. L. REV. 39, 88-90 (2020).

[11]The classic law firm "bake off" or "beauty contest," designed to help a client choose its outside counsel, often starts with each firm touting its expertise in an area. We're always surprised, then, when those selfsame law firms have a hard time estimating how much a matter is likely to cost. We're equally surprised when those expert firms spend a lot of billable time reinventing the wheel by researching basic concepts or struggling with cookie-cutter drafts.

[12]Lawyers should not take artificial intelligence-generated work and rely on it indiscriminately. They need to use their expertise to review and revise that work. But for work that computers can do more efficiently than humans can, perhaps "identical quality" is giving humans too much credit. After all, humans get hungry, tired, bored, and distracted, so computers are better at truly repetitive work. And they're far, far faster at turning out such work.

or opening "the book" and pinpointing the cost to replace a broken car part. To the contrary, a lawyer's judgment comes into play both when the lawyer handles legal matters in an efficient manner and when the lawyer charges properly for those services. Indeed, in order to achieve the client's goals, a lawyer must make decisions about what legal work to do and who should handle each task involved in the overall matter. These decisions involve billing judgment. As with any exercise of judgment, lawyers can make either good or not-so-good decisions. Currently, there is no easy formula to assess good billing judgment.

Defining exemplary "billing judgment" is complex. Insofar as law firms and corporate legal departments must evaluate billing judgment, common sense dictates that legal industry constituents should develop a framework for a meaningful, apples-to-apples "billing judgment" analysis. So we thought we'd get the ball rolling. If legal industry constituents don't develop and define the standards, outsiders such as chief financial officers, insurance companies, and financial institutions will. Outsiders also might apply arbitrary standards or develop their own metrics on an ad hoc basis. A universal framework to analyze billing judgment—the value of the services provided, relative to the cost of those services—should not elude the legal industry simply because creating a sensible framework is difficult.

Currently, Model Rule of Professional Conduct 1.5 ("Rule 1.5")[13] offers an approximation of defining billing judgment—albeit obliquely—through the concept of "reasonable fees."[14] But even though the Rule 1.5(a) factors provide useful context, reasonable fees don't necessarily map directly to good billing judgment. In our minds, Rule 1.5 is just a start. Good billing judgment involves much more than delivering a client an affordable bill that meets minimum ethical guidelines and that a client will pay.

The first step towards exercising good billing judgment is defining it. We propose our own formula for identifying good billing judgment. Lawyers demonstrate billing judgment when the legal services for which they bill: (A) advance a meaningful client goal while alleviating the client's burden; (B) are delivered with peak staffing and workflow efficiency; and (C) describe the work done in a clear invoice delivered in a timely manner.

A. Advancing a meaningful client goal while alleviating the client's burden.

Client strategies, tactics, and goals vary from matter to matter based not just on the law but also on non-legal, business exigencies.[15] Most lawyers

[13]Model Rules of Pro. Conduct r. 1.5 (Am. Bar Ass'n 2020).

[14]Model Rules of Pro. Conduct r. 1.5(a)(1-8) (Am. Bar Ass'n 2020); *see id.* at r. 1.5(a) (using an eight-factor test to describe the parameters of reasonableness).

[15]There's even an ethics rule for that. *See* Model Rules of Pro. Conduct r. 1.2 (Am. Bar Ass'n

recognize that their clients hire them to provide specialized expertise. The savviest lawyers embrace client goals that transcend a mere legal win-loss formula.[16] Lawyers must bring to bear not just legal strategies and tactics but billing judgment when advancing a client's goals. That billing judgment requires them to consider a mix of legal, economic, operational, reputational, political, and precedential factors.[17] When lawyers exercise excellent billing judgment, the cost of legal services should correlate to both legal and non-legal goals. Clients can then evaluate the legal work not just on legal mastery but on overall problem-solving.

After all, clients hire lawyers to do something that the clients can't do, or don't want to do, themselves. Clients who can pay for legal services will do so when the services' benefit outweighs their burden and cost. Most clients who can afford to pay for legal services understand that it costs money to solve problems, but clients don't want to overpay for bad billing judgment. Clients often say that the best lawyers know and understand the client's business. We add that the lawyers who understand their clients' businesses are most likely to have the foundational underpinnings of good billing judgment. A lawyer familiar with a client's business can practice preventative law, reducing the client's burden to troubleshoot risks. Moreover, when legal issues do materialize, the lawyer who already understands a client's business delivers value by finding sensible ways to deal with those issues.[18]

B. Deliver legal services with peak staffing and workflow efficiency.

Inefficient work will disappoint a sophisticated client even if the work results in a good outcome. Peak staffing efficiency and workflow efficiency are hallmarks of exemplary billing judgment, and good staffing and workflow will increase client satisfaction. Optimal staffing efficiency happens when the right level of legal professional handles a task appropriate for the profes-

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2020) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

[16]Consider a securities fraud action by renegade limited partners against a well-established private equity fund. The private equity fund may decide to litigate the case until the case ends in a final, non-appealable decision, even if the likely result of the litigation will be a loss. If the private equity fund's management mainly intends to send a message to existing and future limited partnership investors that it does not capitulate to renegade limited partners, then the actual result isn't the point: the cost of the fight serves as a deterrent.

[17]Of course, those goals can't include frivolous claims and objections, *see* Model Rules of Pro. Conduct r. 3.1, unlawful obstruction or false evidence, *see* Model Rules of Pro. Conduct r. 3.4, or abusive treatment, *see* Model Rules of Pro. Conduct r. 4.4.

[18]The best lawyers invest in the client relationship at multiple levels and seek performance feedback, including feedback on billing judgment. Lawyers who don't act as problem-solvers or seek client feedback may never know when and why a client gave up on them.

sional's skill level, with those tasks taking the right amount of time.[19] Failing to supervise a third-year associate properly on the assumption that she functions like a ninth-year associate, or assigning an eighth-year associate routine document review that is more suitable for a second-year associate both indicate questionable staffing efficiency. A lead partner could use benchmarked legal spend data to determine how to staff a matter cost-effectively and eliminate waste. Using such process management will create excellent workflow efficiency. And a law firm's commitment to deliver legal services with optimal workflow efficiency becomes a selling point for the firm when it makes pitches to clients, because that self-governance is fundamental to good billing judgment.

C. Providing clear invoices.

An invoice for legal services billed on an hourly basis should reflect accurately recorded time with clear descriptions of the work performed. This is the minimum threshold to establish fees' reasonableness under Rule 1.5, but good billing judgment does more: It tells the client the story about those services' value.[20]

Ideally, professionals should evaluate what tasks to do, who should handle the tasks, and how long legal professionals should spend on the tasks. In turn, those legal professionals should craft their time entries so that the client understands what the professionals did. Time entries should tell a clear story about a how a matter was staffed and how it progressed.[21] This is a core component of excellent billing judgment for practitioners in all specialties, but

[19]Industry benchmarks showing who should be doing what tasks and how long those tasks can take help to measure efficiency. There may be a good reason to diverge from a benchmark, but a benchmark enables a lawyer to consider just what *was* more complicated about a particular task. Sophisticated clients will notice when Firm A takes ten hours to draft a motion and Firm B takes 50 hours to draft the same type of motion.

[20]*See, e.g.*, Nancy B. Rapoport, *Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals*, 15 Brook. J. Corp. Fin. & Com. L. 359 (2021) (explaining how fee entries tell stories not only about the case, but also about the lawyers themselves).

[21]The old reporter trick of remembering the five Ws and one H (who, what, when, where, why, and how), *see, e.g.*, Richard Nordquist, *The Five Ws (and an H) of Journalism*, ThoughtCo (Jan. 3, 2020) https://www.thoughtco.com/journalists-questions-5-ws-and-h-1691205 (last visited May 14, 2022), provides a useful framework to think about how to explain the "story" in a time entry. The "who" relates to the particular level of professional and to that particular professional's expertise performing the task. In turn, the choice of professional ties to the "what" of the task itself (which encompasses the "when" of how long the task took, the "why" behind undertaking the task, and the "how" of what the professional did). So, if Partner A, whose expertise lies in airplane securitization, reviews lien perfection documents for twenty minutes to determine whether the lender actually has a first priority security interest in a Boeing 747 and then drafts a memorandum to the lead partner in the case for another twenty minutes explaining her conclusions, that time entry will tell the client the entire story except for the "where." And the "where" typically matters only when the lawyer is out of her office, perhaps at court or at a client meeting. Contrast that level of description with a time entry that just says "respond to emails," and you can see the difference in the storytelling.

it is exceptionally valuable in the bankruptcy context, where there's no single "client" watching the burn rate of the fees.

II. BILLING JUDGMENT IN THE BANKRUPTCY CONTEXT

In developing our formula for measuring billing judgment, we considered bankruptcy law's sea change affecting professional fees: The explicit amendment in the Bankruptcy Code in 1979 changing the fee assessment standard from the "preservation of the estate"[22] to a more market-driven approach.[23] Our friend George Kuney has observed, in relation to this change in congressional priorities: "That social engineering is what started the evolution toward the current situation. . . . It was the spark that lit the fuse."[24] He's right. Time has shown that one consequence of a market-driven approach is that professional fees can soar in the absence of good billing judgment. Again, in the bankruptcy context, the root cause of the lack of billing judgment is that estate-paid professionals[25] typically take their marching orders from peo-

[22]The change also comported with the goal of keeping fees down, out of a fear of rewarding the dreaded "bankruptcy ring." *See, e.g.*, Office of the U.S. Trustee v. McQuaide (*In re* CNH, Inc.), 304 B.R. 177, 180 (Bankr. M.D. Pa. 2004) ("Among such practices was the cronyism of the 'bankruptcy ring' and attorney control of bankruptcy cases. In fact, the House Report noted that '[i]n practice . . . the bankruptcy system operates more for the benefit of attorneys than for the benefit of creditors.'") (citing H.R. No. 595, 95th Cong., 2d Sess. 92 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6053).

[23]Steve H. Nickles & Edward S. Adams, *Tracing Proceeds to Attorneys' Pockets (and the Dilemma of Paying for Bankruptcy)*, 78 MINN. L. REV. 1079, 1088-90 (1994) ("[The Bankruptcy Code]. . .overturned the public interest consideration rule that had sharply curtailed attorney compensation [and] adjusted the amount an attorney could earn for performing bankruptcy services to the amount an attorney would earn for performing comparable nonbankruptcy services, by requiring attorneys' fee awards to be based on 'the cost of comparable services' in fields other than bankruptcy.") (footnotes omitted).

[24]Email from George W. Kuney, Lindsay Young Distinguished Professor of L., Univ. of Tenn., Knoxville, College of L., to Nancy B. Rapoport (July 1, 2021, 06:33 PDT) (on file with authors).

[25]We (collectively and individually) have written about this problem before. *See, e.g.*, Nancy B. Rapoport, *Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals*, 15 BROOK. J. OF CORP. FIN. & COM. L. 359 (2021); Nancy B. Rapoport, *Want to Take Control of Professional Fees in Large Chapter 11 Bankruptcy Cases? Talking With Your Client's General Counsel is a Good First Step*, HARV. L. SCH. BANKRUPTCY ROUNDTABLE, July 28, 2020, available at http://blogs.harvard.edu/bankruptcyroundtable/2020/07/28/want-to-take-control-of-professional-fees-in-large-chapter-11-bankruptcy-cases-talking-with-your-clients-general-counsel-is-a-good-first-step/; Nancy B. Rapoport, *Using General Counsel to Set the Tone for Work in Large Chapter 11 Cases*, 88 FORDHAM L. REV. 1727 (2020); Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases*, 28 AM. BANKR. INST. L. REV. 39 (2020); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Leveraging Legal Analytics and Spend Data as a Law Firm Self-Governance Tool*, XIII J. BUS., ENTREPRENEURSHIP & L. 171 (2019); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, 35 GA. ST. U. L. REV. 1269 (2019); Randy D. Gordon & Nancy B. Rapoport, *Virtuous Billing*, 15 NEV. L.J. 698 (2015); Nancy B. Rapoport, *"Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 ST. MARY'S J. L. ETHICS & MALP. 42 (2014); Lois R. Lupica & Nancy B. Rapoport, *Best Practices for Working with Fee Examiners*, 32 AM. BANKR. INST. J. 20 (June 2013); Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. L. & TECH. LAW 117 (2012); Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. LAW 263 (2010); Legal

ple who aren't paying the bills from their own budgets.

A. The disconnect between the work done and who pays for that work.

Given our audience's knowledge about how professionals get appointed and paid, we'll just do a primer on professional's path to payment. 11 U.S.C. § 327 allows a trustee[26] to employ professionals with court approval.[27] Retained professionals must meet certain tests—non-adversity and disinterestedness[28]—before a court may authorize their employment. The bankruptcy court must find the professionals' fees and expenses reasonable and necessary[29] before it will approve them, and before those administrative priority fees[30] get paid.[31] A court may authorize the interim payment of fees and expenses.[32] In larger cases, many courts allow payment more often than the

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Decoder, Inc., *Pricing Legal Services Accurately with Data Analytics Technology*, High Performance Counsel, www.highperformancecounsel.com/whitepaper_legaldecoder_pricing-legal-svcs/ (last visited May 15, 2022).

[26]Or in chapter 11, a debtor-in-possession. *See* 11 U.S.C. § 1107.

[27]The Bankruptcy Code also authorizes creditors' committees to hire professionals. *See* 11 U.S.C. § 1103.

[28]*See* 11 U.S.C. § 327(a) ("Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more . . . professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties . . ."); 11 U.S.C. § 327(e) (stating standard for special counsel appointment); *see also* 11 U.S.C. § 101(14) (setting out test for disinterestedness); Fed. R. Bankr. P. 2014 (requiring disclosure of "connections"); *cf.* 11 U.S.C. § 328 (authorizing "any reasonable terms and conditions of employment"). Some of those section 328 terms and conditions can be aggressive, especially when viewed in the context of the much more restrictive standard of review in that section. In essence, section 328 operates as a "get out of review" card. *See, e.g., In re* Mirant Corp., 365 B.R. 113, 127-28 (Bankr. N.D. Tex. 2006) ("[In terms of the section 328 approval,] [o]nly by implication is there any intent to tie a successful result in the case to the financial advisor's work, and in the case at bar, in which liquidation in chapter 7 was not a realistic possibility, some sort of "success" was inevitable. As counsel for [the financial advisor] advised the court during the Hearing, even had his client done no work whatsoever to earn its fees, it would be entitled to the success fee for which it negotiated."); *cf. In re* Energy Partners, Ltd., 409 B.R. 211, 223 (Bankr. S.D. Texas 2009) ("These two investment banking firms have made it clear that they will only agree to be employed in this case for huge, guaranteed fees under § 328(a) even though, at the time the Applications were filed, the Procedure for Professionals Order and the Cash Collateral Order, which contains the Budget, were already in place governing the retention, compensation levels, and actual payment of compensation of professionals in this case."). In contrast to section 327's standards, section 328(a) provides that "notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, *if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.*" 11 U.S.C. § 328(a) (emphasis added).

[29]11 U.S.C. § 330(a); *see also* Fed. R. Bankr. P. 2016 (setting forth what the professional seeking payment must establish).

[30]*See* 11 U.S.C. § 507(a)(2); *see also* 11 U.S.C. § 503(b)(2) (allowing, as an administrative expense "compensation and reimbursement awarded under section 330(a) of this title").

[31]*See* 11 U.S.C. § 330.

[32]*See* 11 U.S.C. § 331.

statutory 120-day interim application period,[33] often in conjunction with monthly fee statements and conditioned on a 20 percent[34] holdback on fees—but no holdback on expenses—until after notice, a hearing, and an order approving interim or final fee applications.[35]

The glitch in the system—and it is a big glitch—is that fees and expenses almost always get paid either from funds that would otherwise be distributed to general unsecured creditors or from a carve-out from a secured creditor's collateral.[36] Other than the bankruptcy court,[37] there's no one person wearing the proverbial green eyeshade[38] to scrutinize the line-item entries showing who did what (and why) and how long something normally should have taken. Even though legal spend data analytics software can facilitate a bankruptcy court's professional fee analysis,[39] bankruptcy courts still often point to a lack of resources to scrutinize large fee applications in detail.[40] Courts don't usually have the software, and a human-run line-by-line review of time

[33]*See generally* United States Trustee v. Knudsen Corp. (*In re* Knudsen Corp.), 84 B.R. 668, 671-73 (B.A.P. 9th Cir. 1988) (discussing the ability of a bankruptcy court to allow periodic payments of retainers accompanied by appropriate safeguards).

[34]That holdback percentage varies, but the most common one that we've both seen is 20%.

[35]Such a non-statutory approach certainly helps with the professionals' cash flow, though none of those interim fees would actually be safe from clawback until a bankruptcy court enters the final fee orders.

[36]Once in a blue moon, unsecured creditors receive payment in full or even payment in full with interest, obviating this problem. Those situations make excellent newspaper articles, but they don't allow us to write interesting articles about professional fees.

[37]Plus the United States Trustee and, when appointed, a fee examiner.

[38]*See, e.g.*, QUORA, https://www.quora.com/Why-do-accountants-stereotypically-wear-green-eyeshades (last visited May 16, 2022).

[39]*See* Section III *infra*. Legal Decoder's software automates the invoice review process. That software can process hundreds of millions of line-item fee data in minutes and can compare the data against industry-wide benchmarks. We're sure that there are other providers that can crunch numbers quickly as well. Because modern technology can analyze enormous volumes of data on a line-item-by-line-item basis in a timekeeper-specific, task-specific, and industry-benchmarked way, detailed automated analysis should set the baseline standard for section 330 review; a more cursory assessment that focuses only on the bottom-line number and applies just a gut feeling of reasonableness falls short of the section 330 mark in today's data-enabled world.

[40]In general, bankruptcy judges may retain two chambers positions, and those positions can include a law clerk, a paralegal, or a judicial assistant position, at the judge's discretion. *See generally* 28 U.S.C. § 156(a) (authorizing each bankruptcy judge to appoint "a secretary, a law clerk, and [ ] additional assistants . . ." in pre-computer-era legislation). Some bankruptcy judges receive authorization for an additional temporary law clerk if their caseload warrants it, and some bankruptcy appellate panel judges may have an extra law clerk position during their panel term. But most chambers simply won't have the staffing to go through each fee application with a fine-toothed comb.

Moreover, is it really fair to ask a bankruptcy judge to wade deeply into the issue of market forces on billing rates? Judges certainly can review "billing hygiene," *see infra* at note 57, and they can look at general reasonableness, weighing the value of work billed against the cost associated with that work, but they can't do that work in a vacuum. Unless parties in interest weigh in about whether the work that a professional chose to do was reasonable when incurred (section 330's standard), judges only see the part of the work that reaches their docket. They're not seeing the emails, the phone calls, the negotiations, and other out-of-court work in context, other than as that work is reflected in time entries. At the extremes, of

entries takes a lot of people-hours. Moreover, the understaffed Office of the United States Trustee can't devote the thousands of hours of fee review time that fee examiners and their teams can perform. The Office of the United States Trustee might weigh in with objections on principle to certain fee applications, even when other parties in interest stand silent, but that depends on which of that office's multiple priorities is paramount. To be sure, miffed parties in interest do object to certain professionals' fee applications, but only rarely and only in the more contentious cases.[41] Often, no one is metaphorically pushing the bill back across the table[42] to the estate-paid pro-

course, a judge can determine whether a professional behaved vexatiously, *see* 28 U.S.C. § 1927, but judges need to hear from parties in interest to get the entire picture.

[41]We haven't found too many parties in interest who *aren't* miffed filing objections to fee applications, although it's fair to say that the United States Trustee and a fee examiner are objecting for reasons other than being miffed. Most parties in interest don't want to spend their own fees to object unless they're really, really upset about the fee application. Another factor also affects objections to fee applications: fear of retaliation.

> Objections to fee applications will likely trigger counter-objections, and all of those objections are time-consuming and expensive. If professionals lay low except in the most egregious of cases—or when they're really ticked off by an opponent—then they're probably safe in assuming that their fees won't be attacked, either. Unfortunately, that behavior removes another check and balance from the system.

Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. L. & TECH. LAW 117, 150 (2012) (footnotes omitted).

> Imagine all of the forces working against objecting to fees: "if I object to yours, you're likely to object to mine"; "if I object to yours in this case, you'll use that objection against me in another case when I bill the way that you did in this case"; "if you agree to this settlement, let's also agree that we won't object to each other's fees in this case"; "if you object to my fees, that's the end of us working well together in other cases." Those same forces work against fee examiners, too, who are aware that the more aggressive they are, the less likely that professionals will support their appointment in future cases.

See id. at 150, note 180. Of course, fee examiners who have day jobs at law schools are less likely to be concerned about these risks—especially fee examiners who are tenured professors.

[42]As one of us has explained,

> The bankruptcy court has oversight of the payment of professional fees, but the review of those fees can be incredibly time-consuming and is highly detail-driven. Those professionals who submit their bills for court review represent real clients, but those real clients aren't writing the ultimate checks. In most non-bankruptcy settings, there's a metaphorical moment when the professional pushes a bill across the table to the client and waits for the client to react. If the client questions a bill, the professional may well end up lowering it.
>
> When it comes to estate-paid Chapter 11 fees, the professionals are pushing their bills across the table, but on the other side of the table, the client charged with evaluating the reasonableness of the bill may have no meaningful way to put the bill into context. Moreover, because no single client is charged with footing the professionals' entire bill, it's possible that none of the clients really cares how much these professionals are charging. In essence, the client sitting at the table is a stand-in for entities with little voice (and little individual stake) in determining how the

fessionals to object to what might be considered overbilling. Even though it stands to reason that the secured creditor whose collateral is paying those fees *should* care, that carve-out is treated more as a sunk cost and a cap that has been built into the financial model, so even a secured creditor whose collateral is paying the tab might not be overly concerned with how those fees and expenses are mounting up. And mount up, they do.

B. The idiosyncratic way that fees increase in complex bankruptcy cases.

Another reason why fees in large cases mount up quickly involves a solution to a different problem—the problem of disinterestedness[43] and the solution of conflicts counsel. Consider the problems created by overlapping professionals:

> It's possible to have main counsel for the debtor as well as local counsel; main counsel for the creditors' committee and local counsel; main conflicts counsel and local conflicts counsel; and so on. Because the local counsel must ensure that what gets filed is accurate, local counsel is going to have to read everything that the main counsel wants to file. The need to ensure accuracy will increase fees. Moreover, local counsel, by definition, is the on-the-ground counsel to which the debtor or creditors' committee might first turn. Unless the orders appointing both the main counsel and local counsel clarify who should be doing what, overlap (and therefore duplicative fees) will necessarily occur.[44]

Estate-paid professionals need to be disinterested,[45] and in complex cases, many professionals have potentially problematic connections. If most BigLaw firms are so big that they need conflicts counsel to obtain court approval to represent a debtor-in-possession or a creditors' committee,[46] and if both a

> professional makes his billable decisions. And sitting at another table, far away, is the bankruptcy court.

Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. Bus. & Tech. Law 263, 265 (2010) (footnotes omitted). In his comments to an earlier draft of this article, our friend Randy Gordon, the managing partner of Duane Morris's Dallas office, observed that common-fund class-action work also has this dynamic: the people for whom the work is being done are not paying the bills out of their own pockets. *See* email from Randy Gordon to Nancy Rapoport, Dec. 5, 2021 (on file with authors).

[43]*See* 11 U.S.C. §§ 327 and 101(14) (discussing the disinterestedness requirement).

[44]Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. Bus. & Tech. Law 117, 151 (2012) (footnotes omitted).

[45]*See supra* note 43.

[46]Or additional committees. *See* 11 U.S.C. § 1102(a)(2) ("On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. . ..").

debtor-in-possession and a creditors' committee decide to hire BigLaw firms, then it's easy to end up with numerous professionals[47] being paid from estate funds.[48] Add to that the requirements in certain jurisdictions that local counsel be hired, and you will have a scrum of lawyers from the get-go—one that will create an inevitable risk of unnecessary duplication of effort.[49] Other than in bankruptcy and a few other areas of law,[50] parties don't run the risk of alliances shifting and re-shifting as issues arise in a case.[51]

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[47]BigLaw has big rosters and, from what we've seen, those big rosters get *used*.

[48]Bankruptcy courts regularly appoint conflicts counsel in large cases because bankruptcy work is dynamically different from the norm of "plaintiff versus defendant," where the parties know at the onset of the representation who's likely to be adverse to whom. In most non-bankruptcy contexts, the parties know that, if they're adverse at the onset, they're going to stay adverse throughout the case.

[49]Some duplication of effort can be healthy—for example, the necessary coordination between "main counsel" and "conflicts counsel" in a case. *See, e.g.*, LOIS R. LUPICA & NANCY B. RAPOPORT, CO-REPORTERS, FINAL REPORT OF THE ABI NATIONAL ETHICS TASK FORCE 41 (2013) ("[T]he best design for conflicts counsel involves separate spheres of issues, with only minimal overlap for coordination and communication purposes."). As bankruptcy judges know, it is exponentially more difficult to look for duplication of effort manually across multiple law firms that are representing a debtor-in-possession or creditors' committee than it is to find duplication of effort within a given law firm. Technology can solve that problem, though.

[50]Family law, for example. *See, e.g.*, Nancy B. Rapoport, *Our House, Our Rules: The Need For a Uniform Bankruptcy Code of Ethics*, 6 AM. BANKR. INST. L. REV. 45, 61 (1998) (recognizing that family law also has shifting alliances).

[51]One of us has said repeatedly that her career will be complete when a court cites her very first article for her theory that created the underpinning for conflicts counsel in bankruptcy cases. Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913 (1994). In that article, she distinguished larger, more permanent types of conflicts from "dormant, temporary, actual conflicts":

> The ratchet theory may describe some potential conflicts, but it does not describe all of them. I believe that, in bankruptcy cases, a third type of conflict of interest is possible: the dormant, temporary, actual conflict (DTAC). DTACs are more like toggle-switches than like ratchets. DTACs are dormant because the potential for conflict lies in wait unless and until the right combination of strategy decisions (by several parties) comes into play. They are temporary because they are issue-specific: once the underlying issue (e.g., a cash collateral stipulation, voting on a proposed plan of reorganization) has been resolved, the conflict is resolved as well. They are actual because, as long as the particular triggering issue is active, two or more parties are at odds with each other.

Id. at 924 (footnotes omitted). She is only partially kidding when she begs for a court to cite this article. She would also be happy if someone cited the work that she and Professor Lois Lupica did as Reporters for the American Bankruptcy Institute's National Ethics Task Force, particularly the section on conflicts counsel. *See* LOIS R. LUPICA & NANCY B. RAPOPORT, CO-REPORTERS, FINAL REPORT OF THE ABI NATIONAL ETHICS TASK FORCE 37-47 (2013) https://www.abi.org/education-events/sessions/final-report-of-the-abi-national-ethics-task-force (last visited May 15, 2022). The quest for attribution continues.

Of course, a court shouldn't approve the employment of conflicts counsel as a "fix" for conflicts when one of the main issues is a pervasive and permanent conflict. *See, e.g., In re* WM Distrib., Inc., 571 B.R. 866 (Bankr. D.N.M. 2016) (explaining when a conflict is so pervasive that main counsel cannot cure the conflict with the use of conflicts counsel). In that case, the court expounded:

> The concept is that if conflict matters—matters in which general bankruptcy counsel's simultaneous representation of more than one debtor would pose a dis-

But there's another reason that fees can spiral out of control, and surprise: It's not greed.[52] It's a behavioral issue largely resulting from most lawyers' ultra-competitive nature and from their law school training to imagine all

> qualifying conflict of interest—are carved out of the scope of general bankruptcy counsel's representation of the debtors, and are assigned to separate independent counsel, no actual conflict of interest can arise on the part of general bankruptcy counsel. The conflict matters are outside the scope of its representation. However, such use of conflicts counsel is not appropriate where the adverse interests of the debtors represented by the same general bankruptcy counsel are central to the reorganization efforts of either debtor or to other resolutions of the chapter 11 case or where the adverse interests are so extensive that each debtor should have its own independent general bankruptcy counsel.

Id. at 873.

All these professionals—"main" counsel, conflicts counsel, special section 327(e) counsel, local counsel in jurisdictions that require their use, investment banks, and financial advisors—create a staggering number of professionals working on a case, especially when each party in interest wants its own set of professionals. Moreover, just as Isaac Newton theorized, in his Third Law of Motion, that "[f]or every action, there is an equal and opposite reaction." *See Science in Action: Newton's Third Law of Motion*, SPACE CENTER HOUSTON (Feb. 22, 2022), https://spacecenter.org/science-in-motion-newtons-third-law-of-motion/ (last visited May 16, 2022). It is equally true that, for every litigated issue in a large bankruptcy case, other parties in interest will weigh in with a "we agree with that other argument" filing. And they will bill for it. Said less flippantly,

> Various non-quantifiable factors will enter into a professional's decisions about which tasks to undertake, who should do those tasks, and how long those tasks should take. Those factors can include the fear of leaving an important stone unturned, deep-seated and longstanding conflicts between professionals, snap decisions that lead to misallocating workflow, and the relative contentiousness of the entire case. Some of those factors may be working on a subconscious level. Others may be the results of deliberate thought. But all of the professionals' choices for their own particular constituents can create chain reactions for the professionals working with other constituencies. Therefore, gathering all of the facts that contribute to the fees in a case is probably impossible, even for the judge or for the mythical professional who manages to be at every single hearing and in every single negotiation.

Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases*, 28 AM. BANKR. INST. L. REV. 39, 53-54 (2020) (footnotes omitted).

[52]Most of the time, greed really *isn't* the reason, but sometimes we can't rule it out. For just a smattering of billing fraud allegations, *see, e.g.*, Debra Cassens Weiss, *Former BigLaw associate is accused of recording more than 2,000 hours on closed pro bono case*, ABA J. (June 24, 2001. 10:01 AM), https://www.abajournal.com/news/article/former-biglaw-associate-is-accused-of-recording-more-than-2000-hours-on-closed-pro-bono-case; Debra Cassens Weiss, *Lawyer accused of billing more than 24 hours per day is found in Nicaragua*, ABA J. (Jan. 27, 2020, 12:16 PM), https://www.abajournal.com/news/article/lawyer-accused-of-billing-more-than-24-hours-a-day-is-found-in-nicaragua; Martha Neil, *Disbarred After $1.48M Alleged BigLaw Billing Fraud, Ex-Attorney Faces Uphill Reinstatement Battle*, ABA J. (Oct. 21, 2011, 10:31 PM), https://www.abajournal.com/news/article/disbarred_after_1.48m_alleged_biglaw_billing_fraud_ex-attorney_faces_uphill; *cf. Ex-Qwest chief Nacchio says lawyers billed him for underwear*, DENVER POST (Mar. 23, 2011, 4:57 AM), https://www.denverpost.com/2011/03/23/ex-qwest-chief-nacchio-says-lawyers-billed-him-for-underwear/ ("The firm billed Nacchio more than $25 million to defend criminal and civil matters, charging tens of thousands of dollars for staff breakfasts, attorney underwear and in-room movies during the trial in federal court in Denver, according to the complaint in state Superior Court in Newark, N.J.").

eventualities so as not to miss an issue, especially when representing clients who are often fiduciaries themselves.

> Let's think about the things that drive lawyers to perform certain tasks. First, most lawyers want to do a good job for their clients. They want to perform well, not just because they care about serving their clients but also because good, creative work is a source of professional pride. The most successful lawyers typically aced their grades in undergraduate programs and law school. They're used to being at the top of the pecking order, and they have taken that passion for success with them to the office. Second, competition for big, steady clients is intense, and the law firms that get the best results consistently—and that provide the fastest, most attentive service—can win and keep those high-paying clients. Third, choosing to leave a stone unturned may set a trap for the client later on: the unexamined paragraph and the unreviewed discovery can come back to bite the client (and, thus, the law firm). It's better to do a thorough job than risk that sad call to the malpractice carrier. Fourth, when a lawyer's own compensation is based on both the hours that he or she bills and the money that the firm collects, there's a natural disincentive to monitor every single task's efficiency. And, finally, the ethics rules require lawyers to be competent and diligent. All of these factors push outside counsel to work harder and do more to serve clients who routinely defer to outside counsel when it comes to implementing matter strategy, management, and staffing.
>
> What happens when these factors—all of which are good things—combine? Expensive bills are the result.[53]

Other factors also come into play.[54] Given the speed of many complicated

[53]Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, 35 GA. ST. U. L. REV. 1269, 1275-76 (2019) (footnotes omitted); *see also* Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. L. 263, 268-69 (2010) (discussing the dynamics that might cause a professional to overwork a matter and explaining that "the fiduciaries might be practicing the equivalent of 'defensive medicine' in an effort to fulfill their fiduciary duties.").

[54]For example, one of us would love to study whether the billing behavior of law firms with lockstep compensation differs from the behavior of "eat what you kill" law firms. A risk inherent in law firm bureaucracy is how the firm deals with what it later considers to be inefficiently billed time. Does it "eat" the time, or does it include that time in the bill? Law firms tell associates to "bill all of your time, and we'll write down what we think is inefficient." Firms want to be able to monitor how much time their associates are working, even if some of that work ends up being inefficient. But we are guessing, and it's an educated guess, that law firms are also tempted to be overinclusive in their fee applications. That way,

cases, lawyers are making staffing decisions on the fly by finding out who's available, and who can get things done quickly.[55] Using the old adage that clients can have any two of the three attributes of "fast, good, and cheap,"[56] when the "client" isn't paying for the work out of its own budget, guess what the choice tends to be?

Insofar as the fees in large bankruptcy cases can reach staggering levels, we're mystified by examples of questionable "billing judgment" shown in some fee applications.[57] Lawyers who are supposed to be keeping track of their time in tenths of an hour will sometimes work straight through a workday, "guesstimate" how long they worked, and enter their time with either an X.0 or an X.5. Too many X.0 or X.5 time entries raise legitimate concerns about whether the timekeeper has accurately recorded the actual time. Excessive all-hands weekly meetings and conference calls with many legal professionals signal subpar matter management.[58] And we've all seen time entries that are impossible to evaluate for reasonableness because the narrative

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when they voluntarily reduce their time (or reduce their time as part of a negotiation on a fee objection) in order to show a court that they have already "taken a hit" on their fees.

In a perfect world, firms might also "no charge" some of their bills to clients to improve client relations:

> *Not every client interaction is a billing opportunity.* Log all your lawyer time (as always). But take the opportunity to put "no charge" by around 5 percent of your time entries. If your bill shows up with multiple "no charge" entries, that courtesy will show the client that you think about him as a person (not just as a walking dollar sign). This simple step will go a long way to avoiding discussions regarding adjusting your bill.

J. Scott Bovitz, *Being a Great Lawyer (as a Partner)*, in NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, LAW FIRM JOB SURVIVAL MANUAL: FROM FIRST INTERVIEW TO PARTNERSHIP 176-77 (Wolters Kluwer 2014).

[55]Our friend Dwayne Hermes has pointed out that staffing decisions are frequently affected by "talent shortages and high turnover[, which] make it difficult to staff every matter 'perfectly.'" Email from Dwayne Hermes, Founder, Hermes Law, to Nancy B. Rapoport. Dec. 5, 2021 (on file with authors).

[56] Given the speed of law practice today, where law firms strive to provide the fastest, most thorough service, clients have to choose among "fast, good, and cheap," and the rule that clients can only get two of those three variables at any given time still applies. Let's assume that clients always want "good." Let's also assume that law firms are afraid to provide less-than-good work for fear of being accused of malpractice. That leaves a choice between the two remaining variables—fast and cheap.

Nancy B. Rapoport & Joseph R. Tiano, Jr., *Leveraging Legal Analytics and Spend Data as a Law Firm Self-Governance Tool*, XIII J. BUS., ENTREPRENEURSHIP & L. 171, 175-76 (2019) (footnotes omitted).

[57]We first used the moniker "billing hygiene" in an article in 2019, *see* Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, 35 GEORGIA ST. U. L. REV. 1269 (2019), and one of us credits her co-author as the term's inventor. That article defined "billing hygiene" as "recording clear, concise, informative narrative entries linked to the time to complete an individual task." *Id.* at 1293.

[58]Instead of thinking first about who should attend which meetings, the partner calling the meetings is cutting corners by telling all professionals who are working on the case to attend, just in case an attendee's particular issue arises that week.

description is block-billed or uses the meaningless phrases "work on" or "attention to" as substitutes for actual descriptions.[59] Partners performing basic legal research and junior associates drafting complicated deal memos raise questions about cost-effectiveness. Based on our own experiences with "too many cooks" working on documents, when we review fees, we track how many professionals are revising documents, and we ask about the unique contribution of each professional to the resulting finished product. We also flag vague entries, like "consider strategy," given 11 U.S.C. § 330's reasonableness requirement.[60] In the long run, bad choices in a case—bad choices about what work has meaningful value, which and how many legal professionals should undertake a task, how long that work should take, and how to describe that work—will all lead to the same sad result: a likely reduction in fees.

C. Some Actual Data on the Magnitude of Fees (and the Magnitude of Disallowance of Fees).

Our interest in sound billing judgment extends beyond the theoretical. We've investigated the practical economic implications of bad billing judgment using Legal Decoder's legal spend analytics software and its data pool.[61] Of course, there are other companies out there that can provide good data analytics, and we don't intend for this article to be an infomercial. But we're

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[59]*See, e.g.*, Nancy B. Rapoport, *Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals*, 15 Brook. J. Corp. Fin. & Com. L. 359, 365-66 (2021) ("[W]hen fee applications contain vague entries like "attention to file," or have numerous block-billing entries, or list entries that virtually always end in .0 or .5, Joe Tiano and I call that 'bad billing hygiene.'") (footnote omitted); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Using Data Analytics to Predict an Individual Lawyer's Legal Malpractice Risk Profile (Becoming an LPL "Precog")*, 6 U. Pa. J. L. & Pub. Aff. 267, 295-96 (2020) ("Other line-item narrative descriptions may contain considerably less detail (e.g., 'attention to file'), to the point that it is impossible to determine what task the attorney performed."); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, 35 Ga. St. U. L. Rev. 1269, 1293 note 68 (2019) ("As one of us has said before (and as we both have thought, repeatedly), 'attention to file' has never told a single client what the biller actually did.") (citation omitted); Nancy B. Rapoport, *"Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 St. Mary's J. Legal Mal. & Ethics 42, 77 (2014) (" [I]f we want to encourage billers to describe certain activities in detail, then we might want to make it easier to enter detailed descriptions than to enter vague descriptions like 'attention to matter.'") (footnote omitted).

[60]Moreover, in addition to satisfying section 330, each lawyer has his or her own bar card, and every state requires attorney fees to be reasonable. *See, e.g.*, Model Rules of Pro. Conduct 1.5(a). The more vague a description, the less likely it is that someone—the client, a court—reading that description can determine reasonableness. There is an apocryphal story about a senior attorney who billed his clients with a one-word description: "Think." Chances are that an hour of that senior attorney's "thinking" time involved valuable work and a client might pay for that time, even with that vague description. But bankruptcy courts want more information before considering such a time entry to be reasonable when performed.

[61]Fee examiners have used Legal Decoder's software in several high-profile bankruptcy cases, such as *PG&E, Toys "R" Us, Purdue Pharma, Libbey Glass, MTE Holdings*, and *Zetta Jet*.

most familiar with Legal Decoder, so its software will serve as our reference point.

Legal spend data analytics software can analyze professionals' fee data on a line-item-by-line-item basis and highlight problematic billing behaviors and inefficiencies that indicate poor billing judgment.[62] Legal Decoder's system flags and categorizes individual line-item data to show potentially problematic staffing efficiency, workflow efficiency, and billing hygiene.

Let's define those three concepts. Staffing efficiency flags will test whether a legal professional has handled a task appropriate for his or her skill level and whether the professional performed the task within an industry-benchmarked amount of time. Workflow efficiency flags will identify waste, redundancy, and process flaws in task assignments. Billing hygiene flags can ensure that time and billing entries and descriptions are clear and concise and reflect the professional's recorded time promptly and accurately. In the aggregate, flagged line items can tell a meaningful story about billing judgment and its correlated economic effect.[63]

We have studied billions of dollars of bankruptcy professional fee data in Legal Decoder's system to estimate the industry-wide economic effects of good or bad billing judgment. On a macro level, the six most frequent flags, which account for more than half of the total flags, are the Delinquent Time (DT)[64] flag, the Churning File (CF)[65] flag, the Excessive Time (ET)[66] flag,

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[62]Legal Decoder's Compliance Decoder engine is programmed with the 2013 Bankruptcy UST Guidelines (the "UST Guidelines") for fee reasonability in order to flag every line-item charge for legal fees that exceeds the reasonableness standard, as reflected in those guidelines. The UST Guidelines appear in Appendix B-Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 for Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36,248 (June 11, 2013), available at https://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/Fee_Guidelines.pdf, but we'll just refer to them as the UST Guidelines for the rest of this article.

[63]And fee applications should tell a story about the choices that the professional has made. *See, e.g.*, Nancy B. Rapoport, *Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals*, 15 BROOK. J. CORP. FIN. & COM. L. 359, 364-65 (2021) (discussing the need for the "what," the "with whom," and the "why" detail for good time entries).

[64]The Delinquent Time (DT) flag indicates when the dates of the line-item time entries fall outside sixty days of the invoice date. Invoicing delays happen for a myriad of reasons. Sometimes the billing arrangement allows payments on a periodic basis (quarterly, semi-annually, etc.); sometimes the billing arrangement calls for milestone payments (payment on closing, payment by litigation phase, etc.); and sometimes clients request non-monthly payment cycles for their own business reasons. In bankruptcy cases, the billing cycles are even more complicated because of the fee application approval process.

Of course, non-monthly billing happens on a regular basis, and many causes lead to an irregular cadence to the billing and payment cycle. But when monthly billing is the norm, a delay in time recording that leads to a delay in the issuance of invoices (often, but not always, an interrelated and compounding problem) can create significant billing judgment issues. With respect to a delayed, non-concurrent time entry, memories fade, creating inaccurate entries, both in terms of the work performed and in terms of the time that it took to perform the work. We know it's possible that delayed time entries can be both overstated as well as understated; in either case, though, the non-contemporaneous time entries are inaccurate, which is suboptimal from a billing judgment perspective. Delays that lead to the inaccuracies can be entirely

the Skill Set Mismatch-Overqualified (SM-OQ)[67] flag, the Office Communication (OC)[68] flag, and the Excessive Research (ER)[69] flag. The discount percentage for all line items triggering at least one of these six flags averaged approximately 12.6 percent of the invoiced fees across all the cases that we've studied. Extrapolating to the entire $400 billion legal industry, these six flags translate to a "discount" of more than $50 billion on an annual basis. Poor billing judgment lies at the heart of this $50 billion issue.

For perspective on billing judgment on a multi-case basis, we analyzed nearly $2 billion in professional fee data from fee applications in twelve large bankruptcy cases[70] involving hundreds of professional organizations and thousands of legal professionals. In this data set, over 52 percent of line items contained in the fee application invoices triggered a flag in Legal Decoder's software, meaning that the line item had a staffing efficiency, workflow efficiency, or billing hygiene issue. Although that percentage is high, there is some good news, followed by some bad news. The good news is that professionals can, and often do, provide additional information to explain or justify many of the flagged time entries. The bad news is that they could have avoided many of the flags by scrutinizing the time entries before submitting them, thereby avoiding a potential *ASARCO* issue when taking the extra time to rework their fees and expenses after the fact.[71] With fewer than half the invoice line items in the filed fee applications in our data set marked as problem-free, it stands to reason that many bankruptcy professionals still exhibit subpar billing judgment, notwithstanding the multiple safeguards built

innocuous, but they also can be vehicles for fraud. The DT flag signals where these delays and potential inaccuracies occur.

[65]The Churning File (CF) flag triggers when a timekeeper repeatedly undertakes seemingly legitimate tasks in small time increments that appear to add only marginal value.

[66]The Excessive Time (ET) flag triggers when the time for a discrete task exceeds industry norms for similarly experienced timekeepers.

[67]The Skill Set Mismatch-Over-Qualified (SM-OQ) flag indicates that a senior professional is performing a task that is better suited to a more junior professional. Senior professionals are typically more efficient than junior professionals and, for some lower-level tasks, a senior professional can be the lowest efficient biller. For example, senior professionals can perform quick ("spot") research more quickly. But long research projects should usually belong to more junior professionals. The same holds true for initial drafting work: Sometimes, that drafting work belongs at the partner level because that partner is, in fact, the "lowest efficient biller" for that task. Traditionally, though, we would expect partners to spend more time on revisions than on initial drafts. At certain frequencies, SM-OQ flags indicate poor billing judgment.

[68]The Office Communications (OC) flag triggers when a timekeeper at a firm engages in some form of internal communication with one or more other timekeepers at the same firm.

[69]The Excessive Research (ER) flag triggers when a timekeeper conducts unapproved legal research for a period of time exceeding client guidelines for pre-approval, usually four or five hours.

[70]Large enough to have had a fee examiner appointed or, at least, large enough to justify the appointment of a fee examiner.

[71]*See* Baker Botts L.L.P. v. ASARCO, LLC, 576 U.S. 121 (2015) (discussing whether fees for disputing fees are compensable under section 330).

into the bankruptcy system that are designed to promote billing judgment.[72]

For a perspective on the economic effect of a single firm's billing judgment in a single bankruptcy case,[73] we analyzed fee application data submitted by debtors' counsel in one of the largest jointly administered bankruptcy cases in history. Lead counsel's fee applications reflected total fees of over $126 million. Those fees represented work recorded by 276 legal professionals in over 100,000 line-item time entries.[74] Legal Decoder's software identified over $20 million[75] in potentially problematic line items. After considering Legal Decoder's analysis[76] and the fee examiner's recommendation after discussions with the firm, the Court allowed fees of just over $115 million, equating to a write-off of about $11 million. Suboptimal billing judgment resulted in a 10 percent fee reduction—a significant "hit."[77] Clearly, it's time for bankruptcy professionals to hone their good billing judgment so that they don't continue to take such hits because of bad billing judgment.

III. HOW SOME COURTS HAVE DESCRIBED BILLING JUDGMENT (OR THE LACK THEREOF)—"THEY KNOW IT WHEN THEY SEE IT"[78]

One of our favorite cases regarding billing judgment and the concomitant fee reduction is *In re Lumpy's Inc.*[79] In a memorandum of decision, Judge Jury

[72]Those safeguards include the fee application and approval process itself, the UST Guidelines, and, sometimes, the objections of interested counterparties.

[73]The fee examiner in that case used Legal Decoder to analyze the fee applications. We are avoiding naming the case so that we don't embarrass the professionals involved.

[74]Managing 276 professionals on a single matter likely comprises a full-time job—a job lead professionals often don't have time to do. Dwayne Hermes suggests that a legal operations person could monitor the assignment of work. *See* email from Dwayne Hermes to Nancy B. Rapoport, Dec. 6, 2021 (on file with authors). We agree and add that the firm could have realized similarly favorable results by using fee analytic technology prophylactically. Either way, the firm could have made an investment to offset a considerable fee loss—an ostensibly prudent investment, compared to rolling the dice on a bet on professional fees.

[75]We have drawn two conclusions from the size of these flagged fees. First, the $20 million in problematic charges illustrates the accuracy level and reliability of advanced data analytics tools. In over $126 million of fee data, technology narrowed down the problems to a reasonable starting point for fee negotiations ($20 million) that ultimately ended with an $11 million reduction (per negotiations with the fee examiner and approval by the Court). Second, technology will augment and amplify good billing judgment, but algorithms alone can't substitute for good billing judgment

[76]The main reasons for the reduction were redundancy in staffing, repetition of tasks, and excessive time spent on tasks.

[77]We are concealing the identity of the law firm. There is no benefit in pointing out a particular firm's billing judgment problems on top of a write-off of greater than $10 million that the firm had to absorb.

[78]In his concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), Justice Stewart penned the immortal lines, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197 (Stewart, J., concurring).

[79]16-bk-12957 (Bankr. C.D. Cal.) (jointly administered with Case No. 6:16-bk-12958).

reviewed the secured creditor's requested fees and expenses.[80] As the court summarized:

> The chapter 11 debtors and the Official Committee of Unsecured Creditors objected to the fee motion, asserting that the amount of the requested fees was unreasonable and excessive for cases this size in the Riverside Division for a multitude of reasons: the billing rates were too high; much of the work was unnecessary for an oversecured creditor whose cash collateral was segregated early in the case and a cash collateral stipulation was offered by the debtors; the attorneys had greatly "overworked the case" by staffing it with too many high billing rate attorneys who duplicated work; the firm billed for administrative or clerical work; their billing entries lumped multiple tasks into one entry; and the total amount billed "shocked the conscience" when compared to the fees charged for the debtors and committee.[81]

Although the firm argued each of its actions was necessary,[82] the court "[took] into consideration the lack of jeopardy to [the creditor], its amply oversecured status, and the willingness of debtors and their counsel to negotiate an agreement which could have avoided shortened time motions and litigation in general when it analyzes the reasonableness of the detailed billings."[83] In going over the requested fees with a fine-toothed comb, the judge applied a rubric, explaining that "[o]verlying the court's adjustments to the bills in Exhibit J is the fact that [the firm]'s counsel staffed this Volkswagen case with a Cadillac cadre of attorneys":

> D - duplicate work, including too many cooks in the kitchen
> B - bundled time - unable to determine if time on task is reasonable. These entries are noted but not always disallowed.
> C - clerical work, not billable time
> E - excessive time spent on the task or too many eyes were required to review it[84]

A few excerpts from the court's Exhibit J give a flavor of the court's review.[85]

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[80] *In re* Lumpy's Inc., No. 6:16-bk-12957, slip op. Exhibit J (Bankr. C.D. Cal. Sept. 28, 2016), (Docket No. 131).

[81] *Id.* at 2.

[82] *Id.* at 3.

[83] *Id.* at 4.

[84] *Id.* at 5.

[85] *Id.* at 32-33 (excerpted screenshots).

04/15/2016	VAN	Phone conference with Ira Kharasch, Sharon Nickerson and Denise Reyes regarding cash collateral matters	0.40	795.00	~~$318.00~~ D
04/15/2016	VAN	Draft/revise cash collateral stipulations	1.30	795.00	$1,033.50
04/16/2016	IDK	Emails with V. Newmark re finalizing cash collateral stipulation and getting it to Polis today, and her email to Polis with stipulation.	0.30	995.00	~~$298.50~~ D
04/18/2016	BDD	Email to V. Newmark re declaration of service re Notice of Motion/Order Shortening Time re hearing on motion to prohibit debtor from using cash collateral	0.10	325.00	~~$32.50~~ C
04/18/2016	BDD	Attend to misc. calendaring matters with M. Desjardien and M. Evans	0.20	325.00	~~$65.00~~ C
04/18/2016	BDD	Preparation of Declaration of Service of Notice of Hearing to Prohibit Debtor from Using Cash Collateral (re Lumpy's - CA); emails/revisions re same per V. Newmark comments/ conferences with V. Newmark re same	1.10	325.00	~~$357.50~~ C
04/18/2016	BDD	Review service list re Lumpy's -FL and service of Motion, Dec and App Shortening Time; emails to M. Kudick re same	0.30	325.00	~~$97.50~~ C
04/18/2016	BDD	Email to V. Newmark re supplemental service of Motion, Dec and App for OST re Lumpy's -CA	0.10	325.00	~~$32.50~~ C
04/18/2016	VAN	Revise declaration regarding notice of cash collateral hearing	0.40	795.00	$318.00
04/18/2016	VAN	Draft email to Sharon Nickerson and Denise Reyes regarding cash collateral status	0.20	795.00	$159.00
04/19/2016	IDK	Attend conference call with client re status of negotiations and court hearing (.3); Telephone conference with V. Newmark re same after call on next steps and her email to Polis re same re stipulation and hearing (.2); Telephone conference with Polis and emails with V. Newmark re need to contact him, and summary of issues discussed, and court feedback on telephonic appearance, filing stipulations, and her correspondence with UST re same (.4).	0.90	995.00	$895.50

			Hours	Rate	Amount
04/19/2016	BDD	Email to V. Newmark re Declarations re Service of Notice of hearing re motion to prohibit use of cash collateral	0.10	325.00	~~$32.50~~ C
04/19/2016	BDD	Preparation of Decl of Service of Notice of Hearing re Motion to Prohibit Use of Cash Coll (.40); emails to V. Newmark re same (.20)	0.60	325.00	~~$195.00~~ C
04/19/2016	BDD	Emails to/conferences with (several) M. Kulick re Declarations of Notice of Service of hearing on motion to prohibit use of cash collateral (CA and FL)	0.40	325.00	~~$130.00~~ C
04/19/2016	BDD	Confer with V. Newmark and M. Kulick re Stipulations resolving motions to prohibit use of cash collateral	0.40	325.00	$130.00
04/19/2016	VAN	Phone conference with Sharon Nickerson, Denise Reyes and Ira Kharasch regarding cash collateral issues; phone conferences with courtroom deputy (2x) regarding cash collateral stipulations; draft emails to Tom Polis and U.S. Trustee regarding same	1.20	795.00	500 D ~~$954.00~~
04/20/2016	IDK	Review stipulations briefly and emails with V. Newmark re need for proposed orders, and review drafts of same.	0.30	995.00	$298.50
04/20/2016	BDD	Email to V. Newmark re orders on motion to prohibit use of cash collateral	0.10	325.00	$32.50
04/20/2016	VAN	Draft Interim orders approving cash collateral stipulations	1.40	795.00	$1,113.00
04/21/2016	IDK	Prep for hearing today on cash collateral stipulations, and review all relevant pleadings (.4); Attend hearing telephonically re same (.4); Emails with V. Newmark re result of hearing and information to fill in to stipulations and notice of same for final hearing (.2); Emails with Polis re his feedback on stipulations and timing (.2); Emails with V. Newmark and client and others re summary of today's hearing and substance of stipulations and timing of payment (.4); Emails with V. Newmark re whether to push Debtor to amend Florida caption to correct name of debtor, and consider (.2).	1.80	995.00	~~$1,791.00~~ 1500 D
04/21/2016	VAN	Draft notices of final cash collateral hearing; revise interim cash collateral orders; conference with Ira Kharasch regarding interim cash collateral hearing; draft email to Tom Polis regarding interim orders; draft email to Sharon Nickerson and Denise Reyes regarding outcome of interim cash collateral hearing	2.00	795.00	~~$1,590.00~~

We're not trying to embarrass the lawyers who submitted this fee request. We're just using these two screenshots to illustrate how one court reduces fees based on a perception of overbilling.[86]

We'll return to the concept of billing judgment later in this article, but for now, think of it as "do unto the estate as you would do unto a client who is paying you directly—one who can push back when given a massive bill."[87]

[86] *See supra* note 78. State courts also know unreasonable fees when they see them.

[87] With apologies to the originators of the "do unto others" concept.

Let's focus on improving that judgment.

IV. WAYS TO THINK ABOUT ENCOURAGING BETTER BILLING AND BUDGETING JUDGMENT

There are many good ideas floating around about how to control the dynamics of the bankruptcy process, but—as far as we know—fewer ideas about how to use data to assist in controlling those dynamics.

A. THE THIRD-PARTY NEUTRAL IDEA

In 2011, then-Professor (now Bankruptcy Judge) Michelle Harner observed that fiduciaries in a chapter 11 bankruptcy case often act in their own interests, notwithstanding their fiduciary status:

> DIPs and creditors' committees are subject to self-interest and influence by outside pressures. Board members and corporate management may aggressively pursue a reorganization of the business to, among other things, preserve their jobs or attempt to salvage value for shareholders. They may in turn cede to the demands of private funds to obtain postpetition or exit financing for the corporation. Creditors' committees may support a plan that allows one or more of its members to obtain control of the reorganized corporation. Committee members also have access to and may use the corporation's confidential information to advance their own business agendas.[88]

Moreover, as Judge Harner recognized,

> Many Chapter 11 abuses occur because the key players in the case have a vested interest in the restructuring. *Even the professionals retained by the debtors and the committee are not completely free of conflict and loyalty issues, depending on both professional and personal ties that exist prior to the case or are anticipated to develop after.*[89]

She was right. It's human nature to find ways to help oneself, even if one is a fiduciary, and it takes a superhuman effort to put our own interests aside. Judge Harner proposed that a court could appoint a third-party neutral in order "to introduce an objective party into the restructuring process to facilitate (i) the flow of information among all parties and (ii) the ultimate resolu-

[88]Michelle M. Harner, *The Search For an Unbiased Fiduciary in Corporate Reorganizations*, 86 NOTRE DAME L. REV. 469, 474 (2011) (footnotes omitted).

[89]*Id.* at 498-99 (footnote omitted and emphasis added).

tion of the Chapter 11 case."[90] Serving as the "eyes and ears" of the bankruptcy court, the third-party neutral could provide a "neutral perspective" and "convey information to the court, including information concerning obstructionist or self-dealing behavior."[91]

Fee examiners can serve part, but not all, of this proposed role. Fee examiners fill roles both in court and behind the scenes.[92] Typically, they negotiate fee and expense reductions privately, rather than arguing about them in a court hearing.[93] Multiple conversations between the fee examiner and the professionals underpin the fee examiner's conclusions about reasonableness. Those conversations, akin to settlement discussions, are confidential.[94] From what the two of us have heard, some fee examiners are active participants in the decision-making of the parties in interest, raising questions about strategy. Others are agnostic about the "live" decision-making process, preferring to wait until courts have ruled on arguments about potentially frivolous activities.[95] A fee examiner with a public role as the court's eyes and ears—explicitly reporting on misbehavior—might experience different dynamics in her conversations with professionals. Judge Harner's suggestion is intriguing, but it does add a layer of costs. Mindful of that extra layer of costs, we believe that applied behavioral economics[96] might incentivize behavioral changes to accomplish the same objective.

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[90]*Id.* at 475. She proposed that "[t]he case facilitator would, among other things, work with the DIP to gather information and explore restructuring alternatives; provide information to the debtor's stakeholders; act as a facilitator for negotiations among the debtor and its stakeholders; and report all relevant information to the bankruptcy court and U.S. trustee." *Id.*

[91]*See id.* at 509-10.

[92]The best fee examiners have an active dialogue with the professionals involved in the case to familiarize themselves with the case's facts, strategy, undulations, and trajectory, and they use comparative industry benchmarks and data to assist the court in fulfilling its section 330 duty. The perception that fee examiners are "Monday-morning quarterbacks" second-guessing professionals' strategy in the matter without any context fails to reflect the reality of competent fee examiners. Competent fee examiners add value to a court's section 330 analysis by being informed, neutral experts. They don't—and others shouldn't—measure their value in professional fee reductions.

[93]We draw this conclusion from our own numerous informal conversations with fellow fee examiners.

[94]*See* FED. R. EVID. 408 (Compromise Offers and Negotiations). One of us has relied on this theory of confidentiality and has also signed confidentiality agreements with various professionals to get more detailed information than the time sheets contain. Others, including our friend Scott Bovitz, who is the lawyer for the fee examiner in the *ZettaJet* case, has roped that selfsame one of us into co-authoring an article (forthcoming) exploring the reliance on these traditional protectors of confidential information.

[95]*See, e.g.*, Response of Fee Examiner to Docket Number 1518, Docket Number 1519, Docket Number 1520, and Docket Number 1521 (Various Objections to the Second Interim Fee Application of DLA Piper), at 7, *In re* Zetta Jet USA, Inc., No. 2:17-bk-21386 (Bankr. C.D. Cal. June 17, 2021) (Docket No. 1524) at 7 ("Until the final fee applications are filed, I must remain agnostic as to whether, viewed as a whole, certain activities and expenses of [the law firm] were reasonable or necessary when performed or incurred.").

[96]Minus the formulas. We love the pop-culture versions of behavioral economics, but we shy away from their advanced mathematics components.

B. BEHAVIORAL ECONOMICS AND "NUDGING" BETTER JUDGMENT

> When we speak of good or bad judgments, we may be speaking either about the output. . .or about the process—what you did to arrive at [that conclusion].[97]

Humans behave in predictably odd ways, due to patterns of thinking they do as individuals and in groups.[98] Even with all good intentions,[99] billing judgment is falling through the cracks. We therefore suggest using behavioral economics as a hedge against human nature. We want to be "choice architects,"[100] who use the Thaler-Sunstein principles of "libertarian paternalism":

> When we use the term *libertarian* to modify the word paternalism, we simply mean liberty-preserving. And when we say liberty-preserving, we really mean it. Libertarian paternalists want to make it easy for people to go their own way; they do not want to burden those who want to exercise their freedom.
>
> The paternalistic aspect lies in the claim that it is legitimate for choice architects to try to influence people's behavior in order to make their lives longer, healthier, and better. In other words, we argue for self-conscious efforts, by institutions in the private sector and also by government, to steer people's choices in directions that will improve their lives. In our understanding, a policy is "paternalistic" if it tries to influence choices in a way that will make choosers better off, *as judged by themselves*. . . . [I]n many cases, individuals make pretty bad decisions—decisions they would not have made if they had paid full attention and possessed complete information, unlimited cognitive abilities, and complete self-control.[101]

There you have it: Professionals would prefer to be compensated for all the time that they bill, but when they don't exercise billing judgment, they

[97]DANIEL KAHNEMAN, OLIVIER SIBONY & CASS SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT 49 (2021) (emphasis in original) [hereinafter NOISE].

[98]We heartily recommend this classic book: JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2d ed. 2021). This American Bar Association publication provides easy-to-understand discussions of the myriad cognitive errors humans make.

[99]*Cf.* the classic quote, "[t]he road to hell is paved with good intentions." *See* THE SAMUEL JOHNSON SOUND BITE PAGE, https://www.samueljohnson.com/road.html (last visited May 16, 2022).

[100]RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3 (2009) ("A *choice architect* has the responsibility for organizing the context in which people make decisions.") (emphasis in original) [hereinafter NUDGE].

[101]*Id.* at 5 (emphasis in original and footnote omitted).

should expect to see cuts in their fee applications.[102] Better billing judgment will reduce cuts and make these professionals better off, in Thaler-Sunstein lingo, as judged by themselves.[103] We can counter some of the cognitive errors that chapter 11 professionals make—not because those professionals are bad people, but because they are human—with nudges.

What are some of the cognitive errors that these professionals are making?

- That their busy schedules prevent them from thinking about who should do which parts of which assignments (cognitive dissonance).[104]
- That "everyone else does it" the same way—with seat-of-the-pants decision-making (social pressure).[105]
- That there is no possible way to budget for all the moving parts in a complex chapter 11 case, so any task-by-task budgeting is doomed to fail (all-or-nothing thinking).[106]

We get it. Large chapter 11 cases are complex, and no two chapter 11 cases are exactly alike.[107] Each professional must weigh multiple options.[108] But if the definition of insanity is doing the same thing over and over and expecting a different result,[109] then it's time for us to find sanity by using behavioral economics as a tool.

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[102]On the other hand, these same professionals likely are willing to assume the risk of getting their fees reduced, because such cuts depend on the case and the court reviewing the fees.

[103]And better billing judgment can also contribute to a higher recovery for unsecured creditors, when funds are available.

[104]For a good working definition of cognitive dissonance, see Saul McLeod, *Cognitive Dissonance*, SIMPLY PSYCH. (Feb. 5, 2018), https://www.simplypsychology.org/cognitive-dissonance.html (last visited May 16, 2022).

[105]For our favorite study of social pressure, see Saul McLeod, *Solomon Asch - Conformity Experiment*, SIMPLY PSYCH. (Dec. 28, 2018), https://www.simplypsychology.org/asch-conformity.html (last visited May 16, 2022).

[106]For a nice description of this cognitive error, see *Cognitive Distortions: All-or-Nothing Thinking*, COGNITIVE BEHAVIORAL THERAPY LOS ANGELES, https://cogbtherapy.com/cbt-blog/cognitive-distortions-all-or-nothing-thinking (last visited May 16, 2022).

[107]But we can't resist *this* comparison: "Happy families are all alike; every unhappy family is unhappy in its own way." LEO TOLSTOY, ANNA KARENINA 1 (Gutenberg e-book 2020 ed., available at https://www.gutenberg.org/files/1399/1399-h/1399-h.htm) (last visited May 16, 2022). Personally, from the unhappy families (and fraught chapter 11s) that we've seen, the range of "unhappiness" triggers isn't nearly as broad as Tolstoy might have thought.

[108]*See* NOISE, *supra* note 97, at 51 ("A different kind of evaluative judgment is made in decisions that involve multiple options and trade-offs between them.").

[109]Apparently, Einstein didn't utter these words. See Christina Sterbenz, *12 Famous Quotes That Always Get Misattributed*, INSIDER (Oct. 7, 2013, 5:10 PM), https://www.businessinsider.com/misattributed-quotes-2013-10 (last visited May 16, 2022). Inherent irony rests in the perpetuation of this attribution.

C. "BILLING JUDGMENT" AND "BUDGETING JUDGMENT"

We've established that setting the cost of legal services is more of an art than a science, largely because of variability and uncertainty in how legal matters progress. In a bankruptcy context, there are several parties whose billing judgment comes into play when evaluating the cost of legal services versus value delivered, and the Bankruptcy Code has mechanisms to let parties weigh in on the value of legal services and the billing judgment that accompanied the delivery of those services.[110] Typically, in the non-bankruptcy context, only two parties—clients and their law firms—are relevant when evaluating billing judgment.[111] Our point is that, without an analytic structure like ours, it is difficult, if not impossible, to reach a unanimous conclusion as to billing judgment, even with the benefit of 20/20 hindsight. That's the point of this passage in *Noise*:

> We have contrasted two ways of evaluating a judgment: by comparing it to an *outcome* and by assessing the quality of the *process* that led to it. Note that when the judgment is verifiable, the two ways of evaluating it may reach different conclusions in a single case. A skilled and careful forecaster using the best possible tools and techniques will often miss the correct number in making a quarterly inflation forecast. Meanwhile, in a single quarter a dart-throwing chimpanzee will sometimes be right.[112]

We believe that the days of "guesstimating" are over. There's sufficient data, both inside a single law firm and across law firms, to have a process for analyzing how much something should cost and determining who should be doing which task. And, in fact, some firms are doing just that.[113] They may be using data to increase their own profitability, they may be doing so to address

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[110]In our experience, though, parties in interest rarely take that opportunity to weigh in on fee applications. And, outside of bankruptcy, there are other situations in which third parties can weigh in on the fees and expenses charged to a client: Fee-shifting provisions in contracts and statutes come to mind. But our point is that, in bankruptcy cases, neither of us has seen third parties weigh in on fee applications unless they are (1) seriously aggrieved, (2) fee examiners, or (3) the United States Trustee assigned to the case.

[111]But in an email to us, Dwayne Hermes made an excellent point: "[C]arriers are very much in the relationship between counsel and insured as to the [amount] of fees to be paid." So it's actually a tripartite relationship, as he recognizes. Email from Dwayne Hermes to Nancy Rapoport, Dec. 6, 2021 (on file with authors).

[112]NOISE, *supra* note 97, at 50 (emphasis in original).

[113]We presented at a recent General Counsel Roundtable—part of a series that Georgetown Law runs, courtesy of Senior Fellow Jim Jones and Professor Mitt Regan (https://www.law.georgetown.edu/legal-profession/events/)—and learned from some law firm general counsel about how they use data from their financial reporting and accounting systems to highlight potential financial risks posed by changes in client billing arrangements and in the amounts and timing of collections.

client pressure on billing or budgeting judgment, or they may be doing so for both reasons. We see a few reasons for this new focus.

First, since 2008, the competitive landscape has become immeasurably more intense for law firms. Law firms not only face competition from each other, but also from in-house legal departments that keep more of their work internal, from alternative legal service providers, and from automated tools that are taking billable hours away from law firms. Law firms need to justify why they did what they did, why a particular person performed a task, and why they're so sure that their fees are set at market rate. Billing judgment should be at a premium in this hyper-competitive environment. Second, the rise of legal operations professionals has created more business-level accountability for law firms. In-house lawyers used to defer to how outside counsel ran a matter. Not anymore. Legal operations professionals want to know not just an outcome but also that the outcome has been achieved in the most efficient manner. Third, eBilling and billing systems allow for the programmatic review of legal invoices. Clients can accept or reject charges from law firms and generate useful reports to help them analyze fees and expenses. Finally, legal spend data analytics platforms have the ability to analyze and synthesize vast amounts of industry data, establish benchmarks, and prepare budgets and workflow and staffing plans. The confluence of these factors is forcing some legal industry leaders to step up their game when it comes to billing judgment, though the overall transition to better billing judgment is taking its time.

These external forces have made it clear that billing judgment doesn't revolve only around the billing and invoicing process. Clients are no longer keen on addressing the economics of a matter in a reactive, ex post facto review after a matter is completed. There's a mandate for law firms to exercise billing judgment in a more holistic approach. Sophisticated clients are insisting that firms not only demonstrate good billing judgment but also good *budgeting* judgment.[114] In (perhaps) the good old days, during a client's annual outside counsel evaluation process, one of the main items on the agenda items

[114]During the public comment period on the proposed 2013 UST Guidelines, a comment filed by over 100 law firms contested the issue of whether firms could or should provide budgets for the larger chapter 11 cases and whether they could identify the fees that they had collected on a per-professional basis. See Comments from 119 Law Firms, (Jan. 30, 2012), available at https://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/proposed/119_Law_Firms_Comments.pdf (select "January 30, 2012, Comments from 119 Law Firms" hyperlink from table located at https://www.justice.gov/ust/fee-guidelines/public-comments-proposed-appendix-b-fee-guidelines-attorneys-larger-chapter-11-cases); *see also* Public Meeting on the United States Trustee Program's Proposed Guidelines for Attorney Compensation in Larger Chapter 11 Bankruptcy Cases (June 4, 2012), available at https://www.justice.gov/sites/default/files/ust/legacy/2012/06/26/Transcript_June4_Public_Meeting.pdf (select "June 4, 2012, Transcript of Public Meeting on the United States Trustee Program's Proposed Guidelines for Attorney Compensation in Larger Chapter 11 Bankruptcy Cases" hyperlink from table located at https://www.justice.gov/ust/fee-guidelines). That hearing also included a snarky comment by one of us. That snarky comment read, in part:

was the negotiation of hourly rates. That process was predictable: the law firm notified the client of its annual across-the-board hourly rate increases of X percent, the client would balk at the increase, the law firm would then offer a 5 percent discount in exchange for assurance of a certain volume of work, and everyone moved on. Times have changed, and annual budgeting discussions are common now.

Starting in April 2020, we started sharing our contrarian view "that, over the next twelve months, the 400 largest U.S. law firms (i.e., 'BigLaw') and the legal departments of BigLaw's largest clients will dust themselves off after some initial retrenchment, quickly stabilize, and start showing positive trends."[115] We predicted that "[o]ver the longer term, BigLaw (at least that part of BigLaw that made sensible internal economic decisions over the past several years) should gain positive momentum"[116] and that "[l]egal industry leaders should be bullish about their industry's economic future."[117] Our contrarian view has proven to be correct. Today, the bigger law firms have more work than they can handle, and rate increases may still be more of a "take it or leave it" proposition. BigLaw firms now take the position that clients who do not like a proposed rate hike can look elsewhere for outside legal advice. Consequently, many clients are accepting the proposed rates, but those self-same clients are now asking for budgets, by phase, for every matter, and they are treating those budgets as hard caps on fees.[118] Any budget overruns become the law firm's problem, not the client's problem. This new emphasis on budgeting could be a seismic shift in the client-law firm relationship when it comes to billing judgment.[119]

> Some of the other suggestions and comments, I don't think, have been as useful. To me, it is not credible to say, as one comment did, "[i]n firms with many offices, billing partners and attorneys, it is probably impossible or, at the very minimum, impossibly burdensome to find out what billing rate was actually collected for a particular attorney's services in every matter in which he or she billed time." If it is true that that is the case, I am nervous about the state of law firm practice today. I am running a law school with only a $24 million budget and, if I turn to my CFO and I say I want this or that, I get it by the end of the day, so I know if a State institution can get those records, probably a law firm can[,] too.

Id. at 18-19. Randy Gordon takes this point a step further: "[M]ost BigLaw firms have analytics departments to help with budgeting these days. That's a favorable result." Email from Randy Gordon to Nancy Rapoport, Dec. 5, 2021 (on file with authors).

[115]Nancy B. Rapoport & Joseph R. Tiano, Jr., *The Legal Industry's Second Chance To Get It Right*, 57 WILLAMETTE L. REV. 1, 2 (2021).

[116]*See id.* at 2.

[117]*Id.*

[118]Randy Gordon points out that "[b]illing and collection activities now take up . . . near as much time as lawyering! And with all things in the law-firm world, elaborate sets of 'rules' punish everyone for the actions of a few. Can't we come up with Rawlsian justice-as-fairness view of billing?!" Email from Randy Gordon to Nancy Rapoport, Dec. 5, 2021 (on file with authors).

[119]We don't see an end to the billable hour any time soon, though.

Indeed, if clients are now emphasizing budgeting, what is the interplay between billing judgment and budgeting judgment? It cannot possibly mean that billing judgment is subsumed or replaced by budgeting judgment, because the hypothetical results are untenable. Sticking to a budget without also using billing judgment could allow a firm to do a horrible job of staffing and managing the matter, even if the outcome achieved the client's goal.[120] The right outcome within the budgeted cost might not trigger complaints from clients, but lawyers are fiduciaries, so they should still be mindful of budgeting judgment as it relates to the value provided to the client. If there were efficiency misfires and the law firm still came in under budget, the erroneous budget estimate could still mean that the law firm overcharged the client.[121] Our point? Budgets are still an important component of billing judgment, and law firms actually already have sufficient data, in the form of their very own time entries, to develop their own reasonably accurate budgets to inform their billing judgment. "Good and accurate" begins with an automated analysis of historical data by matter.

D. How automated budgeting works

We'll describe how to build a data-based budget by using, as an example, the database that the two of us know intimately. There are, of course, other such databases out there,[122] but we're familiar with Legal Decoder's Pricing Decoder tool, which is built across millions of lines of time entries. That tool can help answer questions such as "how many billable hours does it take to complete Task X?"; "what are the most common work activities?"; "what is

[120]When the matter's bill hits the budget correctly, everyone is happy. When the matter comes in under budget *and* the law firm can demonstrate that it worked efficiently, the client should be thrilled. The important thing is to have a well-informed budget. An actively engaged client will take a look at the budget from the get-go, ask questions about particular elements of the budget, understand that budgets must adjust as circumstances change, and pay attention to what Dwayne Hermes calls the key: "The key is to keep the budget ahead of the legal spend even if you have to revise it multiple times." Email from Dwayne Hermes to Nancy B. Rapoport, Dec. 6, 2021 (on file with authors).

[121]After all, a law firm could recognize that it is terribly inefficient and could build that level of inefficiency into its budget and pricing model—to the detriment of an unknowingly and unwitting client who winds up overpaying. Law firms should never unfairly benefit from their inefficiency, but maybe they really aren't. Assuming that there is a fully vetted budget discussed between a willing buyer of legal services and a willing seller of legal services, contract law tells us that two sophisticated parties should be allowed to set the contract's terms even if those terms later prove to be suboptimal for one side. But we acknowledge that, in the bankruptcy context, the willing buyer of legal services and willing seller of legal services skews away from an informed arms-length transaction, because the buyer of legal services isn't paying out of pocket.

[122]In a different project, we're working with Standards Advancement for the Legal Industry (*see* https://www.sali.org) to create a bankruptcy lexicon to "tag" things that matter in insolvency work. Those tags will eventually make it far easier for people to do searches at a granular level. If someone, not too far in the future, wants to find out how Judge X will rule on approving a section 363 sale with terms A, B, and C, the SALI tagging system will be able to give a percentage calculation on the likelihood of approval.

the estimated cost through Y phases of a matter"; "what is the incremental cost of tasks in a given phase?"; and "how many associates and paralegals will be needed for the due diligence phase?" When developing a budget programmatically, a pricing engine identifies and aggregates discrete work elements within historic invoice data.[123] Some work elements may occur just once during a matter; others may recur. Even though no cases, transactions, or matters are identical, every matter has hundreds or thousands of recurring work elements that make up its anatomy. By selecting and aggregating projected work elements, it is easy to develop a "bottom-up" pricing model and then to generate pricing models by adding or deleting various work elements.[124] The table below shows how Legal Decoder's Pricing Engine pinpoints how long a given work element would take a partner with a certain level of seniority to do, versus how long that task would take an associate with a different level of seniority.

Work Element	Partner Hourly Average per Discrete Work Element	Partner Hourly Average per Recurring Work Elements (Matter Lifetime)	Average Partner Seniority (years)	Associate Hourly Average per Discrete Work Element	Associate Hourly Average per Recurring Work Elements (Matter Lifetime)	Average Associate Seniority (years)
Hearing Preparation	3.2	5.3	19	4.8	6.7	5
Hearing Attendance	4.3	13.6	21	4.0	10.7	5
Stockholder Agreement	4.7	8.4	14	4.4	7.0	4
Expert Reports	6.2	22.5	18	7.0	23.5	4
Depositions	7.4	34.2	21	7.2	28.1	5
Board Meeting	4.7	10.3	22	3.5	5.5	5
Board Presentation	3.9	7.8	23	3.6	5.2	4

Our point is simple. Data should be driving better billing judgment through accurate budgeting decisions. Billing always happens; budgeting sometimes happens. Billing is backwards-looking; budgeting is forward-thinking. Some of the criteria demonstrating "reasonableness"[125] in a billing context are best managed by smart budgeting. Hindsight tells us that law firms rarely operate at peak efficiency without constraint, so accurate budgeting at the outset should offer enormous benefits.

[123]Work elements are very specific "legal" things produced by a legal professional, such as a motion in limine, an asset purchase agreement, expert depositions, due diligence reports, FERC applications, owner's affidavits, wills, court hearings, and so on.

[124]We know some firms that take a proactive look at budgets by reviewing their own work in past cases. For one of our favorite examples, see HERMES LAW, https://www.hermes-law.com (last visited May 16, 2022).

[125]*See* 11 U.S.C. § 330.

E. Our Solution—at least our beginning of a solution

The right answer is to manage matters with an intelligent, data-driven mix of budgeting judgment and billing judgment. Lawyers should strive to price matters correctly at the task level and at the phase level,[126] using the right legal professionals to handle each task in the right amount of time, measured against industry standards. Those lawyers also should monitor their billing on an ongoing basis to make sure that the budget and work plan is honored not just in the breach but in reality. The good news is that legal spend data analytics tools exist to help lawyers do just that. These tools allow lawyers to leverage firm-specific data and industry-wide data to pinpoint the likely tasks involved in a legal matter. The data can forecast the time expected to be expended on such tasks based on the experience level of the legal professionals who should be involved, and the data can generate more accurate budgets. Using real data, lawyers and clients can have a more informed conversation budgets, strategy, tasks, and related costs. And yes, those same data analytics tools can be used to monitor actual-to-budget results to ensure optimal billing judgment.

If we assume that professionals want to work efficiently and want to be able to recover all of the billed time and expenses that they submit in fee applications, then we want to nudge[127] them to make the choices that will help them achieve those goals.[128] And for that, we'll start by turning to the concept of "anchoring."

> [The *anchoring effect*] occurs when people consider a particular value for an unknown quantity before estimating that quantity. What happens is one of the most reliable and robust results of experimental psychology: the estimates stay

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[126]And we really mean "strive." We don't expect perfection here, given all of the factors that go into handling any given matter. But we do expect legal professionals to do more than guess at pricing and staffing.

[127]Consider:

> A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit at eye level [in a grocery store] counts as a nudge. Banning junk food does not.

Nudge, *supra* note 100, at 6; *cf.* Leo Rosten, The New Joys of Yiddish 273 (Lawrence Bush ed., Three Rivers Press 2001) (1968) (defining "nudzh" as "a Yinglish word, descended from 'nudge'. But where a nudge is open, a nudzh is surreptitious, a kick under the table . . . to indicate that the recipient of the nudzh is being reminded: of a job to be done, or a nicety that has been overlooked . . .").

[128]After all, behavioral economics teaches us this key lesson: "People hate losses (and their Automatic Systems can get pretty emotional about them). Roughly speaking, losing something makes you twice as miserable as gaining the same thing makes you happy. In more technical language, people are 'loss averse.'" Nudge, *supra* note 100, at 33. We want professionals to reduce their risk of losses *ex ante*.

> close to the number that people considered—hence the image of an anchor.[129]

The more that we can help professionals anchor on what tasks "should" cost based on data, and not on a gut feeling, the better off we are.

Anchoring can be misleading, of course. A "bad" anchoring number can distort behavior, as this passage explains:

> "Anchoring and adjustment" is one of three well-known heuristics described by Tversky and Kahneman (1974) in a classic paper that also describes the representativeness and availability heuristics. Like the other heuristics, anchoring and adjustment can be a useful way of making judgments. Imagine that you are trying to set a value on an antique chair that you have inherited from a distant aunt. You might recall seeing a very similar chair in slightly better condition at a local antique dealer. You might start with that price as an anchor, and incorporate the difference in quality. This seems to be a useful and effort-saving use of the anchoring and adjustment heuristic. Now, however, imagine that you had seen (on Public Television's *Antiques Road Show*) a not-so-similar chair that, unlike yours, is signed by the designer and worth, as a result, many thousands of dollars more. If you were to use this as an anchor, and if you did not properly incorporate the fact that your chair did not have a signature, you might end up with an estimate that was too high, or biased. Thus anchoring can be a useful heuristic, but it can also result in biased answers.[130]

The key is to find useful anchors and to use them at times at which they might aid in decision-making about staffing, time spent on a task, and the ratio of the fees incurred to the matter's total value. What we want to do is help professionals titrate[131] their billing judgment by using data that they already have or can get.

Remember: courts care about billing judgment.[132] Even the United

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[129]DANIEL KAHNEMAN, THINKING, FAST AND SLOW 119 (2011) (emphasis on the defined term in brackets in the original).

[130]Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 120, 120 (Thomas Gilovich, Dale Griffin & Daniel Kahneman, eds. 2002); *see also id.* at 121 (listing the negative connotations of anchoring). It is, therefore, important to choose a *good* anchoring number, because anchoring to irrelevant numbers can contribute to bad decision-making.

[131]For those of you without chemists in your families, here's a definition of "titrate": "Titrate", MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/titrate (last visited May 16, 2022).

[132]They also care about accuracy and clarity. *See, e.g., In re* Sanders, 521 B.R. 389, 391-92 (Bankr. S.D.

States Supreme Court cares.[133] And separate and apart from Supreme Court caselaw, bankruptcy courts have the statutory responsibility to review an estate-paid professional's billing judgment. Section 330 requires a court to examine the reasonableness of the fees and expenses:

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.[134]

Fla. 2014) (footnote omitted) ("The Second [Fee] Application is replete with incomprehensible numbers [and] thus goes beyond mere professional sloppiness into arithmetic gibberish."); *see id.* at 392 ("To summarize: the Second [Fee] Application variously represents, in accordance with the requirements of Rule 9011, that [the law firm] spent (a) 59.01 hours, (b) 51.41 hours, (c) 19.51 hours, (d) 45.4 hours, or (e) 60.7 hours representing the Debtor. And it asks that each of [the two lawyers] be paid at a rate of $450/hour.").

[133] Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (citing Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir.1980) (en banc) (emphasis in original)).

[134] 11 U.S.C. § 330(a)(3). These factors (or a close variation of them) are likewise used in Model Rule 1.5 and in many of the states who have adopted a variant of that rule. For a handy American Bar Association comparison chart of the state variations on Rule 1.5, *see* AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (select "Model Rule 1.5" hyperlink) (last visited May 16, 2022).

Section 330 kicks in when it's time to review fee applications, and it does a good job of enumerating the steps that go into reviewing a professional's billing judgment.[135] The court's review often includes the judge's own experience regarding how long a task should have taken, as well as the level of professional who should have performed the task:[136]

> [The financial advisor] requests compensation for 111 hours of time spent on Committee communication after the formation of the Committee. Of these 111 hours, 103 hours were performed by no less than 3 professionals performing the same task. The fewest number of professionals should be assigned to perform each task; if it is more efficient and economical to use one professional instead of two, then one

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[135]*In re* Recycling Indus., Inc., 243 B.R. 396, 401 (Bankr. D. Colo. 2000) (citations omitted) ("Professionals, in applying for fees, 'should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.'"). In this case, the court disallowed summer associate time that had been billed at the same rate as that of some senior attorneys who were local counsel for the creditors' committee, *id.* at 402-03. In so doing, the court observed:

> Absent evidence to the contrary—and there is none whatsoever—this Court concludes that utilizing law student summer associates, each billing at the rate of $185.00 per hour, results in excessive time, and consequently excessive attorneys fees when much more experienced, skilled, knowledgeable, and highly regarded counsel—all of whom bill at an equal or lower hourly rate—are readily available and familiar with the case at hand. More importantly, the Court can conclude that, absent evidence to the contrary, local counsel is much more knowledgeable, experienced and facile than second year law students in researching, briefing and otherwise dealing with most bankruptcy issues, such as the deposition notice referenced above [which took 7.3 hours of summer associate time, plus attorney time spent in reviewing the draft] and the Exclusivity Motion Objection . . ..

Id. at 404; *see id.* at 404 ("The summer associates expended an enormous amount of time on research and projects that were not commensurate with the complexity, importance, and nature of the problem, issue or task addressed."). The court also addressed a 10-page exclusivity motion for which the firm billed 91 hours:

> In addition to [a] summer associate, [two lawyers] both appear to have also performed extensive research on this particular matter. [Those two lawyers] also reviewed each other's research, edited and commented upon various versions of the pleading and prepared for hearings and discovery which did not proceed and have not proceeded to date. It is apparent that [the two lawyers and the summer associate] billed their time without reduction and without billing judgment.

Id. at 405; *see also In re* Bush, No. 17-14004, 2019 WL 5875705, at *4 (Bankr. D. Nev. March 1, 2019) (reducing fees for (1) billing for non-legal services, (2) billing for non-contemporaneous time entries, and (3) spending too much time drafting a simple motion). Courts care, too, about whether national law firms are always the right choice. *See, e.g., In re* Kennewick Public Hospital Dist., No. 17-12025, 2018 WL 5799258, at *7 (Bankr. E.D. Wash. Oct. 19, 2018) (footnotes omitted) ("The fee of $1,500,000 is sufficiently less than the fee requested by [national law firm] to adjust for the fact that local attorneys could have performed some of the services at rates lower than [national law firm's] Guideline Rates.").

[136]Even though judges are well qualified to make such § 330 determinations, we believe that judges would still benefit from a data-driven analysis that includes industry benchmarks.

> should be used. . .. Based on the Court's experience and judgment with regard to professional billing practices, the amount of time spent on Committee communication was duplicative and excessive. We will disallow half of the 103 hours billed for Committee communication tasks where more than one professional participated.[137]

In addition to the court's own experience as an aid in parsing fee applications, fee examiners and the Office of the United States Trustee can weigh in. But the court, a fee examiner, and someone from the United States Trustee's office are all after-the-fact reviewers. It would be far better, from the Thaler-Sunstein perspective, for the professionals to use data to plan their workstreams in advance.

1. *An easy nudge: mine the law firm's own data to develop benchmarks that indicate what time a given task takes and what level of professional should undertake that task.*

Law firms that tout their expertise in large, complicated matters have a treasure trove[138] of data sitting around in their old bills. Partners who have just added a new chapter 11 representation could start by identifying other cases that the firm had handled in the past that are similar to the new case.[139] Firms can mine their billing data from these similar cases and place the data into categories of common tasks (*pro hac vice* motions, first-day motions, cash collateral stipulations, 2004 examinations, preference actions, and the like, all the way to—of course—interim fee applications). During the budgeting process at the beginning of a given case, the assigning partner could anchor on this firm-specific information about specific tasks, concentrating on what level of professional did the initial drafting, who reviewed it, and how long each professional took. That would help the partner set a reasonable budget, with the appropriate language included about budgets having to be adjusted as the case develops. Moreover, every morning, that professional could get a running total of the cost of current tasks as compared to similar tasks in prior cases. Think of this as not just "budget to actual" but as "prior cases to budget to actual."

Anchoring will provide a helpful benchmark, with the side benefit of allowing partners to monitor the burn rate of the case as it progresses. Having active reminders about how much something "should" cost, on average, be-

[137] *In re* Stations Holding Co., Inc., No. 02-10882, 2004 WL 1857116, at *3 (Bankr. D. Dela. Aug. 18, 2004).

[138] That "treasure trove" of billing information might tend toward higher fees, on the theory that those fees might get reduced in later fee applications, but it's still useful information.

[139] Remember, these firms are all "experts," so there should be plenty of data from similar cases that they've done.

cause of what that task actually cost in the past is a better process than is the current one: A blitz of work assignments, all of which come from the speed of complex cases, with inertia defeating the active monitoring of fees.[140] Although every case is unique, the overwhelming majority of the tasks involved in moving a case forward are not "tasks of first impression." To the contrary, most task recur at a frequency that allow them to be priced and benchmarked with reasonable certainty.

Remember: When professionals fail to pay attention to what level of person is doing what kind of tasks, courts notice. In *In re United Plastic Recycling*, for example, the court observed:

> One of the fundamental purposes of the Committee is to monitor the progress of the case to ensure that unsecured creditors receive the highest value possible. This purpose is often typically carried out by counsel approved by the Court to represent the Committee. Naturally, the Court expects counsel to bill for such monitoring; however, this is not a license to sit, watch, and bill. If counsel spends an exorbitant amount of time monitoring the case but accomplishes next to nothing for the unsecured creditors, then counsel's services cannot be said to be necessary or reasonable. Upon reviewing [the law firm's] application, it appears that counsel spent a significant amount of time reviewing and monitoring the case. Unfortunately for the unsecured creditors, [the law firm's] monitoring did not benefit the Committee.
>
> Furthermore, [the law firm's] application is replete with attorney entries for work pertaining to matters better left to a paralegal, administrative staff, or someone billing a lesser

[140]This "yeah, whatever" of inertia when it comes to budgeting and monitoring budgets is understandable but still suboptimal.

> One of the causes of status quo bias is a lack of attention. Many people adopt what we will call the "yeah, whatever" heuristic. A good illustration is the carryover effect in television viewing. Network executives spend a lot of time working on scheduling because they know that a viewer who starts the evening on NBC tends to stay there. Since remote controls have been pervasive in this country for decades, the actual "switching" costs in this context are literally one thumb press. But when one show ends and the next one comes on, a surprisingly high number of viewers (implicitly) say, "yeah, whatever" and keep watching. . ..
>
> The combination of loss aversion with mindless choosing implies that if an option is designated as the "default," it will attract a large market share. Default options thus act as powerful nudges. In many contexts defaults have some extra nudging power because consumers may feel, rightly or wrongly, that default options come with an implicit endorsement from the default setter, be it the employer, government, or TV scheduler.

NUDGE, *supra* note 100, at 35.

> fee. For example, an attorney at [the law firm] billed extensive hours uploading documents to "Dropbox." Time was also billed for sending Dropbox invitations. At other times, counsel billed for time spent sending invitations to Committee members for conference calls. Counsel even submitted billing entries for phone calls and emails to Chambers to inquire about the status of a Court Order, once even billing for two emails pertaining to the same matter on the same day. It is unreasonable for counsel to bill $225 per hour for such tasks.[141]

And *United Plastic Recycling* is not an outlier of a case. There are many opinions that refer to what we call "overstaffing."[142]

In addition to the question of who's billing for what, the question of how long a task should take comes up repeatedly in opinions. Here's one example:

> With section 330 and these cases as my framework, I will now turn to the application. I have reviewed the application exhaustively. I went through each time entry and, where appropriate, compared the time entry to the associated docket entry. I reviewed each iteration of the plan, beginning with the last plan filed by Debtor's prior counsel, to compare each amended plan to the plan that preceded it. I reviewed each time entry to assess the value of the services to the Debtor, and whether the time appeared reasonable. After having done so I find that the only reasonable portion of the Application is [the attorney]'s hourly rate. $375.00 an hour, for an

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[141] *In re* United Plastic Recycling, Inc., No. 15-32928, 2017 WL 4404780, at *6 (Bankr. M.D. Ala. Sept. 28, 2017) (unreported case) (citations omitted). Here's another good reminder why paying attention to staffing is important:

> While the Court is reluctant to reduce counsel's fees for work performed, the Court cannot discern why it took the equivalent of five 40 hour work weeks to draft the Disclosure Statement and Plan. Further, the Court questions why four bankruptcy partners worked on the same documents, particularly where a number of the provisions in both documents are fairly standard in chapter 11 cases. The Court is mindful that the Disclosure Statement and Plan were filed roughly two months after the petition date, but this does not excuse the amount of hours charged. As such, the Court finds that not all the fees requested of $109,682.50 are reasonable and necessary, and reduces the fees allowed in this category by $34,682.50 to $75,000.00.

In re First River Energy, LLC, No. 18-50085, 2018 WL 4403820, at *10 (Bankr. W.D. Tex. Sept. 13, 2018).

[142] For a smattering of these cases, see, e.g., *In re* Heritage Hotel Associates, LLC, No. 8:19-bk-09946, 2021 WL 2646533, at *20 (Bankr. M.D. Fla. June 28, 2021) ("[T]he Court finds that significant reductions in the requested fees are appropriate based on issues with [the professional]'s invoices and overstaffing."); *In re* Navient Solutions, LLC, 627 B.R. 581, 593 (Bankr. S.D.N.Y. 2021) ("No fees were awarded for numerous vague entries, and this Court has applied a further 50% reduction for overstaffing.").

> attorney of [the attorney]'s experience in the consumer bar is on the higher end but is still a reasonable rate. However, [the attorney] appears to have exaggerated his time significantly, or taken far more time than was appropriate for a particular task. Moreover, there are many tasks [the attorney] performed that were not necessary, or that provided no benefit to the Debtor.[143]

You get our point. Had the law firm used its own data, it could have either changed the work assignments on the front end, thus saving itself from potential cuts for overstaffing or overworking a task. Had the firm had access to industry benchmarks, it could have explained, in the fee application, that X number of other cases did the same amount of work that it did, using the same level of professionals. We've already highlighted a multi-million dollar reduction in a bankruptcy case that could have been avoided if the firm had prophylactically used data analytics tools for its benefit.[144] Instead of being a shield for the firm, data analytics tools morphed into a sword for the court. For estate-paid professionals, data should be a friend, not a foe.

2. *A slightly more expensive, but possibly more useful, nudge: use data aggregated across several cases and across several law firms.*

The more examples of how much a particular task should cost and who should perform it, the more the professional in charge of a case can shape his or her decisions when assigning tasks. If it's good to use a law firm's own data as an anchor, would it be even more useful to find ways to aggregate data across several law firms and several complex cases? It would be possible for a professional to hire a database analytics company, ask, "how much should we budget for these depositions in this adversary proceeding in a case of this size," and get an answer that reveals no one law firm's particular costs[145] but provides useful comparisons.[146] Those comparisons let the requesting firm

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[143] *In re* Villaverde, 2016 WL 1178343, at *5 (Bankr. S.D. Fla. 2016).

[144] *See supra* notes 73-77 and accompanying text.

[145] A particularly dedicated sleuth could pull up hundreds and hundreds of fee applications, aggregate the data, and calculate the average costs of tasks. It would take a long time, of course, because those fee applications are in portable document format. But it could be done. It's just not particularly cost-effective for a motivated sleuth to do it for free.

[146] Our idea is that, even though we still think that each firm's data on fees will show slightly higher costs than, perhaps, they should, due to the tendency of accounting for later reductions by "starting high," the more that professionals can look behind the screen of "what things cost," the more likely that they can make better, realistic choices when assigning and monitoring tasks. Outside bankruptcy practice, sophisticated clients (whose budgets are paying the bills) do expect their outside law firms to think hard about high-ticket budget items.

> The third of the original three heuristics bears an unwieldy name: representativeness. Think of it as the similarity heuristic. The idea is that when asked to judge how likely it is that A belongs to category B, people (and especially their Auto-

develop a more precise budget than using the firm's own data alone. The more data, the more likely it is that there are good benchmarks out there. Those benchmarks can also help in terms of justifying a fee application.[147]

In chapter 11 reorganizations, decisions on what to do, who should do it, and how long it should take are, in behavioral economics terms, "recurrent" decisions:

> In the private realm, decisions you make when choosing a job, buying a house, or proposing marriage have the same characteristics. Even if this is not your first job, house, or marriage, and despite the fact that countless people have faced these decisions before, the decision feels unique to you. In business, heads of companies are often called on to make what seem like unique decisions to them: whether to launch a potentially game-changing innovation, how much to close down during a pandemic, whether to open an office in a foreign country, or whether to capitulate to a government that seeks to regulate them.
>
> Arguably, there is a continuum, not a category difference, between singular and recurrent decisions. Underwriters may deal with some cases that strike them as very much out of the ordinary. Conversely, if you are buying a house for the fourth time in your life, you have probably started to think of home buying as a recurrent decision. But extreme examples clearly suggest that the difference is meaningful. Going to war is one thing; going through annual budget reviews is another.[148]

Budgeting for chapter 11 work is a recurrent decision. Professionals can mine data for better estimates of who should do what, and for how long. If they can, they should.[149]

> matic Systems) answer by asking themselves how similar A is to their image or stereotype of B (that is, how "representative" A is of B). Like the other two heuristics we have discussed, this one is used because it often works. . . . Again, biases can creep in when similarity and frequency diverge.

NUDGE, *supra* note 100, at 26.

[147]We don't want to go too far out on a limb on this point, because if every professional overcharges the same amount for a task, that doesn't make the fee reasonable. But we believe that presenting evidence on why the industry standard is X dollars for Y task could help the judge who is determining reasonableness under section 330.

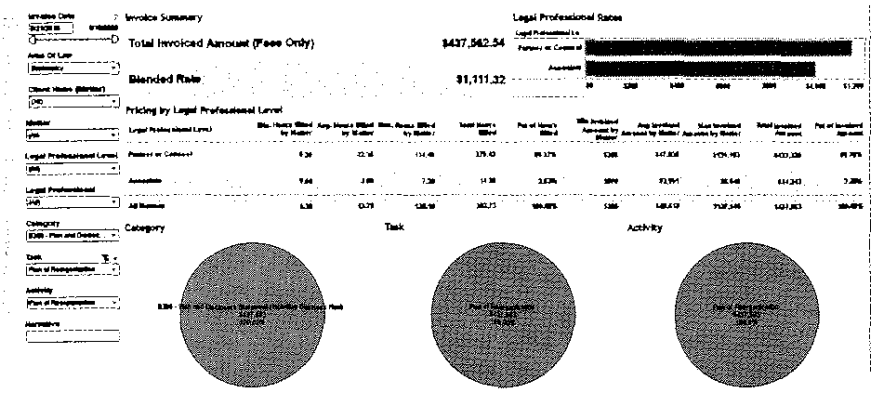
[148]NOISE, *supra* note 97, at 35-36 (2021). We know that bankruptcy professionals like to think of themselves as going to war, but they're wrong, at least usually.

[149]Because those data can be used across several different cases, courts will probably consider the purchase price of the data to be overhead. But if courts wanted to encourage the purchase of data sets, they should consider allowing the expense, perhaps as a part of a local rule for larger cases.

3. *The big gun: A court could require professionals, as part of the employment application process to provide data-driven budgets, using prior cases as anchoring points.*

Sure, it's nice to think that professionals will want to use benchmarks when they are talking their partners into letting them do work for which they will get paid down the line. It's also nice to think that partners would prefer to find ways to recover every single billed dollar of fees by focusing on cost-effectiveness at the get-go. But, due to inertia, those nice thoughts might not become reality. What would cause professionals to mine such readily available data? Rules. Courts could create local rules that require firms to mine data as part of their employment applications under 11 U.S.C. § 327, as well as during the budgeting process and as part of their fee applications. Those local rules could limit this data-mining requirement to the bigger cases, in order to limit the costs of acquiring and parsing the data. On the theory that judges don't enjoy combing through timesheets, a local rule that gives them some billing context should make their jobs easier. Such a rule could also help professionals use that context proactively to shape and explain their own decisions.

What might this particular type of nudge do to facilitate fee reviews? Here's an example of how such comparisons might work:



The goal is to find a way to show professionals (and their clients, and—for estate-paid professionals—the judges) where a given professional's work fits within a zone of reasonableness. When particular tasks within a matter are more complicated than the industry average, the professional can explain the complexity. The professional could even take the position that a higher charge is justified for this more complicated task. And when particular tasks are less complicated than the industry average—when they took too long or were performed by the wrong level of professional—the professional can

choose whether to write down or write off that work before filing the fee application.[150]

V. OTHER USES FOR DATA: MORE NUDGES CAN HELP PROFESSIONALS MAKE BETTER CHOICES

We believe that anchoring helps the court and the estate-paid professionals. But we also believe that there are other "nudges" that can catch billing errors as they occur, in order to fix them contemporaneously.

A. Reality Checks on Raw Billing Data

One such nudge would have pop-ups on the raw billing data at the stage of timesheet entry,[151] and again when it comes time to turn time entries into a fee application. A pop-up at the time-entry stage could nudge someone to provide a more complete narrative, and a pop-up at the fee application drafting stage could flag the number of rounded hours, repeated narratives, or other billing hygiene issues. These interventions could help to identify those colleagues who need to be trained (or re-trained) in best billing practices. Just to give you a glimpse into how fee examiners think,[152] professionals who submit fee applications could save themselves some pain by scrubbing their time sheets for triggers like "rounded hours" (entries that end in X.0 or X.5); the word "and" ("prepare and participate"; "travel to and attend"); vague words such as "attention to" or "work on"; or semi-colons that don't have tenths of hours associated with the various entries. For example, there could be a pop-up that says, "X percent of your time has been recorded in increments of .0 or .5. Have you checked to make sure that these time entries have accurately recorded the work?" There could be another pop-up that says, "these time entries have descriptions linked by the word 'and' or a semi-colon; please check to ensure that the entries have not been block-billed."[153] It's

[150]We can see a world in which skilled fee examiners could morph into fee advisors, shifting their help to professionals before the professionals file their fee applications.

[151]For those bankruptcy professionals who are frustrated by their non-bankruptcy colleagues' lack of billing hygiene, those pop-ups could be a game-changer.

[152]Or, at least, how the two of us think.

[153]For a nice description of why block-billing makes it difficult for a court to review time entries for compliance with 11 U.S.C. § 330, see *In re* Britt, 551 B.R. 522, 524-25 (Bankr. N.D. Fla. 2016) (disallowing some of the oversecured creditor's attorney fees based on block-billing). Whether a court calls the grouping together of time "block-billing" or "lumping," caselaw is replete with examples of courts pointing out time entries that don't allow the court to determine reasonableness of some or all of the tasks.

> [There] are six different time entries from two attorneys relating to preparation of the original proof of claim. It is not unreasonable to expect a creditor[']s staff or non-professional staff to draft the proof of claim form and furnish the documentation. The original proof of claim was on the official form and includes as attachments copies of the original documents. It is not clear why an unusual amount of time would be needed for this task. The time entries which reference this proof of

relatively easy to use artificial intelligence to link certain tasks and highlight the need for more specificity. For example, a time entry that begins with the phrase "telephone call" could have a prompt asking the professional to enter information about with whom the professional was speaking and the general subject matter of the call.[154] Both of us fantasize about time entry pop-ups that, when confronted with "attention to" or "work on," passive-aggressively respond with something akin to "can you please open up a thesaurus and find an actual verb to use here?"[155]

B. Are there too many cooks in the kitchen?

Pop-ups or other nudges might also help to identify whether the right mix of professionals is involved in a task. The number of professionals who attend meetings and go to hearings can—in the larger cases—involve ten or more professionals from the same firm. Sometimes, a matter does need a lot of cooks in the kitchen.[156] We don't suggest that a law firm should minimize

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> claim total 6.4 hours but are lumped with other tasks. The court would be reduced to guessing if it tried to segregate these services by the specific task.

In re Wanecheck, 349 B.R. 836, 844-45 (Bankr. E.D. Wash. 2006) (footnotes and citation omitted) (reducing a $30,000 claim for fees to $12,000).

[154] Because they impede the Court's ability to clearly understand the nature of the work for which compensation is sought, certain billing practices are unacceptable. For instance, bare billing entries for activities like a "telephone call" or a "conference" which do not offer any context or explanation for the charges do not enable the Court to assess the necessity of the services rendered. Likewise, the practice of "lumping"—which is to say, some lawyers' habit of including several different activities into a single time entry—may prevent the Court from determining whether the time spent on each individual activity was reasonable or necessary. These opaque billing practices, and others like them, are generally suspicious and, in the absence of a compelling explanation, are subject to disallowance.

These considerations are not, however, inflexible. Counsel for debtors must balance the requirements of providing sufficient detail to enable the court and parties to be reasonably informed about the services performed against the cost and inefficiency of separating every single task no matter how small the time or how related the entries may be to one another. At the same time, during the course of a case there are also matters that clearly invoke strategic considerations that should be kept confidential when, for example, negotiations or contested matters are being litigated. As noted, a billing entry that merely states "telephone call" is not sufficient because the reader cannot ascertain from the description the subject matter or even whether the call is related to the instant case. A description that states, for example, "telephone call with Debtor Jane Doe to discuss potential settlement parameters for preference demands" would provide information permitting a conclusion the call was related to the instant case and an understanding of the general subject matter without disclosing potentially strategic information.

In re Harry, 520 B.R. 268, 275-76 (Bankr. W.D. Wis. 2014) (citations omitted).

[155] But stated more politely.

[156] One author has observed:

> [M]any cases need staffing by multiple attorneys. Clients need to recognize that staffing requirements are dependent upon what one court has called "a particular

staffing by leaving out important team members. Rather, we suggest that a firm should think carefully about how to staff the team based on each person's expertise and value added. A law firm can articulate the value of multiple-member teams by explaining the reasons for using each person.[157]

> Billing judgment is reflected in staffing a file in a manner that efficiently provides the most cost effective representation necessary to a client's interest without redundant, duplicative, and unnecessary services. At the outset, it is noted that multiple attorneys appeared to monitor hearings by telephone even though there was no apparent reason for such participation, especially because audio recordings and transcripts were ordered for these same proceedings. The need for this duplication in effort is not adequately explained . . .
>
> [National law firm]'s billing also reflects that attorneys were involved in ministerial tasks such as: gathering, coordinating, and providing documents to local counsel; discussing filing practices with local counsel; attention to notices; and preparation of exhibits. No information has been provided to justify why it was necessary to have attorneys performing many of the functions identified in the itemization. Paralegals are used for only a fraction of the total time billed. . .. Based simply upon the number of attorneys and hours billed leads to the inherent conclusion that there was a distinct lack of billing judgment exercised by [national law firm] in its representation of [its client].[158]

Sometimes, though, a profession's decision to leave some people out of a meeting or a hearing will reflect good billing judgment. If a question arises

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> case's nuances and idiosyncrasies" and "vary in direct proportion to the ferocity of her adversary's handling of the case." A district court has stated that "zealously representing one's client does not include drawing straws to determine which attorney should attend crucial conferences, meetings, hearings and trial." The court explained that "the defendants' use of three and four attorneys may not, in itself, have contributed to the plaintiffs' need for representation by multiple counsel."

WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 103-04 (1996) (citations and footnotes omitted).

[157]And we should keep some protocols brought about by the COVID-19 pandemic, such as video conferences and certain Zoom hearings, to offset some of the costly inefficiencies brought about by the "too many cooks" phenomenon. But our point is that the lead partner in a case should avoid creating a Noah's Ark staffing model.

[158]*Matter of* Fansteel, Inc., No. 16-01823, 2017 WL 1929489, at *5 (Bankr. S.D. Iowa May 9, 2017) (citations omitted).

that needs an answer from someone who is not part of the group, a break for a phone call, text, or email can serve to get the answer.

Based on our experience consulting with law firm management teams, reviewing academic research on professional responsibility, engaging in less-formal interactions with law firm leaders and, most important, analyzing the data, it has become clear to us that some classes of non-"rainmaker" attorneys are more likely to be part of the "superfluous" crowd in meetings or at hearings. Specifically, this crowd includes: (i) "service partners" who are generalists without a differentiating practice specialty; (ii) newly-minted partners who have yet to develop an independently viable practice, (iii) very senior attorneys in the twilight of their careers trying to hang on at a firm; and (iv) senior associates who are being evaluated for promotion or who are mainly compensated based on their billable hours. We don't mean to imply that these categories of legal professionals can't deliver exemplary value; our point is that sometimes the data points say that they don't. Our aim is to find ways to manage the crowd up front so that the fee application stage goes more smoothly.

C. Whether the Cooks in the Kitchen Should Assign Some Work to Kitchen Assistants

In addition to the "too many cooks" problem is the "what kind of cook" problem: Using a partner when a lower-billing professional or an administrative assistant is a better choice. As the court in *In re Wanecheck* noted as it reduced some fees:

> Compounding the problem of lumping is the problem that a number of seemingly simple administrative matters are included in the billing entries. These matters might commonly be performed by non-professional staff or even employees of the creditor. For example, there are five different time entries from three different attorneys relating to preparation of a notice of appearance[,] a task commonly delegated to clerical staff.
>
> Likewise there are six different time entries from two attorneys relating to preparation of the original proof of claim. It is not unreasonable to expect a creditor[']s staff or non-professional staff to draft the proof of claim form and furnish the documentation. The original proof of claim was on the official form and includes as attachments copies of the original documents. It is not clear why an unusual amount of time would be needed for this task. The time entries which reference this proof of claim total 6.4 hours but are lumped

> with other tasks. The court would be reduced to guessing if it tried to segregate these services by the specific task.[159]

We know that we're harping on this point, but a firm's own data can help the assigning partner decide who should do which tasks and create a ballpark for how long that task should take.

D. Let's not forget the creditors who are seeking attorney fees

It's not just the professionals for a debtor-in-possession or a committee that could benefit from the use of data. Creditors seeking 11 U.S.C. § 506(b) compensation could also benefit from front-end benchmarks and pre-fee-request editing. After all, there is always a risk, when someone else may be footing the bill, that a client's natural cut-off point for the amount of work to be done is blurred or erased entirely, leading to the phenomenon of what one court called "[t]horoughness to the point of overzealousness."[160] Depending on the contentiousness of a matter, thoroughness on one side can lead to the equal and opposite reaction of overlawyering on the other side—the phenomenon of "litigation by platoon."[161] As with Section 330 reviews, courts are comfortable reducing professional fees sought by creditors when those fees don't reflect billing judgment.[162]

E. Problems with this more data-driven approach

As with any other proposed solution to the mismatch of who's asking for work to be done with who's paying for that work, we want to find ways for legal professionals to keep the concept of excellent billing judgment in mind. That way, the senior legal professionals who are managing a matter will be prepared to troubleshoot challenges in real time. But our solution isn't perfect. Here are some problems with our idea that we can foresee.

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[159] *In re* Wanecheck, 349 B.R. 836, 844-45 (Bankr. E.D. Wash. 2006) (footnotes and citation omitted) (reducing a $30,000 claim for fees to $12,000).

[160] *In re* Jemps, Inc., 330 B.R. 258, 263 (Bankr. D. Wyo. 2005).

[161] William G. Ross, The Honest Hour: The Ethics of Time-Based Billing By Attorneys 105 (1996) (citation and footnote omitted) ("These wars of attrition, of course, can escalate until both sides are using an absurdly large number of attorneys—what one lawyer has called 'litigation by platoon.'").

[162] *Fansteel*, 2017 WL 1929489, at *3 (citations omitted) (applying discretion in reaching a conclusion regarding a creditor's 11 U.S.C. § 506(b) fee request in order "to prevent creditors from 'fail[ing] to exercise restraint in the attorneys' fees and expenses they incur, perhaps exhibiting excessive caution, overzealous advocacy and hyperactive legal efforts[.]'"); *see also In re* Lund, 187 B.R. 245, 254 (Bankr. N.D. Ill. 1995) ("As piling on is not permitted by the rules of football, neither is it allowed under § 506(b) to the taxing of an oversecured creditor's attorneys' fees to a debtor."); *see id.* at 257 (calling 46 hours to prepare a TRO "overkill").

1. *What happens when the data provide mixed information?*

It's possible for a law firm's own data to be misunderstood.[163] For one thing, if the lead partner chooses the wrong cases for comparison's sake, then the old adage of "garbage in, garbage out" will apply. Finding too few comparisons risks not having a large enough sample size to have any confidence in what the data are saying. Finding too many comparisons risks being bombarded with so much information that making sense of it is well-nigh impossible. For example, fees for the negotiation part of developing a complex reorganization plan can range from $25,000 to $250,000. A swing that wide is not particularly useful. Finding the wrong comparisons means that the data provided will be contextually wrong.

But here's some good news. Those selfsame humans who have been chosen for a case because of their expertise will still have their own judgment to help them interpret what data they get. It is important for senior legal professionals to remember that legal analytics is a tool, not an end unto itself. Legal spend data, much like a circular saw, can be incredibly effective and useful when used adeptly but dangerous when used without thinking. As with any other tool, the more practice and experience that legal professionals develop working with legal analytics data, the more effective the legal spend data can become in improving and informing good billing judgment.

2. *What about the problem of dueling data?*

Let's assume that Law Firm A queries its database to find out how much a plan confirmation hearing should cost and who should attend that hearing. Its data indicate that the cost of a plan confirmation hearing ranges from $8,000 to $90,000. Law Firm B searches its own database and comes up with a range from $3,000 to $25,000. These figures are so far apart that something seems amiss. Relying on a single firm's data will distort its usefulness, because a firm can develop habits over a series of cases that might make its overall fees inflated. Focusing on the bottom-line price only, without paying attention to who was doing what and how long that "what" took,[164] will skew the data, especially when those data are also affected by firm size, geography, rate differences, and experience levels.

We can think of a couple of easy fixes here. One is for each firm to go

[163] Legal spend data interpretation can be tricky, especially for the self-assessed "math-phobic" lawyers who went to law school to avoid taking any more quantitative classes. *See, e.g.*, Erin Fuchs, *The 8 Worst Reasons to Go to Law School*, INSIDER (Oct. 21, 2012), https://www.businessinsider.com/bad-reasons-to-go-to-law-school-2012-10.

[164] Here's the right way to price matters and set a budget: Determine the likely tasks that the matter will require and then focus on how long each task should take when performed by the right level of professional. The reason is simple. All things being equal—in other words, equal competence of the professionals performing a task of equal scope and complexity—the task should take roughly the same amount of time no matter how large the firm is or where it's located.

back through its own data and add data fields that amplify an analysis, like a per-task cost, or a categorization of the types of cuts (excessive research, overstaffing, duplication of effort, and the like) that courts have ordered in its fee applications. Not only does that additional information indicate how much the work is "really" worth, but it can help a firm diagnose recurring problems. Perhaps Law Firm A experiences a 35 percent cut for its vague entries in one fee application. If that magnitude of cut occurs across several cases' fee applications, the firm's management can institute procedures for decreasing the number of vague entries that make their way into fee applications.[165] And, naturally, the second fix is our second-order suggestion above: Purchase data that derive from fee applications of other law firms in other cases.[166]

3. *Using data won't get rid of cognitive errors ("This case is so different!")*

Humans—and lawyers are human—tend to disregard data that conflict with their beliefs. They may disregard data that can signal a million-dollar swing on how much a chapter 11 case should cost or a ten-thousand-dollar swing on how much attending a hearing should cost. Our beliefs are usually predicated on our experience. Indeed, lawyers reflexively rely on decades of experience to offer advice, even in the face of novel issues or wildly fluid circumstances. Perhaps that's why they risk mining their own data.

But in facing new situations, data can help. When properly collected, mined, and analyzed, big data will aggregate the lessons of experience. We know that data shouldn't replace judgment; instead, lawyers should use data to augment and inform their judgment. Some of that judgment will include the applicability of the data set itself. We just worry about lawyers who reject data-mining because of their instinct that a particular case is so different from prior cases that the data won't help them exercise billing judgment.

Sure, bad data, coupled with the wrong anchoring information,[167] can throw even the most well-intentioned assigning partner off the right track. But that isn't a justification for ignoring all data. Although we hate to resort to this as a justification for our approach, we will: *not* using data hasn't helped. Courts are still reducing some professionals' fees[168] when those professionals push the envelope. That disallowed work isn't recoverable elsewhere. Time zeroed out is time wasted. Using data—and making sure to use

[165] *See supra* notes 151-155 and accompanying text.

[166] *See supra* notes 145-149 and accompanying text.

[167] *See supra* notes 127-131 and accompanying text.

[168] We haven't been talking about expenses here, but using data to show what's reasonable in terms of expenses would be useful, too. For example, "X firms working on this size of chapter 11 case have seen their fees cut by X% when staying at the Four Seasons and eating at Del Frisco's" might help to remind professionals to monitor their hotel and food choices.

the right data—simply has to be better than what many professionals are doing now.

VI. CONCLUSION

There's a gap between billing for legal work and getting paid for that work. When there is a disconnect between who "approves" the work[169] and who pays for it (the estate), there's a risk that a court might cut the fee application based on a perceived lack of billing judgment.[170] We recognize that there is often a months-long lag between time entries and fee applications, and another lag between fee applications and the approval of fees. It's far better for professionals to find ways to be proactive. If from the start, they can design more efficient billing behavior, their odds of recouping the fees for their work will go up dramatically. A data-driven approach can bridge the gap so that lawyers get paid for every reasonable hour billed.

[169]Not that most first-time debtors or first-time committee members know what to ask their lawyers to do for them.

[170] Bankruptcy attorneys are not entitled to compensation merely because time recorded was actually expended. "Billable hours do not necessarily translate into compensable hours." Professionals paid by the estate should evaluate how their work will advance the interests of the estate or unsecured creditors, and whether other professionals in the proceeding have already adequately addressed identical issues.

In re Natural Pork Prod. II, LLP, No. 12-02872, 2013 WL 8351979, at *6 (Bankr. S.D. Iowa March 12, 2013) (citation omitted).

Faculty

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