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Winter Leadership Conference

To Use or Not to Use: Ethics and the Use of AI in the Legal Industry

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NAVIGATING THE ETHICAL DIMENSIONS OF ARTIFICIAL INTELLIGENCE IN BANKRUPTCY PRACTICE

WINTER LEADERSHIP CONFERENCE

FAIRMONT SCOTTSDALE PRINCESS
NOVEMBER 30-DECEMBER 2, 2023

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HORAN

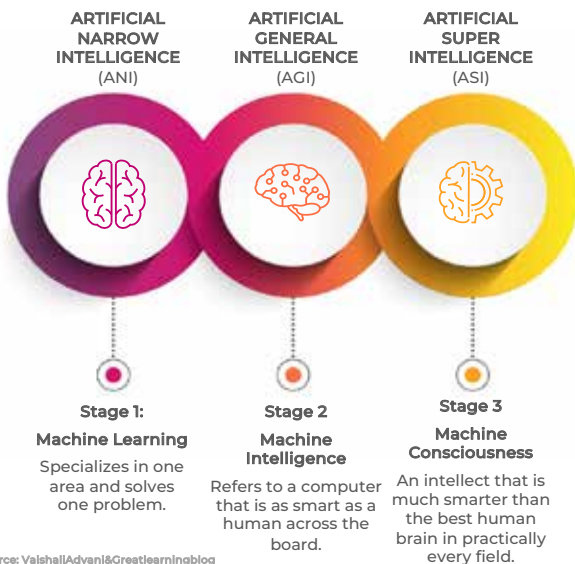
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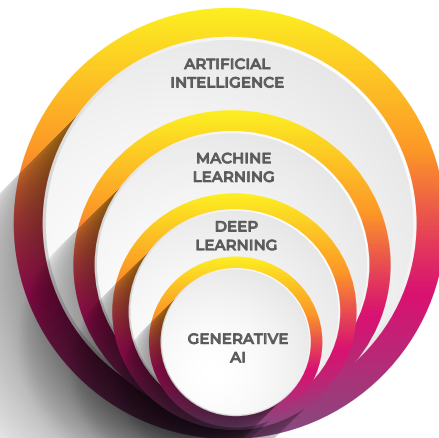
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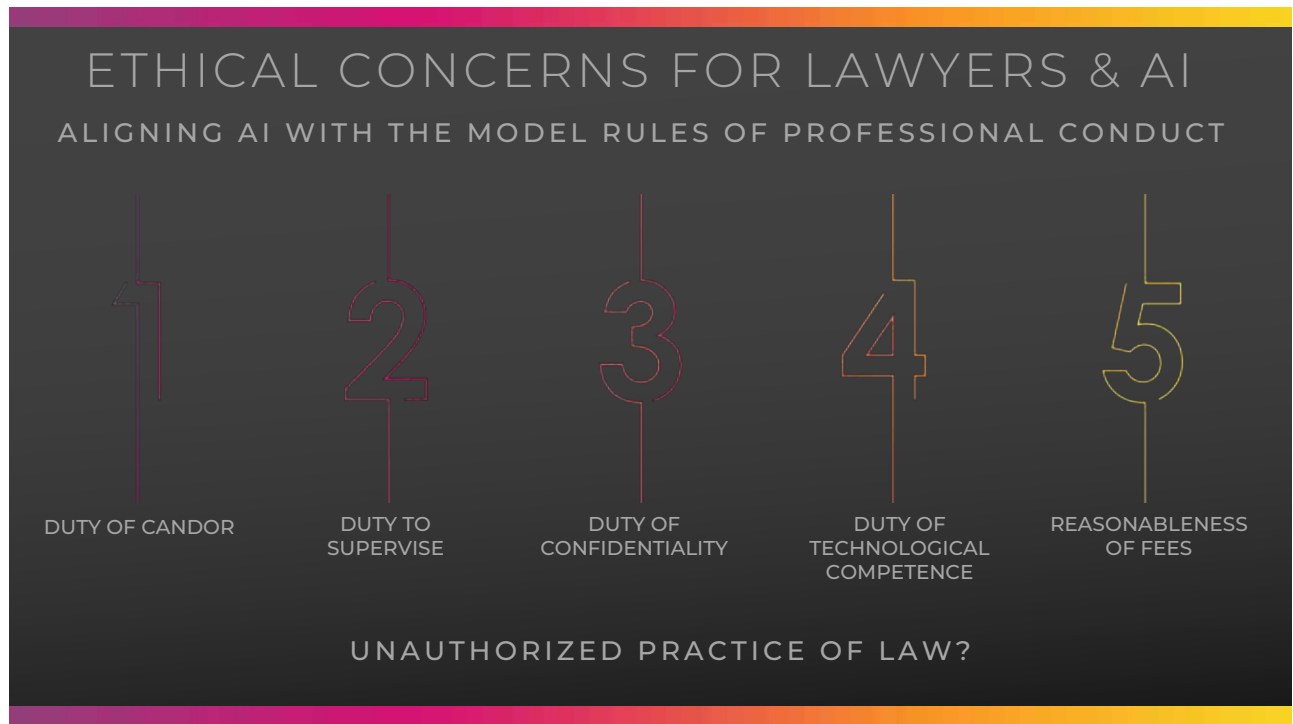
ARTIFICIAL INTELLIGENCE: WHAT IS IT?

3 TYPES OF ARTIFICIAL INTELLIGENCE



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USE OF ARTIFICIAL INTELLIGENCE IN THE LEGAL INDUSTRY



EMERGING REGULATORY STANDARDS FOR AI

- Bias & skewed training data
- Lack of transparency
- Job elimination
- Discriminatory results
- Data security
- Personal privacy



AMERICAN BANKRUPTCY INSTITUTE

ABI WINTER LEADERSHIP CONFERENCE 2023 FAIRMONT SCOTTSDALE PRINCESS SCOTTSDALE, ARIZONA

DECEMBER 2, 2023

Course Title: TO USE OF NOT TO USE: ETHICS AND THE USE OF AI IN THE LEGAL INDUSTRY

Summary: Many industries have incorporated artificial intelligence (AI) into operations over the last several years, including the legal industry. This panel will discuss the current status of the use of AI in the legal industry and will explore the ethical implications and obligations of practitioners when using (or not using) AI. Is AI the answer to increasing access to justice? What are lawyers' ethical obligations when using (or not using) AI? How have lawyers gotten into trouble when using AI?

Presented by:

- The Honorable Thomas M. Horan, United States Bankruptcy Court, District of Delaware
- Ericka F. Johnson, Esq., Director and Chair of the Business Restructuring & Liquidations Practice, Bayard, PA
- Professor Gary E. Marchant, Regents Professor of Law; Faculty Director, Center for Law, Science and Innovation, ASU Sandra Day O'Connor College of Law
- Joseph R. Tiano, Jr., Esq., Founder and CEO, Legal Decoder, Inc., Former Partner, Pillsbury Winthrop Shaw Pittman, LLP

Agenda for Live Presentation (11:00 am – 12:00 Noon):

- ▶ The Growing Role of AI in the Legal Industry
- ▶ A Judge's Perspective on the Use of AI in bankruptcy proceedings
- ▶ Business and Legal Ethical Considerations When Using AI & Data Analytics
- ▶ How Practitioners are Embracing AI in their Practices
- ▶ Preparing for the Emerging Regulatory Standards Governing AI

Educational Materials:

1. Ericka Johnson, Ethical Rules Related to the Use of Artificial Intelligence in the Legal Industry
2. Nancy B. Rapoport & Joseph R. Tiano Jr., Annotated Outline on ABA Ethics Rule 1.5 Reasonableness of Fees (last updated 2022).
3. Nancy B. Rapoport & Joseph R. Tiano, Jr., Reimagining "Reasonableness" Under Section 330(a) in a World of Technology, Data, and Artificial Intelligence, 97 AM. BANKR. L.J. 254 (2023) (peer-reviewed), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4515196.
4. 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), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525660.

5. Nancy B. Rapoport & Joseph R. Tiano, Jr., Legal Analytics, Social Science, and Legal Fees: Reimagining “Legal Spend” Decisions in an Evolving Industry, Georgia State Symposium on Legal Analytics, 35 GA. ST. U. L. REV. 1269 (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418465.
6. 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. AFFAIRS (2020). Available at: <https://scholarship.law.upenn.edu/jlpa/vol6/iss2/2>
7. Gary Marchant and Whitney Stefko Dover, *Law Practice Disruptors: Large Language Models and AI*, ARIZONA ATTORNEY MAGAZINE (October 2023). Available at <https://www.azattorneymag-digital.com/azattorneymag/library/item/202310/4137243/>
8. Nancy B. Rapoport & Joseph R. Tiano, Jr., *Billing Judgment*, 96 AM. BANKR. L.J. 311 (2022) (peer-reviewed), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172409
9. Joseph R. Tiano Jr., Nancy B. Rapoport, and William J. Siroky, *The Specter of Malpractice: When Law Firm General Counsel and Risk Management Professionals are Confronted with Potential Malpractice Claims and Ethics Violations*, 81 Md. L. Rev. Online 1 (2021), Available at: <https://digitalcommons.law.umaryland.edu/endnotes/76>

**Ethical Rules Related to the Use of Artificial Intelligence
in the Legal Industry**

Materials, in part, from ABI Mid-Atlantic Presentation in 2018 by:

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Ethical Rules Related to the Use of Artificial Intelligence in the Legal Industry

a. Rule 1.1 – Duty of Competence

i. Text:

1. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ii. In 2012, the ABA amended Rule 1.1 to emphasize that the duty of competence requires that an attorney have a reasonable understanding of the risks and benefits of relevant technology.
- iii. Comment 8 - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
- iv. In 2016, Florida became the first state to require attorneys to complete technology training. North Carolina adopted this requirement in 2019. Effective July 1, 2023, New York attorneys became required to take at least one CLE credit related to cybersecurity, privacy, and data protection every two years.

v. Cases:

1. New Hampshire Bar Association Opinion #2012-13/4:

As per Rule 1.1, “a competent lawyer using cloud computing must understand and guard against the risks inherent in it...The facts and circumstances of each case, including the type and sensitivity of client information, will dictate what reasonable protective measures a lawyer must take when using cloud computing...Competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes.”

2. New Hampshire Bar Association, Ethics Committee Opinion 2008-2009/4:

In general, lawyers should be reasonably informed about the types of metadata that may be included in documents when they are transmitted electronically and the steps that can be taken to remove it, if necessary. Lawyers should stay abreast of technological advances and potential risks of transmission through appropriate training and education. In the Committee’s view, lawyers should acquire, at the very least, a basic understanding of the existence of metadata embedded in electronic documents, the features of the software they have used to generate the document and any practical measures that may be taken to limit the likelihood of transmitting metadata or to purge the documents of sensitive information.

Of course, this does not mean that lawyers must necessarily purchase expensive computer software to ensure that metadata is removed or “scrubbed” from documents in all cases. In most circumstances, lawyers can limit the likelihood of

transmitting metadata containing confidential information by avoiding its creation during document drafting or subsequently deleting it, as well as by sending a different version of the document without the embedded information through hard copy, scanned or faxed versions.

3. Vermont Bar Association, Ethics Opinion 2009-1:

The Bar Associations that have examined the duty of the sending lawyer with respect to metadata have been virtually unanimous in concluding that lawyers who send documents in electronic form to opposing counsel have a duty to exercise reasonable care to ensure that metadata containing confidential information protected by the attorney client privilege and the work product doctrine is not disclosed during the transmission process. See Alabama Ethics Op. RO 2007-02; Arizona Ethics Op. 07-03; Colorado Ethics Op. 119 (2008); DC Ethics Op. 341 (2007); Florida Ethics Op. 06-2; Maryland Ethics Op. 2007-09; New Hampshire Ethics Op. 2008-2009/4; New York City Lawyers Ass’n Ethics Op. No. 738 (2008); New York State Ethics Op. 782 (2004).

A number of other ethics opinions note that a sending lawyer has tools available to prevent against the risk of disclosing client confidences when electronic documents are transmitted to opposing counsel, but do not affirmatively address the scope of the sending lawyer’s duty to take these steps. See Pennsylvania Formal Ethics Op. 2007-500; ABA Formal Ethics Op. 06-442.

This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file. This duty has its roots in VRPC 1.1, which requires lawyers to provide competent representation; VRPC 1.3, which requires lawyers to exercise diligence; and VRPC 1.6, which requires lawyers to protect confidential client information.

The Professional Responsibility Section notes that various tools are available to comply with this duty to exercise reasonable care, including programs to “scrub” metadata from electronic documents before they are dispatched, converting electronic documents to a read-only, PDF format before transmission, or insisting on transmission of sensitive documents only on paper. The steps that should be taken by the sending lawyer in specific instances depend on the circumstances.

Reviewing the language of the Vermont Rules of Professional Conduct quoted above, the Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file’s content, including metadata. A rule prohibiting a search for metadata in the context of electronically transmitted documents would,

in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel.

4. Cloud Computing for Lawyers, TSUM04 ALI-CLE 1 (2012) - California State Bar, Formal Ethics Opinion 2010-179 (Dec. 2010):

Whether an attorney violates his or her duties of confidentiality and competence (Rules 1.1 and 1.6) when using technology to transmit or store confidential client information will depend on the technology being used and the circumstances surrounding such use. Before using a particular technology while representing a client, an attorney must take appropriate steps to evaluate:

- the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security;
- the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information;
- the degree of sensitivity of the information;
- the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product;
- the urgency of the situation; and
- the client's instructions and circumstances, such as access by others to the client's devices and communications.

5. Protecting Living Fossils: Crafting Technology Ethics Standards for the District of Columbia, 30 Geo. J. Legal Ethics 933 (Fall 2017):

a. *In re Reisman*, 2013 WL 5967131 *1 (Ma. St. Bar Disp. Bd. 2013)

The case of *In re Reisman* depicts a lawyer who failed to recognize his own deficiencies and failed to consult someone familiar with the technology. In what could be considered a “light” e-discovery case, the disciplinary board for the state of Massachusetts sanctioned one of its lawyers in 2013 for failing to competently preserve data pursuant to an injunction. In 2006, an employee of the lawyer's client brought his former work computer, supplied by and owned by his previous employer (the NSA), into the offices of his new employer, where he copied files of a confidential nature from his old computer onto his new one. Crucially, the lawyer instructed his client that it was acceptable for its employee to erase any files from the hard drive of his current work computer that had not originated with his first employer. The lawyer did not understand that the whole hard drive required preservation due to an existing court order granting access to the computer to an NSA investigator.

Although Massachusetts did not amend its rules to require technological competency until 2015, the Board of Bar Overseers Office of the Bar Counsel analyzed this case much as it might under a technological competence analysis, finding, for instance, that the sanctioned attorney had violated Rule 1.1.

The court faulted the lawyer for “handling a matter that he was not competent to handle without adequate research or associating with or conferring with experienced counsel, and without any attempt to confirm the nature and content of the proposed deletions.”

b. *In re Collie*, 749 S.E.2d 522 (S.C. 2013).

In 2013, the state of South Carolina sanctioned a member of its bar for numerous transgressions that flowed from her failure to keep up with prevailing technology. It was discovered by the state Supreme Court that a woman representing herself in a 2012 case had not updated her contact information with the court, which in turn led to a series of missed communications from the court, as she failed to check her incoming email. Though she had been a member of the bar for more than thirty years, she had never practiced in the state except for the act of representing herself in the instant litigation. The court did not find that her semi-retired status was a mitigating factor.

The court's analysis reinforces the notion, expressed most strongly in the California Bar Opinion, that the duty to remain technologically competent (Rule 1.1) is a blanket duty that applies to all practicing lawyers even when the disciplined lawyer could not have harmed any party other than herself.

The lawyer in this case was handed an interim suspension by the court for failing to maintain and monitor an email account.

6. The Attorney’s Ethical Obligations with Regard to the Technologies Employed in the Practice of Law, 29 Geo. J. Legal Ethics 849 (2016) - State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010)

The Standing Committee on Professional Responsibility evaluated the ethical duties related to technology that arise from a fairly common law firm arrangement-law-firm issued laptops that are used inside and outside the office and connected to public internet connections such as those found in coffee shops.

The committee concluded, “transmission of information through a third party [ISP] reasonably necessary for purposes of the representation should not be deemed to have destroyed the confidentiality of the information.” (Rule 1.6) A lawyer may “meet the duty of [technological] competence (Rule 1.1) through association with another lawyer or consultation with an expert. Such expert may be an outside vendor, a subordinate attorney, or even the client, if they possess the necessary expertise.” Although even when relying on experts, “[t]his consultation or association ... does not absolve an attorney's obligation to supervise the work of the expert under [the duty of competence], which is a non-delegable duty belonging to the attorney who is counsel in the litigation.

The committee outlines several factors a lawyer should consider before using a specific technology to meet his or her duties of confidentiality and competence. All attorneys, regardless of the size or nature of their practice should have the “ability to assess the level of security afforded by the technology:”

First, the practitioner should consider “how the particular technology differs from other media use.”

Second, the practitioner should evaluate “[w]hether reasonable precautions may be taken when using the technology to increase the level of security.” If an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced.” Further these steps are “readily available and relatively inexpensive.” Additionally, the committee recommended enabling password features on laptops and PDAs to secure client information in the event of loss or theft.

Third, the lawyer should evaluate “who is permitted to monitor the use of the technology, to what extent and on what grounds.” For example, the lawyer should determine that the technology's use or license agreements “do not permit the third party to disclose confidential client information to others or use such information for any purpose other than to ensure the functionality of the software or that the technology is not being used for an improper purpose.” Additionally, “when a lawyer considers entering into a relationship with [] a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard.” Moreover, “[i]n connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality.”

Finally, the lawyer should consider the sensitivity of the information, the “[p]ossible impact on the client of an inadvertent disclosure of privileged or confidential information or work product,” the necessity and urgency of using the technology, and client instructions and circumstances.

b. Rule 1.4 – Duty to Communicate

i. Text:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

- ii. A lawyer must consult with the client about how the lawyer intends to represent the client, including discussing risks and benefits of the use of artificial intelligence (if using it), explaining why the lawyer will not be using it if the technology is otherwise available, obtaining the client's informed consent to use or not use artificial intelligence.
- iii. Comment 5: The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

iv. Cases:

1. Vermont Bar Association, Ethics Opinion 2003-03:

A lawyer may engage an outside contractor as a computer consultant to recover a lost data-base file, which contains confidential client information so long as: The lawyer clearly communicates the confidentiality rules to the outside contractor; the contractor fully understands the confidentiality rules and embraces the obligation to maintain the confidentiality of any information obtained in the course of assisting the lawyer; and the lawyer determines that the contractor has instituted adequate safeguards to preserve and protect confidential information. If a significant breach of confidentiality should occur by the outside contractor, the law firm would be obligated to disclose such a breach to the client.

For purposes of the Vermont Rules and in response to the pending inquiry, we believe that the requesting lawyer should follow a three-step process:

- 1. The lawyer must clearly explain the confidentiality rules to the contractor;

2. The contractor must fully understand the confidentiality rules and embrace the obligation to maintain the confidentiality of all information obtained in the course of assisting the lawyer.

3. The lawyer must determine that the contractor has instituted adequate safeguards to preserve and protect confidential information.

How a lawyer is to assure that a nonlawyer understands the obligation of confidentiality is not specifically spelled out in the Vermont Rules. Nonetheless, we believe that a lawyer would satisfy the reasonableness requirements of Rule 5.3 if the lawyer obtained a written acknowledgment from an outside contractor that the contractor understands the confidential nature of the material and understands his or her duty not to keep any information gained in strictest confidence. If a breach of confidentiality were to occur, RPC 1.4 requires a lawyer to explain a matter reasonably necessary to permit the client to make informed decision regarding representation. Thus, if the breach would affect the outcome of the client legal matter in any fashion, the lawyer would be obligated to tell the client of the breach by the nonlawyer.

2. Jackson v. Lowe's Companies, 2016 WL 6155937:

Plaintiff's counsel did not serve a copy of the motion to withdraw on the Plaintiff as required under Rule 1.4 using traditional methods of service. Plaintiff's counsel emailed the motion to withdraw to the Plaintiff and sent him text messages telling him to check his email. Nonetheless, the Court finds that Plaintiff's counsel properly served the Plaintiff.

Given the extraordinary occurrences here, including the fact that the Plaintiff moved to the Dominican Republic and refused to provide his new address; that the attorneys allegedly do not know the only mailing address in New York where the Plaintiff still receives mail; and that Plaintiff's counsel has previously corresponded with the Plaintiff via email; the Court finds that Plaintiff's counsel's efforts to serve the Plaintiff through a known email address are sufficient to provide notice under Rule 1.4.

3. Cloud Computing for Lawyers, TSUM04 ALI-CLE 1 (2012) - ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 11-459 (August 4, 2011):

“Duty to Protect the Confidentiality of E-mail Communications with One's Client.”
(Rules 1.4 and 1.6)

The opinion describes a situation where the lawyer has reason to believe that his or her client is transmitting confidential information via email in a situation where the client's employer has a monitoring system in place, such as a keylogger system, where there is a risk that the employer could access the client's confidential information. While this opinion on first glance covers the use of email only in

workplace scenarios, the last paragraph of the opinion potentially broadens the scope to expand to other lawyer client communications. The opinion states:

[a] lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

4. VA Legal Eth. Op. 1872 (Virginia Legal Ethics Opinions), 2013 WL 6151724:

If the communication will be conducted primarily or entirely electronically, the lawyer may need to take extra precautions to ensure that communication is adequate and that it is received and understood by the client.... A lawyer could permissibly represent clients with whom he had no in-person contact, because Rule 1.4 “in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is what information was transmitted, not how.” On the other hand, one of the aspects of communication required by Rule 1.4 is that a lawyer must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Use of the word “explain” necessarily implies that the lawyer must take some steps beyond merely providing information to make sure that the client actually is in a position to make informed decisions. A lawyer may not simply upload information to an Internet portal and assume that her duty of communication is fulfilled without some confirmation from the client that he has received and understands the information provided.

Finally, the technology that enables a lawyer to practice “virtually” without any face-to-face contact with clients can also allow lawyers and their staff to work in separate locations rather than together in centralized offices. As with other issues discussed in this opinion, a partner or other managing lawyer in a firm always has the same responsibility to take reasonable steps to supervise subordinate lawyers and nonlawyer assistants, but the meaning of “reasonable” steps may vary depending upon the structure of the law firm and its practice. Additional measures may be necessary to supervise staff who are not physically present where the lawyer works.

5. NY Eth. Op. 2014-2 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2014 WL 11395033:

Rule 1.4 requires lawyers to communicate with clients and keep them apprised of the status of their legal matters. Lawyers who use VLOs must be particularly mindful of these ethical obligations, given that the lawyers may frequently be away from the physical location that serves as their business address. Lawyers who use VLOs should also take steps to ensure that they are available to meet with and communicate with their clients and respond promptly to their requests for information.

6. PA Eth. Op. 2010-200 (Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp.), 2010 WL 11221119:

An attorney maintaining a Virtual Law Office (VLO) may have unique communication considerations that attorneys in traditional physical offices do not face. For example, because the lawyer may only communicate with a client by email, the lawyer must take appropriate steps to confirm that the client has read and understands the information provided. (Rule 1.4).

c. Rule 1.5(a) – Attorney may not charge unreasonable fee

i. Text:

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.
- ii. Consider reasonableness of fees if there are more efficient, less expensive methods of accomplishing a task.
- iii. See Nancy B. Rapoport & Joseph R. Tiano Jr., Annotated Outline on ABA Ethics Rule 1.5 Reasonableness of Fees (last updated 2022).

d. Rule 1.6(a) – Duty of Confidentiality

i. Text:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

- ii. Attorneys must assess security of the technology being used.
- iii. 1.6 was modified in 2012 to add a duty in paragraph (c) that: “A lawyer shall make reasonable efforts prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”
- iv. Comment 18: Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.
- v. Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a “reasonable efforts” determination. Those factors include:
 - a. the sensitivity of the information,
 - b. the likelihood of disclosure if additional safeguards are not employed,
 - c. the cost of employing additional safeguards,
 - d. the difficulty of implementing the safeguards, and
 - e. the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).
- vi. Cases:

1. ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 18-483 (2018)

Discussing ethical responsibilities when a data breach and/or cyberattack exposes client confidential information. The opinion concludes that lawyers must employ reasonable efforts to monitor firm systems that are connected to the internet, external data sources, and external vendors providing services related to data and the use of data to promptly identify data breaches. Lawyers have a duty to safeguard and monitor the security of electronically stored client property and information. If there is a breach, lawyers have a duty to notify the client under rule 1.4 in sufficient detail to keep clients reasonably informed with an explanation that permits the client to make informed decisions about the representation.

2. VA Legal Eth. Op. 1872 (Virginia Legal Ethics Opinions), 2013 WL 6151724:

Acting competently to protect the confidentiality of clients' information is more difficult when the information is being transmitted and/or stored electronically through third- party software and storage providers. The lawyer is not required, of course, to absolutely guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to the representation of a client. When a lawyer is using cloud computing or any other technology that involves the

use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination.

3. Massachusetts Bar Association, Opinion 12-03 (March 2012):

A lawyer generally may store and synchronize electronic work files containing confidential client information across different platforms and devices using an Internet based storage solution, such as "Google docs," so long as the lawyer undertakes reasonable efforts to ensure that the provider's terms of use and data privacy policies, practices and procedures are compatible with the lawyer's professional obligations, including the obligation to protect confidential client information reflected in Rule 1.6(a). A lawyer remains bound, however, to follow an express instruction from his or her client that the client's confidential information not be stored or transmitted by means of the Internet, and all lawyers should refrain from storing or transmitting particularly sensitive client information by means of the Internet without first obtaining the client's express consent to do so.

4. North Carolina 2011 Formal Opinion #6 (January 27, 2012):

While the duty of confidentiality applies to lawyers who choose to use technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality. (Rule 1.6)

In light of the above, the Ethics Committee concludes that a law firm may use [cloud computing] . . . if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of [cloud computing] . . . that the lawyer is required to apply when representing clients.

5. New Hampshire Bar Association Opinion #2012-13/4:

Cloud computing comes into wider use, storing and transmitting information in the cloud may be deemed an impliedly authorized disclosure to the provider, so long as the lawyer takes reasonable steps to ensure that the provider of cloud computing services has adequate safeguards...Not all information is alike. For example, where

highly sensitive data is involved, it may become necessary to inform the client of the lawyer's use of cloud computing and to obtain the client's informed consent.

6. Vermont Bar Association, Ethics Opinion 2009-1:

The Bar Associations that have examined the duty of the sending lawyer with respect to metadata have been virtually unanimous in concluding that lawyers who send documents in electronic form to opposing counsel have a duty to exercise reasonable care to ensure that metadata containing confidential information protected by the attorney client privilege and the work product doctrine is not disclosed during the transmission process. *See* Alabama Ethics Op. RO 2007-02; Arizona Ethics Op. 07-03; Colorado Ethics Op. 119 (2008); DC Ethics Op. 341 (2007); Florida Ethics Op. 06-2; Maryland Ethics Op. 2007-09; New Hampshire Ethics Op. 2008-2009/4; New York City Lawyers Ass'n Ethics Op. No. 738 (2008); New York State Ethics Op. 782 (2004).

A number of other ethics opinions note that a sending lawyer has tools available to prevent against the risk of disclosing client confidences when electronic documents are transmitted to opposing counsel, but do not affirmatively address the scope of the sending lawyer's duty to take these steps. *See* Pennsylvania Formal Ethics Op. 2007-500; ABA Formal Ethics Op. 06-442.

This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file. This duty has its roots in VRPC 1.1, which requires lawyers to provide competent representation; VRPC 1.3, which requires lawyers to exercise diligence; and VRPC 1.6, which requires lawyers to protect confidential client information.

The Professional Responsibility Section notes that various tools are available to comply with this duty to exercise reasonable care, including programs to "scrub" metadata from electronic documents before they are dispatched, converting electronic documents to a read-only, PDF format before transmission, or insisting on transmission of sensitive documents only on paper. The steps that should be taken by the sending lawyer in specific instances depend on the circumstances.

Reviewing the language of the Vermont Rules of Professional Conduct quoted above, the Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata. A rule prohibiting a search for metadata in the context of electronically transmitted documents would, in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel.

7. A Lawyer's Duty to Clients, Elect. Disc. L. & Pract. 5622329 (C.C.H.), 2015 WL 5622329 - In re Peshek, Ill. Attorney Registration and Disciplinary Comm'n, Commission No. 09CH89 (Aug. 25, 2009)

A lawyer was found to have violated Illinois Professional Conduct Rule 1.6, based on numerous comments the lawyer posted on her blog regarding her work as a public defender. The disciplinary commission determined that in her work-related blogs, the lawyer disclosed 'confidential information about [the lawyer's] clients and [made] derogatory comments about judges.' Among other things, the lawyer 'referred to her clients by either their first name, a derivative of their first name, or by their jail identification number.'

8. Cloud Computing for Lawyers, TSUM04 ALI-CLE 1 (2012):

- a. *ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 11-459 (August 4, 2011)*

"Duty to Protect the Confidentiality of E-mail Communications with One's Client."
(Rules 1.4 and 1.6)

The opinion describes a situation where the lawyer has reason to believe that his or her client is transmitting confidential information via email in a situation where the client's employer has a monitoring system in place, such as a keylogger system, where there is a risk that the employer could access the client's confidential information. While this opinion on first glance covers the use of email only in workplace scenarios, the last paragraph of the opinion potentially broadens the scope to expand to other lawyer client communications. The opinion states:

[a] lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

- b. *California State Bar, Formal Ethics Opinion 2010-179 (December 2010):*

Whether an attorney violates his or her duties of confidentiality and competence (Rules 1.1 and 1.6) when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate:

- 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security;
 - 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information;
 - 3) the degree of sensitivity of the information;
 - 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product;
 - 5) the urgency of the situation; and
 - 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.
9. The Attorney's Ethical Obligations with Regard to the Technologies Employed in the Practice of Law, 29 Geo. J. Legal Ethics 849 (2016):
- a. *N.Y. State Bar Ass'n Comm. on Professional Ethics, Opinion 820 (2008)*

In 2008, the New York State Bar Association Committee on Professional Ethics revisited email and considered the use of email service providers that scan emails for advertising purposes. In the instances at issue, email providers were using computer programs to scan the user's mail, looking for keywords in order to provide targeted advertising. The analysis focused on the email provider's privacy policy that stated the content of the emails were not read by any humans other than the sender and the intended recipient. The committee reasoned, “[m]erely scanning the content of e-mails by computer to generate computer advertising, however, does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content.”

Therefore, the committee found the use of email providers that employ automated scanning of emails did not violate the duty to preserve client confidentiality (Rule 1.6). The committee was quick to note that the opposite conclusion would have been reached had humans read the emails “or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission.” Finally, the committee charged lawyers with a duty to exercise due care in selecting email providers and evaluating their privacy policies and practices.
 - b. *State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010)*

The Standing Committee on Professional Responsibility evaluated the ethical duties related to technology that arise from a fairly common law firm arrangement-

-law-firm issued laptops that are used inside and outside the office and connected to public internet connections such as those found in coffee shops.

The committee concluded, “transmission of information through a third party [ISP] reasonably necessary for purposes of the representation should not be deemed to have destroyed the confidentiality of the information.” (Rule 1.6) A lawyer may “meet the duty of [technological] competence (Rule 1.1) through association with another lawyer or consultation with an expert. Such expert may be an outside vendor, a subordinate attorney, or even the client, if they possess the necessary expertise.” Although even when relying on experts, “[t]his consultation or association ... does not absolve an attorney's obligation to supervise the work of the expert under [the duty of competence], which is a non-delegable duty belonging to the attorney who is counsel in the litigation.

The committee outlines several factors a lawyer should consider before using a specific technology to meet his or her duties of confidentiality and competence. All attorneys, regardless of the size or nature of their practice should have the “ability to assess the level of security afforded by the technology:”

First, the practitioner should consider “how the particular technology differs from other media use.” Second, the practitioner should evaluate “[w]hether reasonable precautions may be taken when using the technology to increase the level of security.” If an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced.” Further these steps are “readily available and relatively inexpensive.” Additionally, the committee recommended enabling password features on laptops and PDAs to secure client information in the event of loss or theft. Third, the lawyer should evaluate “who is permitted to monitor the use of the technology, to what extent and on what grounds.” For example, the lawyer should determine that the technology's use or license agreements “do not permit the third party to disclose confidential client information to others or use such information for any purpose other than to ensure the functionality of the software or that the technology is not being used for an improper purpose.” Additionally, “when a lawyer considers entering into a relationship with [] a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard.” Moreover, “[i]n connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality.” Finally, the lawyer should consider the sensitivity of the information, the “[p]ossible impact on the client of an inadvertent disclosure of privileged or confidential information or work product,” the necessity and urgency of using the technology, and client instructions and circumstances.

e. Rule 2.1 – Lawyer as counselor

i. Text:

1. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

ii. Case:

1. New Hampshire Bar Association Opinion #2012-13/4:

Under Rule 2.1, a lawyer must exercise independent professional judgment in representing a client and cannot hide behind a hired intermediary and ignore how client information is stored in or transmitted through the cloud...It bears repeating that a lawyer's duty is to take reasonable steps to protect confidential client information, not to become an expert in information technology. When it comes to the use of cloud computing, the Rules of Professional Conduct do not impose a strict liability standard."

f. Rules 5.1-5.3 – Duty of Supervision

i. Text:

1. Rule 5.1 –

- a. A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- b. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- c. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - i. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - ii. the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

2. Rule 5.2 –

- a. A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- b. A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

3. Rule 5.3 –

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- a. a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- b. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- c. a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - i. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - ii. the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- ii. In 2012, the ABA amended rule 5.3's title from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." Accordingly, the definition of nonlawyer assistance has expanded to include outside service providers and technology providers. See Comment 3 to ABA Model Rule 5.3 (listing examples).
- iii. Cases:

1. NY Eth. Op. 2014-2 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2014 WL 11395033:

Under Rules 5.1 and 5.3, law firms and lawyers are responsible for supervising the conduct of subordinate lawyers and nonlawyers and ensuring that their conduct complies with the Rules. These obligations apply to attorneys who use Virtual Law Offices (VLOs). *See* Cal. Op. 2012-184, 2012 WL 3182985, at *7 (noting that "in all law offices, including this hypothetical VLO, attorneys have a duty to supervise subordinate attorneys, and non-attorney employees or agents"). Given the differences between a VLO and a traditional law office, however, it may be more challenging for lawyers who use VLOs to comply with their supervisory obligations. As explained in Cal. Op. 2012-184, "supervision [in the context of a VLO] can be a challenge if Attorney and her various subordinate attorneys and employees operate out of several different physical locations." *Id.* Furthermore, as a practical matter, lawyers have less control over the conduct of VLO personnel than they would over their own direct employees in a conventional physical law firm office. Thus, lawyers who use VLOs may need to take additional precautions to ensure that they are fulfilling their supervisory obligations. Notwithstanding the differences between VLOs and traditional law firms, the "[a]ttorney must take reasonable measures to ascertain that everyone under her supervision is complying with the Rules of Professional Conduct, including the duties of confidentiality and competence." *Id.* at *7.

A lawyer who uses the shared services and office space of a VLO to perform legal services and to meet with clients, witnesses, or other third parties must take reasonable steps to ensure that she does not expose or put the client's confidential information at risk. This should include, as appropriate, training and educating staff at the VLO on these obligations. *See* Rule 5.3(a) (requiring lawyers to supervise the work on nonlawyers).

2. PA Eth. Op. 2010-200 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.), 2010 WL 11221119:

It is likely in a VLO that a supervisory lawyer may not be practicing in the same building (or perhaps the same city or county) as subordinate lawyers over whom the lawyer has a duty of supervision. In these circumstances, a supervisory lawyer must “make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”

3. Connecticut Bar Association, Informal Opinion 2013-07 (June 19, 2013):

Cloud computing online outsourcing is subject to Rule 5.1 and Rule 5.3 governing the supervision of those who are hired by and associated with the lawyer. Therefore, a lawyer must ensure that tasks are delegated to competent and reliable people and organizations. This means that the lawyer outsourcing cloud computing tasks (of transmitting, storing and processing data) must exercise reasonable efforts to select a cloud service provider whose conduct is compatible with the professional obligations of the lawyer and is able to limit authorized access to the data, ensure that the data is preserved (“backed up”), reasonably available to the lawyer, and reasonably safe from unauthorized intrusion.

4. New Hampshire Bar Association, Ethics Committee Opinion 2008-2009/4:

Lawyers should consider the duty to provide competent representation under Rule 1.1, as well as the general requirement under Rules 5.1 and 5.3 that lawyers make reasonable efforts to ensure that their firms, including lawyers and non-lawyers, conform to the Rules. In general, lawyers should be reasonably informed about the types of metadata that may be included in documents when they are transmitted electronically and the steps that can be taken to remove it, if necessary. Lawyers should stay abreast of technological advances and potential risks of transmission through appropriate training and education. In the Committee’s view, lawyers should acquire, at the very least, a basic understanding of the existence of metadata embedded in electronic documents, the features of the software they have used to generate the document and any practical measures that may be taken to limit the likelihood of transmitting metadata or to purge the documents of sensitive information.

Of course, this does not mean that lawyers must necessarily purchase expensive computer software to ensure that metadata is removed or “scrubbed” from documents in all cases. In most circumstances, lawyers can limit the likelihood of transmitting metadata containing confidential information by avoiding its creation

during document drafting or subsequently deleting it, as well as by sending a different version of the document without the embedded information through hard copy, scanned or faxed versions.

5. New Hampshire Bar Association Opinion #2012-13/4:

As per Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), “Cloud computing is a form of outsourcing the storage and transmission of data...[W]hen, instead of directly engaging a cloud computing provider, a lawyer hires an intermediary, such as an information technology professional or other support staff, to find and engage a provider...When engaging a cloud computing provider or an intermediary who engages such a provider, the responsibility rests with the lawyer to ensure that the work is performed in a manner consistent with the lawyer’s professional duties. Rule 5.3 (a). Additionally, under Rule 2.1, a lawyer must exercise independent professional judgment in representing a client and cannot hide behind a hired intermediary and ignore how client information is stored in or transmitted through the cloud...It bears repeating that a lawyer’s duty is to take reasonable steps to protect confidential client information, not to become an expert in information technology. When it comes to the use of cloud computing, the Rules of Professional Conduct do not impose a strict liability standard.”

6. NHBA Ethics Committee, #2012-13/05 Social Media Contact with Witnesses in the Course of Litigation:

May the lawyer’s client send a Facebook friend request or request to follow a restricted Twitter feed, and then reveal the information learned to the lawyer? The answer depends on the extent to which the lawyer directs the client who is sending the request. Rule 8.4(a) prohibits a lawyer from accomplishing through another that which would be otherwise barred. Also, while Rule 5.3 is directed at legal assistants rather than clients, to the extent that the client is acting as a non-lawyer assistant to his or her own lawyer, Rule 5.3 requires the lawyer to advise the client to avoid conduct on the lawyer’s behalf which would be a violation of the rules.

Subject to these limitations, however, if the client has a Facebook or Twitter account that reasonably reveals the client’s identity to the witness, and the witness accepts the friend request or request to follow a restricted Twitter feed, no rule prohibits the client from sharing with the lawyer information gained by that means. In the non-social media context, the American Bar Association has stated that such contact is permitted in similar limitations. See ABA Ethics Opinion 11-461.7

The non-lawyer assistant is subject to the same restrictions as the lawyer. The lawyer has a duty to make sure the assistant is informed about these restrictions and to take reasonable steps to ensure that the assistant acts in accordance with the restrictions. Thus, if the non-lawyer assistant identifies him- or herself, the lawyer, the client, and the cause in litigation, then the non-lawyer assistant may properly send a social media request to an unrepresented witness.

7. Vermont Bar Association, Ethics Opinion 2003-03:

A lawyer may engage an outside contractor as a computer consultant to recover a lost data-base file, which contains confidential client information so long as: The lawyer clearly communicates the confidentiality rules to the outside contractor; the contractor fully understands the confidentiality rules and embraces the obligation to maintain the confidentiality of any information obtained in the course of assisting the lawyer; and the lawyer determines that the contractor has instituted adequate safeguards to preserve and protect confidential information. If a significant breach of confidentiality should occur by the outside contractor, the law firm would be obligated to disclose such a breach to the client.

For purposes of the Vermont Rules and in response to the pending inquiry, we believe that the requesting lawyer should follow a three-step process:

1. The lawyer must clearly explain the confidentiality rules to the contractor;
2. The contractor must fully understand the confidentiality rules and embrace the obligation to maintain the confidentiality of all information obtained in the course of assisting the lawyer.
3. The lawyer must determine that the contractor has instituted adequate safeguards to preserve and protect confidential information.

How a lawyer is to assure that a nonlawyer understands the obligation of confidentiality is not specifically spelled out in the Vermont Rules. Nonetheless, we believe that a lawyer would satisfy the reasonableness requirements of Rule 5.3 if the lawyer obtained a written acknowledgment from an outside contractor that the contractor understands the confidential nature of the material and understands his or her duty not to keep any information gained in strictest confidence. If a breach of confidentiality were to occur, RPC 1.4 requires a lawyer to explain a matter reasonably necessary to permit the client to make informed decision regarding representation. Thus, if the breach would affect the outcome of the client legal matter in any fashion, the lawyer would be obligated to tell the client of the breach by the nonlawyer.

g. Rule 5.5(a) – Unauthorized Practice of Law

i. Text

1. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ii. Cases:

1. Artificial Intelligence: State of the Industry and Ethical Issues, 54-Mar Tenn. B.J. 24 (2018) - Reynoso v US, 477 F.3d 1117 (9th Cir. 2007)

In 2007, the Ninth Circuit held that a software called the Ziinet Bankruptcy Engine, which offered **automated bankruptcy assistance**, constituted the **unauthorized** practice of law (Rule 5.5):

The software did, indeed, go far beyond providing clerical services. It determined where (particularly, in which schedule) to place information provided by the debtor, selected exemptions for the debtor and supplied relevant legal citations. Providing such personalized guidance has been held to constitute the practice law [The] system touted its offering of legal advice and projected an aura of expertise concerning bankruptcy petitions; and, in that context, it offer personalized--albeit automated--counsel. We find that because this was the conduct of a non-attorney, it constituted the unauthorized practice of law.

2. Artificial Intelligence: Ethics Issues, TSZJ10 ALI-CLE 1 (February 22, 2018) - LegalZoom.com, Inc., v. N.C. State Bar, 2015 NCBC 96 ¶¶ 1, 2 (N.C. Super. Ct. Oct. 22, 2015)

The parties agree that the definition of the ‘practice of law’ (Rule 5.5) as set forth in N.C.G.S. § 84-2.1 does not encompass LegalZoom's operation of a website that offers consumers access to interactive software that generates a legal document based on the consumer's answers to questions presented by the software so long as LegalZoom complies with the below provisions:

“(a) LegalZoom shall provide to any consumer purchasing a North Carolina product (a North Carolina Consumer) a means to see the blank template or the final, completed document before finalizing a purchase of that document”;

“(b) An attorney licensed to practice law in the State of North Carolina has reviewed each blank template offered to North Carolina Consumers, including each and every potential part thereof that may appear in the completed document. The name and address of each reviewing attorney must be kept on file by LegalZoom and provided to the North Carolina Consumer upon written request”

“(c) LegalZoom must communicate to the North Carolina Consumer that the forms or templates are not a substitute for the advice or services of an attorney”;

“(d) LegalZoom discloses its legal name and physical location and address to the North Carolina Consumer”;

“(e) LegalZoom does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the North Carolina Consumer; and

(f) LegalZoom does not require any North Carolina Consumer to agree to jurisdiction or venue in any state other than North Carolina for the resolution of disputes between LegalZoom and the North Carolina Consumer.”

3. Artificial Intelligence: Ethical Obligations in the Use of AI Research Tools *Mata v. Avianca*, — F. Supp. 3d —, 2023 WL 4114965, at *11-12 (S.D.N.Y. June 22, 2023)

The case involves sanctions imposed against attorneys who submitted fake judicial opinions generated by the AI tool ChatGPT. The attorneys cited non-existent cases created by ChatGPT in a court filing opposing a motion to dismiss. Even after the fake cases were questioned by opposing counsel and the court, the attorneys stood by the ChatGPT-generated opinions and submitted excerpts of them. The court found the attorneys acted in bad faith and violated their responsibilities under Rule 11 by relying solely on ChatGPT to research and draft substantive legal arguments, without verifying the information or performing their own legal research. The opinion notes that while AI tools like ChatGPT can provide assistance to lawyers, attorneys have a gatekeeping role to ensure accuracy. By failing to inquire into ChatGPT's cited authorities, not reading cases they cited, and submitting fake case excerpts, the attorneys here breached their duties and misled the court. The court imposed monetary sanctions on the attorneys and their law firm for their misconduct involving ChatGPT. The opinion serves as a warning about the potential misuse of AI tools like ChatGPT in legal work if lawyers do not exercise care and confirm the information generated.



Introduction

1. Introduction to the Model Rules of Professional Conduct and Rule 1.5

The ABA Model Rules of Professional Conduct (the “Model Rules” or “Rules”), created by the American Bar Association, are a set of rules that prescribe baseline standards of legal ethics and professional responsibility for lawyers in the United States. The rules are merely recommendations, or models, and are not themselves binding. However, forty-nine states have adopted the Model Rules as the professional standards of conduct by the judiciaries or integrated bar associations. Because these state rules are legally enforceable, nearly every lawyer is ultimately governed by the Model Rules. California is the only state that has not adopted the Rules or a modified version.

Rule 1.5 is the Model Rule governing legal fees. Generally, Rule 1.5 requires that any fee or expense charged by a lawyer must be reasonable. Some states use “unconscionable” instead of “unreasonable” to indicate when fees have crossed the line, though the effect is largely the same.

2. Background rules and principles

The application of Rule 1.5 works in tandem with other ethical rules and long held principles regarding the attorney-client relationship. In reviewing the Model Rules and related case law, it is helpful to know the following:

- a. **A lawyer is the client’s fiduciary.** As such, a lawyer is required to act in the best interests of her clients. Fees are governed by the Model Rules because a lawyer’s legal skill and training, combined with the relationship of trust and confidence between lawyer and client, creates the possibility of overreaching. Lawyers may frequently have the opportunity to take advantage of clients who are not familiar with legal fees and do not know how to properly value the services they are receiving. As a fiduciary, a lawyer must inform a client of any lawyer mistakes which materially and adversely affect the client.
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_481.authcheckdam.pdf
- b. **A client may fire a lawyer at any time.** There are no restrictions on when a client can fire his lawyer. However, if services have been performed, the client must compensate the lawyer for any those services pursuant to the fee agreement or based on quantum meruit (see below).
[Comment 4 to Model Rule 1.16]
- c. **In the absence of a fee agreement or where a fee is deemed unreasonable, a lawyer may still receive quantum meruit compensation.** Quantum meruit is a phrase meaning “what one has earned.” It is derived from the principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered. Fees awarded in quantum meruit are measured based on the actual value of the services rendered without regard to the contract. Without other ethical or legal violations, a lawyer who charges an unreasonable fee or fails to execute a fee agreement should still be able to receive some compensation based on this principle. Indeed, courts have affirmed that “when an attorney completes the legal services for which he was retained, the fact that the underlying fee



agreement was unenforceable does not itself preclude the attorney from being paid the reasonable value of his services.” *Mullens v. Hansel-Henderson*, 65 P.3d 992, 999 (Colo. 2002); See also *Alioto v. Hoiles*, 341 F. App'x 433 (10th Cir. 2009).

- d. **Fee shifting statutes are distinguished from fee contracts.** There are certain laws that provide for the shifting of reasonable attorney’s fees from a losing party to a prevailing plaintiff. When such fees are awarded, a court determining reasonableness is applying the statute, not the ethics rules. Because the party paying the fee in these situations did not contract with the lawyer, a reasonableness analysis may differ from that in a typical fee dispute; however, courts awarding attorney fees pursuant to a statute often refer to the Model Rules and use them as guidance. Therefore, fee shifting cases can offer helpful insight to how a court reviewing a disputed fee agreement might apply the Rules. [Cf. Legal Ethics, Law. Deskbk. Prof Resp. §1.5-1(j) (2013-2014 ed.)]
- e. **A lawyer always has the duty to act honestly.** Model Rule 8.4 states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” This rule is always in operation and may be triggered by an attorney who charges unreasonable fees.

3. Consequences for violating rules and charging unreasonable fees

The penalties for violating the Model Rules may vary depending on the extent of the lawyer’s misconduct. Charging an unreasonable fee alone will not normally result in disciplinary action. Rather, the lawyer will simply have to return the fee or a portion of it. In many cases, however, lawyers engage in additional unethical conduct and violate other Rules, leading to disciplinary action ranging from public admonition to suspension or disbarment.

4. Text of Rule 1.5

The full text of Rule 1.5 (Fees) and the accompanying comments are as follows:

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - and
 - (8) whether the fee is fixed or contingent.



(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

See comments to Rule 1.5

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/comment_on_rule_1_5/

1.5(a) - Reasonableness

1. Any fee charged by a lawyer must be reasonable

The Model Rules prohibit a lawyer from making an agreement for, charging, or collecting an “unreasonable” fee or an “unreasonable” amount of expenses [Model Rule 1.5(a)]. Rule 1.5 provides eight factors to be considered in determining whether a fee is reasonable. The Comments to the Rule



note that the factors are not exclusive and will not all be relevant in all circumstances [Comment 1 to Model Rule 1.5].

Regardless of the factors, there are certain principles that a court reviewing attorney fees will apply.

- a. **Client consent does not make a fee reasonable.** The rule that attorney fees must be reasonable under the circumstances cannot be waived by a client's consent. Although consent may be considered by a reviewing court, it will not make an otherwise unreasonable fee reasonable. [Restatement Third, The Law Governing Lawyers §34, com. a (2000)]
 - i. **Example.** A lawyer represented a wealthy client in an employment law matter. The client was "zealous" in her interest in litigating against her former employers, and thus instructed her lawyer to submit excessive discovery requests that provided little to no value to the client's case. At best, the lawyer thought the client could recover up to \$770,000 from the employer. Yet during the discovery period alone, the lawyer billed about \$700,000 in fees, destroying the economic viability of the case. Ultimately, the client recovered only \$40,000. Even though the court determined that the hourly rate was itself reasonable and the client contributed to the wasted time and expenses, the total fee itself was clearly excessive under Rule 1.5. The court noted that the lawyer placed his interest in retaining a profitable client ahead of his professional duties as a member of the bar. Her consent to the litigation strategy and time spent did not relieve the lawyer of his duty to charge a reasonable fee under the circumstances. [In re Rafferty, 2010 WL 1367745 (Ma. St. Bar. Disp. Bd., Jan. 2010)]
- b. **Not all high fees are unreasonable.** A fee that seems high or is high is not the same as an unreasonable or unconscionable fee.
- c. **Fees must be reasonable when agreed to, not after the fact.** Generally, a fee agreement will be evaluated for reasonableness at the time it was entered into, not in hindsight. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-1(c) (2013-2014 ed.)]

2. Factors

The factors to be considered in determining the reasonableness of a fee include the following:

- a. **The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.** Because most lawyers bill by the hour, the time required by a matter is one of the most important factors in determining the reasonableness of a fee. Many violations of Rule 1.5 involve manipulations of time billed to the client. In general, a lawyer should not collect fees for hours that are excessive, redundant, or otherwise unnecessary. [Duran v. Town of Cicero, 2012 WL 1279903 (N.D. Illinois, April 16, 2012)]
 - i. **Double billing is prohibited.** A lawyer can only bill for time that he actually expended. For example, a lawyer traveling five hours on behalf of one client cannot work for four hours on the plane for another client and bill a total of nine hours. Similarly, a lawyer cannot re-earn hours previously earned by recycling old work product that is relevant to a new client if he is working under an hourly fee agreement. [ABA Formal Opinion 93-379 (1993)]
 - ii. **Padding bills ("goldbricking") is prohibited.** A lawyer may not engage in wasteful procedures or make up hours in order to increase the number of billable hours. For



example, a client should not be charged a lawyer's hourly rate for time spent doing purely clerical work that would normally be performed by a non-lawyer. [In re Green, 11 P.3d 1078 (Colo. 2000)]

1. **Exception – Rounding Up Hours.** While an attorney may only bill for time actually expended, the standard practice of rounding up to minimum time periods (such as tenths of an hour) is permitted. Such a practice should be disclosed in the retainer agreement. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-1(b) (2013-2014 ed.)]
- iii. **Legal issues should not be overcomplicated by a lawyer.** More difficult legal questions will warrant a higher fee. However, courts have reduced fees and disciplined attorneys for billing more hours than warranted by the specific legal issues in a matter. A client should not be charged for time necessitated by an attorney's inexperience, and similarly, experienced lawyers should not have to consult one another about mundane matters. [ABA-AMRPC S 1.5]
- iv. **Example.** After a successful claim for the return of a security deposit of \$6,400, lawyers made a motion to recover attorney fees of \$126,026.68 pursuant to the terms of a residential lease. The court found that the law firm invoices reflected duplicated efforts and research on "the most basic and banal legal principles that a client could reasonably expect counsel charging minimally \$405 per hour would have prior knowledge of." The court concluded that the issues presented in the case did not justify the amount of time documented by the attorneys, noting that certain issues could be researched in just a few minutes rather than several hours. Finding the items billed for and the amount of time spent on them to be "incredible," the court awarded no attorney fees. [Clozel v. Jalisi, No. 11227/12 (N.Y. Jan. 14, 2014)]
- b. **The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.** This factor reflects the reality that when a lawyer accepts a case, she may be precluded from taking other legal work either because of resulting conflicts or time constraints. The issue of opportunity cost comes up most often in the context of non-refundable retainers, which are considered earned by the attorney when paid by the client, even before any work is begun. Such retainers may be justified on the basis that the lawyer is making herself available as needed by the client and not working for adverse parties. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-1(d) (2013-2014 ed.)]
 - i. **Example.** A lawyer required a \$4,000 non-refundable "minimum fee" from a client seeking a divorce. Two weeks into the representation and after 6.4 hours of work, the client reported to her attorney that she reconciled with her husband and requested a refund of the retainer. The lawyer returned some of the unearned money, but not all. The Michigan Supreme Court held that the retainer did not violate Rule 1.5(a) because the agreement was unambiguous as to its non-refundable nature and was paid to secure the attorney's services. [GRIEVANCE ADM'R, ATTY. GRIEVANCE COM'N v. COOPER, 757 N.W.2d 867 (2008), Supreme Court of Michigan., December 12, 2008]
 - ii. **Exception –** Some states prohibit nonrefundable retainers. Different jurisdictions treat non-refundable retainers differently, and courts will scrutinize them with care. Some states,



such as New York, prohibit non-refundable retainers altogether [Rule 1.5(d)(4) of the New York Rules of Professional Conduct].

- c. **The fee customarily charged in the locality for similar legal services.** A reviewing court may conclude that attorney fees are unreasonable if they are significantly higher than fees charged in comparable cases.
 - i. **Example – Excessive Fee.** A lawyer charged a \$50,000 fee to represent a client who was charged with operating a motor vehicle while under the influence of alcohol. The lawyer was disciplined for violating Rule 1.5 because the court determined that the fee was more than three times the fee typically charged for such a case and there were no particularly complex issues of law involved. [Matter of Fordham, 423 Mass. 481 (1996)]
 - ii. **Example – Reasonable Fee.** A defendant was ordered to pay reasonable attorney fees to a counterparty for failure to arbitrate pursuant to a contract. Defendant challenged the \$700,000 in fees payable on the basis that the hourly rates were unreasonable. The court rejected this argument, stating that the hourly rates ranging between \$125 and \$825 per hour were “consistent with market rates for attorneys with reputable and sophisticated firms.” [Aveta Inc. v. Bengoa, 2010 WL 3221823 (Del. Ch. Aug. 13, 2010)]
- d. **The amount involved and the results obtained.** In determining an appropriate fee, a lawyer may (and often should) take into account how much money is involved and how successful the attorney has been in the particular matter. This factor is most often evaluated in cases where clients recovered relatively little but were charged large fees; however, a substantial recovery could also justify large attorney fees.
 - i. **Example.** An inexperienced lawyer billed client \$93,000 in attorney fees for 45 days of legal representation in a family law matter. The client challenged the fees and the court determined that the actual value of the services performed by lawyer was \$10,000. Because the fees were so disproportionate to the value provided to the client, the court rescinded the fee agreement and awarded the lawyer \$10,000 in quantum meruit fees. [In re Nownejad, 2011 WL 9374059 (Cal. Feb. 7, 2013)]
 - ii. **Fee Recovery for Prevailing Plaintiffs.** Under the Civil Rights Attorney's Fees Awards Act of 1976, district courts are authorized to award a reasonable attorney's fee to prevailing parties in civil rights litigation. In *Hensley v. Eckerhart*, the Supreme Court stated that in such cases, the result obtained is “particularly crucial.” This is because a plaintiff will often offer several theories for recovery but prevail on just one or a fraction of them. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. [Hensley v. Eckerhart, 461 U.S. 424 (1983)]
 - iii. **Exception - Contractual Fee Shifting.** If two parties to a transaction agree to a contractual fee shifting provision, a lawyer may not recover for any results that may be secondary to that agreement. Rather than emphasize the results obtained, a court will likely focus principally on enforcing the parties’ agreement to make the prevailing party whole. [Aveta Inc. v. Bengoa, 2010 WL 3221823 (Del. Ch. Aug. 13, 2010)]
- e. **The time limitations imposed by the client or by the circumstances.** If a client asks a lawyer to take on a major project with critical time deadlines, the lawyer may advise the client that he will take on the matter for a fee above his usual rate because of that constraint. The client can choose whether to agree or seek another lawyer. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-



1(h) (2013-2014 ed.)]

- f. **The nature and length of the professional relationship with the client.** It is not uncommon for a lawyer to reduce a bill for an old client. Similarly, a lawyer may offer a discount to a new client in order to encourage that client to continue to use the lawyer in other matters. Neither of these practices would alone violate the Model Rules. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-1(h) (2013-2014 ed.)]
- g. **The experience, reputation, and ability of the lawyer or lawyers performing the services.** A better, more efficient lawyer is justified in charging more for her services. So is a lawyer with expertise in a particular area of the law. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-1(h) (2013-2014 ed.)]
 - i. **Example – Expertise in Locality.** A corporate client hired several law firms to represent it in a contract dispute. Two of the firms were engaged because they regularly practiced in the jurisdictions where the proceedings were located. The court concluded that despite the appearance of duplicate work, fees were not unreasonable because relying on counsel from these jurisdictions suggests the prudent allocation of resources rather than excess. These lawyers could answer in minutes what a lawyer who is unfamiliar with the local courts might spend days researching. [Aveta Inc. v. Bengoa, 2010 WL 3221823 (Del. Ch. Aug. 13, 2010)]
 - ii. **Example – Lacking Skill.** A lawyer who had been practicing for only three years and had very little family law experience charged an unreasonable fee in part because he “did not have the background, skill, experience or sophistication necessary to act as counsel in the case.” The court rescinded his fee agreement and awarded him fees in quantum meruit. [In re Nownejad, 2011 WL 9374059 (Cal. Feb. 7, 2013)]
- h. **Whether the fee is fixed or contingent.** Finally, a court will consider whether a disputed fee was contingent on the outcome of the case. A fee that looks large in retrospect may not seem as large if one considers that the lawyer risked receiving nothing at all for his services. See below section on contingency arrangements for more detail.
 - iii. **A contingency fee claim cannot influence the determination of the reasonableness of an hourly rate.** In certain types of cases, the court may require the losing party to pay plaintiff reasonable attorney fees in addition to whatever damages were awarded. Courts have made clear that the contingent fee that an attorney earns from his client and the statutory fee that an attorney recovers from the losing party represent distinct entitlements. Therefore, an awarding court should determine the appropriate amount of fee recovery by multiplying the number of hours actually worked by a reasonable hourly rate without regard to amount paid under the contingency arrangement. [Duran v. Town of Cicero, 2012 WL 1279903 (N.D. Illinois, April 16, 2012)]
- i. **Other State Factors.** Some states include additional factors in their own codes of professional conduct.
 - i. **Example – California.** Unlike many other states, California has not explicitly adopted the ABA’s Model Rules of Professional Conduct. Under California law, a court will test for the “unconscionability” of a fee using eleven non-exhaustive factors. Most of the factors are identical or similar to those of the Model Rules; however, California also lists informed



consent by the client and relative sophistication of the lawyer and the client as factors to be considered. [Rule 4-200(A) of the California Rules of Professional Conduct]

3. Expenses and non-legal fees

- a. **Expenses must also be reasonable.** The reasonableness requirement for attorney fees also applies to expenses charged to the client. Under the Model Rules, a lawyer can seek reimbursement from the client for the cost of services performed in-house. This may include photocopying, telephone charges, etc. The lawyer can choose to charge a reasonable amount to which the client has agreed *in advance* or charge an amount that reasonably reflects *the actual cost* incurred by the lawyer. [Comment 1 to Model Rule 1.5] In general, expenses for which reimbursements are sought from clients should not exceed the amounts that a law firm actually pays out. [SPARTNER § 14:11, Successful Partnering Between Inside and Outside Counsel]
- b. **A lawyer may outsource services.** A lawyer may find it beneficial to outsource certain legal or support services in the course of representation. Before any such outsourcing, the lawyer should obtain the client's informed consent. Further, the lawyer should disclose whether the client will be billed for the outsourced services as part of the legal fee or as an expense that will be passed through to the client. In either case, any amount added to the actual cost of the services must itself be reasonable, and the fee in total must be reasonable.
 - i. **Outsourcing Legal Services.** A lawyer may seek third party or contract lawyers not associated with the lawyer's firm to perform legal work such as the preparation of trial briefs, drafting of pleadings or motions, document review, legal research, and other tasks. Whether these services are billed as part of the legal fee or as an expense is at the discretion of the attorney; however, any charge must be reasonable. If the services of the contracted lawyer(s) are to be billed as just another attorney whose work makes up the fee for the matter, the firm may bill the client a reasonable rate for the services just as it does for one of its associates. If the cost of the services is to be passed through to the client as an expense, however, the billing lawyer should charge only the cost actually incurred, without a markup. He may charge a reasonable allocation of associated overhead, such as the amount spent on supervision, additional office space, equipment and supplies. Any charge for supervision should only be added to a disbursement if not otherwise captured by the lawyer's fee. [Ohio Board of Commissioners on Grievances and Discipline, Opinion 2009-6, Aug. 14, 2009, citing ABA, Formal Op. 08-451 (2008)]
 - ii. **Outsourcing Support Services.** In addition to legal services, a lawyer may outsource non-legal administrative work such as transcribing, compiling, collating and copying documents. For these expenses, the lawyer should only pass to the client the actual cost of such services plus the actual overhead costs associated with them. [Virginia Legal Ethics Opinion 1850]
- c. **A lawyer is subject to the rules when performing non-legal services.** The Model Rules do not prohibit a lawyer from providing non-legal services, such as financial planning, to clients. When a lawyer engages in such services, he will still usually be subject to the Model Rules (see Model Rule 5.7 for details on applicability) governing his general behavior; however, the Rules do not provide guidance regarding what a lawyer may charge for such services and how the reasonableness factors apply. A court dealing with the issue will likely apply the reasonableness



factors of Rule 1.5(a) unless the lawyer has taken appropriate steps to assure that the client knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. [Model Rule 5.7]

- i. **Example – Mortgage Services.** A lawyer provided mortgage renegotiation services to clients with troubled mortgages. Under a retainer agreement, the lawyer charged a fixed fee that increased with the value of the relevant mortgage: \$3,000 for a mortgage of \$300,000 or less; \$4,000 for mortgages on excess of \$300,000 to \$650,000; and \$5,000 for mortgages more than \$650,000. The court held that because the lawyer did not take any steps to communicate that the services did not create a client-lawyer relationship, the lawyer was subject to the Model Rules. As such, the fee arrangement was evaluated using the reasonableness factors in Model Rule 1.5. The court concluded that the fee charged was unreasonable because there was no relationship between the work to be performed and the fee to be earned; thus, several of the factors could not be satisfied. [Timofeyev v. Palant and Shapiro, P.C., 30 Misc.3d 546 (2010)]
- ii. **Example – Administrative Tasks.** A lawyer was appointed as an elderly client’s attorney-in-fact. The lawyer performed traditional legal services for the client, such as estate planning. Because there was no one else to care for the client, the lawyer also performed several non-legal services, such as arranging and attending the client’s doctors’ appointments, managing the client’s cable service and magazine subscriptions, and replacing the client’s watch battery. The lawyer charged his usual attorney rates for all services provided to the client. The court held that while the fees for the legal work were reasonable, the charges for the non-legal services were clearly excessive. The court noted that Rule 1.5 was violated because the cost of providing the services were disproportionate to the benefit received and very little skill was necessary to perform them. [Dayton Bar Assn. v. Parisi, 131 Ohio St.3d 345 (2012)]

4. Fees that are per se unreasonable

In some situations, an attorney fee charged to a client may be per se unreasonable regardless of the fee agreement entered into. The following are examples of such fees:

- a. **Fees collected for services provided during the unauthorized practice of law.** An individual engaged in the unauthorized practice of law is not entitled to charge or collect fees for legal services provided.
 - i. **Example – Bar Suspension.** A lawyer who practiced law for 28 years without discipline was late in paying annual bar membership dues, causing her license to be suspended for two weeks. Even though she immediately paid her dues after learning of the suspension, the lawyer was not entitled to collect fees for services provided to two clients during the time she was unknowingly suspended because that constituted the unauthorized practice of law. [In re Seltzer, 2012 WL 5406495 (Ca. June 19, 2012)]
- b. **Non-refundable retainers.** Although the Model Rules do not explicitly prohibit non-refundable retainers, some states do. For example, Rule 1.5(d) of New York’s Code of Professional Responsibility states that “[a] lawyer shall may not enter into an arrangement for, charge or



collect a nonrefundable retainer fee.” A lawyer should make sure he is familiar with the relevant state rules before charging or collecting a non-refundable retainer from a client.

- c. **Fees otherwise prohibited by law.** There may be instances where the law or a court prohibits a lawyer from collecting a fee. In such cases, a court will typically find that collection of such a fee is *per se* unreasonable. Some jurisdictions, such as the District of Columbia, explicitly provide for this conclusion in their versions of the Model Rules [DC’s Rule 1.5(f) states that “[a]ny fee that is prohibited...by law is *per se* unreasonable.”]
 - i. **Example – Fee Collected Without Court Approval.** A lawyer was required to obtain court approval before collecting his fee under probate laws in effect. The lawyer did not obtain such approval, so the court found that the fee the collected was *per se* unreasonable. [In re Pye, 57 A.3d 960 (2012)]
 - ii. **Lawyers cannot contract around fee limitations imposed by law.** If the law sets limits on how much a lawyer can collect from a client, the lawyer cannot collect additional amounts by providing for an alternate means of payment in a fee agreement.
 - 1. **Example.** A lawyer was hired to represent client in client’s role as executor of a decedent’s estate. The fee agreement entered into provided that the attorney’s fees would be paid by the estate. The agreement also stated that to the extent that the probate court disallows any part of the fee for any reason, the client will pay the disallowed portion of the fee from the client’s separate and individual funds. Attorney petitioned for fees of \$10,000, but the probate court allowed only \$7,500. The attorney then sought the remaining \$2,500 from the client per the terms of the agreement. Collecting this additional amount would be a violation of Rule 1.5 because the probate court already decided what fee is reasonable under the circumstances. Anything in excess would be unreasonable. [Illinois State Bar Association Advisory Opinion No. 13-01 (Jan. 2013)]

5. Drafting tips and best practices

- a. Be aware of the local ethics rules for attorney fees. Some states have variations on the Model Rules that should be considered prior to entering into a fee agreement.
- b. Disclose the practice of rounding up hours to a minimum time period. Consider training your newest professionals on what “counts” for billable time, especially for tasks that take only 1-2 minutes of work.
- c. Provide for expense reimbursement in the retainer agreement or engagement letter. Specify whether the client will pay an agreed-to reasonable amount or be billed on actual costs.
- d. Don’t contract for a non-refundable retainer if that is prohibited in the state. Instead, consider whether a “minimum fee” arrangement is permitted.
- e. Don’t attempt to contract around fee limitations imposed by law. Such a provision is unlikely to be enforced.
- f. A lawyer providing non-legal services must consider whether he wants to be subject to the Model Rules governing the lawyer-client relationship. If he does not, the lawyer must make it clear to clients that no such relationship has been created.



- g. Remember that as a client's fiduciary, a lawyer is expected to act in the client's best interest. This duty applies to legal fees. A lawyer may need to offer alternative fee arrangements or refer the client to another lawyer if an agreement cannot be adequately structured under the circumstances.

1.5(b) – Communication of Fees

1. Scope of representation and basis or rate of fee

Rule 1.5(b) requires that a lawyer communicate to the client the scope of the representation and the basis or rate of the fee, as well as any expenses for which the client will be responsible. Communication should be made either before or within a reasonable amount of time after commencing the representation. [Model Rule 1.5(b)]

- a. **Written communication is preferred.** Although Model Rule 1.5(b) does not require a fee agreement to be in writing, best practices call for written fee agreements. Capturing an agreement in writing will help reduce potential conflicts over fees and will help to protect the attorney in the event of a dispute.
 - i. **A written agreement is required for contingency arrangements.** An exception to the general rule that a fee agreement need not be in writing is in cases where the lawyer's fee will be contingent on the outcome of the matter. [Model Rule 1.5(c)] See below section on contingency agreements for details.
 - ii. **Some states require written agreements.** For example, New York State Court Rule §1215.1(a) provides that "an attorney who represents a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation...."
 - iii. **A written agreement suggests consent.** Client consent is not explicitly mentioned in Rule 1.5, but a court will consider the lack of consent relevant when reviewing fees charged by a lawyer. In some states, such as California, client consent is an enumerated factor for determining whether a fee is unconscionable.
 - 1. **Example.** A lawyer solicited a prospective client by offering a "no-cost consultation" to discuss an estate matter. The prospective client informed the lawyer that she would not be able to incur any costs or fees related to the consultation. After the meeting, the prospective client informed the lawyer that she would not be retaining his services. The lawyer then unilaterally decided to charge the prospective client for the 1.8 hours he spent preparing for the meeting and for placing a telephone call to her. The charge was based on his standard billing practice for his existing clients, even though she was not a client of the firm. The reviewing court found that the lawyer charged an unconscionable fee and he was suspended from practicing law for six months as a result. [In re Goddard, 2011 WL 9375630 (Cal. Mar. 14, 2011)]



- b. New clients should be informed about fee structure and scope.** Clients who are regularly represented by a firm or attorney will typically have gained an understanding of the basis or rate of attorney fees and expenses for which they will be responsible. With a new client, however, this understanding must be promptly established. The Comments to the Model Rules advise that, as a best practice, a new client should be provided with a statement or memorandum that states the “general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation.” [Comment 2 to Model Rule 1.5]
- i. **Example.** A lawyer offered to provide services to a client whose pension benefits were inexplicably reduced. The lawyer charged a flat fee of \$7,500. The agreement was not in writing, and no explanation for the basis of the fee was provided. The lawyer did not update the client on the status of his suit (which had been dismissed) and pursued litigation strategies against the client’s instructions. A dispute with the client arose after the lawyer refused to return client funds held in escrow. Among other violations, the court determined that the lawyer violated 1.5(b) for failing to communicate the scope of the representation and the basis for his fee. [Cleveland Metro. Bar Assn. v. Mishler, 127 Ohio St.3d 336 (2010)].

2. Modifications to fees

The Model Rules provide little guidance on making modifications to fee agreements, stating only that any changes in the basis or rate of the fee or expenses must be communicated to the client [Model Rule 1.5(b)]. However, the ABA has provided additional guidance on fee modifications in a formal opinion.

- a. Modification must be reasonable under the circumstances at the time of the modification.** Any fee that an attorney agrees to, charges, or collects must be reasonable under Rule 1.5(a). Comment 1 to the rules explains that Rule 1.5(a) requires that an attorney fee be “reasonable under the circumstances.” Thus, it follows that any modification to an existing fee agreement must also be reasonable under the circumstances at the time of a modification. [ABA Formal Opinion 11-458 (2011)]
- b. Notice and acceptance of the change are both required.** Although the Model Rule only provides for notice to the client, a lawyer is not free to change existing arrangements merely by notifying clients. Rule 1.5(b) requires that the lawyer communicate the scope of representation and the basis or rate of the fee and expenses to be charged. Also operating in the background is Model Rule 1.4(b), which requires that a lawyer explain a matter to the extent necessary to permit the client “to make informed decisions regarding the representation.” A lawyer’s explanation to the client regarding a proposed fee modification should include the advice that the client need not agree to the change in order to have the lawyer continue the representation. The client must accept any modifications before they are made. [ABA Formal Opinion 11-458 (2011)]
- i. **Threats to withdraw are prohibited.** A lawyer may not threaten to withdraw if the client does not agree to increase the fee. Such a threat will likely be sufficient duress to have the new fee agreement rendered unenforceable or otherwise void under contract law. [McConwell v. FMG of Kansas City, Inc., 861 P.2d 830 (Kan. Ct. App. 1993)]
- ii. **Post-hoc “success fees” are prohibited.** A lawyer generally can’t change a fee agreement to



increase her compensation without previous client agreement or an unanticipated change in circumstances. Thus, a lawyer can't unilaterally impose a success fee or premium on a client whom she has represented on an hourly basis at an agreed rate, even if she secures an advantageous result. However, the lawyer and the client could mutually agree on a success fee. [ABA Formal Opinion 11-458 (2011)]

iii. **Example – No Evidence of Acceptance.** Client and lawyer entered into a contingent fee agreement whereby the lawyer would be paid 15% of anything recovered before a complaint was filed in court, and 20% of anything recovered after a complaint was filed. Although the case never reached the litigation stage and no complaint was ever filed, the lawyer billed the client for 20% of the recovery. The lawyer claimed that the client agreed to the percentage increase in order to eliminate any incentive to prematurely file a complaint and because the scope of the services increased. The client denied ever agreeing to a fee increase. Because no agreement was captured in writing, there was no evidence that the client consented to a new arrangement. The court refused to enforce the increased rate. [Alioto v. Hoiles, 531 Fed. App'x 842 (10th Cir. 2009)]

- c. **Periodic increases to hourly rates are permissible if agreed to by client.** It is not uncommon for lawyers who bill on an hourly basis to increase their standard hourly rate on a routine basis, such as annually. In such cases, the lawyer does not need to get acceptance from every client for every increase if the billing practice is communicated clearly at the commencement of the client-lawyer relationship. Acceptance will be inferred from the circumstances if there is prior agreement; however, the lawyer must still comply with Rule 1.5(b) by clearly informing the client of the change in a timely manner, and best practices for client relationships is to provide time for clients to consider the increased rates. [ABA Formal Opinion 11-458 (2011)]

3. Drafting tips and best practices

- a. Put any agreement regarding fees in writing. This simple step will reduce potential conflict and help the attorney show sufficient evidence of the reasonableness of the terms.
- b. If a client is new, take the time to ensure that the client understands all aspects of the fee agreement. Additionally, the client should be advised that she can seek the advice of independent counsel prior to executing the agreement.
- c. Modifications to existing agreements should also be in writing. Have the client sign the modification or otherwise document his acceptance.
- d. If a client will be represented on a range of matters and such representation may last longer than a year, consider whether a provision allowing for increases to hourly rates is appropriate or desired. Be sure to inform the client of any subsequent rate increases.



1.5(c) & (d) - Contingent Fees

1. Contingent fee agreements generally permitted

In a contingent fee arrangement, the lawyer agrees to accept a fixed percentage of the client's recovery in a matter. The Model Rules generally permit contingent fees, other than for criminal defense and most divorce cases, and they are the customary method of compensating plaintiff's lawyers in personal injury and other tort cases. There are several requirements and potential restrictions on contingent fee agreements. [Model Rule 1.5(c)]

- a. **Reasonableness factors apply.** Contingent fees are still subject to the reasonableness standard of Rule 1.5(a). In determining whether a particular contingent fee is reasonable, a lawyer must consider the factors that are relevant under the circumstances, including whether it is reasonable to charge a contingent fee at all. [Comment 3 to Model Rule 1.5]
 - i. **High recoveries can be reasonable.** Although contingent fees have the potential to generate large dollar awards for attorneys, like other fees arrangements, a contingency arrangement will be evaluated for reasonableness *at the time it was entered into*. A high recovery does not make unreasonable an agreement that was reasonable when made, as the lawyer risks recovering nothing if the claim is unsuccessful. [Legal Ethics, Law. Deskbk. Prof. Resp. §1.5-1 (2013-2014 ed.)]
 - ii. **The outer bound of reasonableness for a contingent fee is typically 45%.** While an attorney may receive a high dollar amount in a contingent matter, it is generally accepted that an attorney should not acquire a greater interest in the outcome of the case than his client. Courts in various jurisdictions have therefore held that the highest reasonable percentage an attorney can charge in a contingent matter is 45% of the client's stake. The fact that the client agrees to a higher percentage does not make an arrangement or fee reasonable. [*In re Martin*, 67 A.3d 1032 (2013)]
 - iii. **Example – Unreasonable Fee.** A lawyer defended client in a lawsuit for breach of contract. Under their existing fee agreement, the lawyer billed the client at an hourly rate. During the representation the client filed a counter claim, which led to a second fee arrangement under which the attorney would receive a 45% contingency fee interest in the litigation outcome. Because the case was filed in a state where the attorney was not licensed, additional counsel was retained in the matter. The client settled for \$2.2 million but needed additional legal services to collect the judgment. As a result, client and attorney entered into a third fee arrangement whereby the attorney would be paid an hourly fee for his collection efforts. When the judgment was collected, the attorney retained the following: hourly fees for time spent on the initial contract case, 45% of the recovery from the counterclaim, hourly fees for his efforts to collect the judgment, and hourly fees for the additional counsel that participated in the litigation and recovery. In total, the legal fees amounted to more than 67% of the client's recovery. The court concluded that:
 - 1. All of the actions for which the lawyer billed were part of a single matter subject to the contingency agreement.



2. The fee collected by the attorney was therefore unreasonable because it exceeded 45% of the client's recovery in the matter.
 3. The fact that the client agreed to the fee arrangements did not make them reasonable.
 4. Even if the lawyer's individual fee was reasonable, it became unreasonable when taking into account the fees charged by the additional counsel. (Rule 1.5(e) permits division of a fee between lawyers in different firms only if the total fee is reasonable.)
 5. Attorney spent a relatively small amount of time on the matter, aggravating the unreasonableness of the fee. [*In re Martin*, 67 A.3d 1032 (2013)]
- b. Reverse contingency fees are also permitted.** A reverse contingency fee is a fee that is based upon the difference between the amount a third party demands from a lawyer's client, typically a defendant, and the amount ultimately obtained from the client. The Model Rules do not explicitly address such arrangements, but like any fee, they are subject to the reasonableness standard of Rule 1.5. They must also be fully disclosed to the client, who must provide consent. Reverse contingency fees are thought to align the client's and the lawyer's interests better than hourly or fixed arrangements because they encourage the lawyer to bring down the amount his client is ultimately bound to pay a third party. However, they are subject to abuse like typical contingency fees. [The District of Columbia Bar Opinion 347, Feb. 2009]
- i. **Reasonableness may not be readily determinable.** One of the complexities with reverse contingency fees is that the actual amount of savings to the client may not be easily calculated. For example, a plaintiff may overstate damages or fail to provide a concrete value. The ABA has noted that "the amount demanded cannot automatically be the number from which saving resulting from a judgment or settlement can reasonably be calculated." Thus, a lawyer must take care in evaluating a plaintiff's claim and set a reasonable number as the amount from which the plaintiff's recovery will be subtracted to determine savings. Additionally, the percentages typically applied in straight contingency arrangements may not be appropriate in reverse contingency situations. The lawyer collecting the fee will have the burden of demonstrating the fairness of the fee. [The District of Columbia Bar Opinion 347, Feb. 2009 (citing ABA Formal Opinion 93-373 (1993))]
 - ii. **Example – Unreasonable Fee.** Lawyers represented a family in an IRS matter regarding the value of an inherited farm. Although the clients desired an hourly fee arrangement, the lawyers insisted on a reverse contingency fee. The fee negotiations took place after the lawyers learned that the IRS' valuation of the farm was highly inflated at \$60 million. With this knowledge, the lawyers knew they could recover a large reverse contingency fee because a lower appraisal would result in significant tax savings to the client. The lawyers did not inform their clients of the lower appraisals before entering into the fee agreement. The litigation was ultimately settled with a valuation of \$20 million, and the lawyers claimed \$40 million in "savings" and charged a fee of \$4.8 million. A reviewing court held that the lawyers' failure to disclose what they knew about the value of the property made the fee agreement unenforceable. Further, the court found the fee to be unreasonable under Rule 1.5 because "it bore little relation to time, labor, novelty and risk of the legal problem." [The District of Columbia Bar Opinion 347, Feb. 2009 (citing



Brown & Sturm v. Frederick Road L.P., 768 A.2d 62 (Md. Ct. Spec. App. 2001))]

- c. **Applicable law may limit contingent fees.** Despite the Model Rule's general allowance of contingent fees, there may be applicable laws that impose limitations on contingent fee recoveries. [Comment 3 to Rule 1.5]
 - i. **Example - State Law Limitations.** The California Medical Injury Compensation Act (MICRA) limits both recoveries by a patient and contingency fees charged by an attorney. A lawyer may not charge or collect more than: forty percent of the first \$50,000 recovered; thirty-three and one-third percent of the next \$50,000; twenty-five percent of the next \$500,000; and fifteen percent of any amount on which the recovery exceeds \$600,000. [California Business and Professions Code Section 6146]
 - ii. **Example - Federal Law Limitations.** Federal law imposes a strict twenty-five percent cap on fees in all cases brought under the Federal Tort Claims Act. [28 USC §2678]
 - iii. **Alternate Basis for the Fee.** In addition to limiting contingent fee recoveries, applicable law may also require a lawyer seeking a contingent arrangement to offer the client an alternative basis for the fee [Comment 3 to Rule 1.5]. Even if not required by law, however, the Comments to the rules make clear that a lawyer must consider whether a contingent fee is appropriate for a given client. A lawyer is the fiduciary of a client, and as such, she must provide appropriate advice in the event a contingent fee is not in the best interest of the client. [Legal Ethics, Law. Deskbk. Prof. Resp. §1.5-3(a) (2013-2014 ed.)]
- d. **Prohibitions on Contingent Fees.** The Model Rules prohibit contingent fee arrangements in two instances:
 - i. **Domestic Relations Matters.** A contingent fee is not permitted in a domestic relations matter when the payment is contingent upon securing a divorce or upon the amount of alimony, support, or property settlement achieved. [Model Rule 1.5(d)(1)]
 - 1. However, this Rule does not apply to legal representation in connection with the recovery of post-judgment balances due for support, alimony, or other financial orders. [Comment 6 to Model Rule 1.5]
 - ii. **Criminal Matters.** Contingent fees are not permitted in the representation of a defendant in a criminal case. [Model Rule 1.5(d)(2)]

2. Written fee agreement required

Unlike traditional hourly fee agreements, where written fee agreements are recommended but not always required, Rule 1.5(c) requires that a contingency agreement be made in writing and signed by the client.

- a. **The written agreement must include:**
 - i. **The method of fee calculation.** The agreement should specify the percentage(s) that will accrue to the lawyer in the event of settlement, trial, or appeal.
 - 1. The client and lawyer may agree to a fee arrangement that charges a different rate at different stages of the matter. Similarly, the lawyer may increase or decrease the percentage taken as the amount of recovery to the client increases. However, the lawyer should ensure that any such arrangement is reasonable under the circumstances. [Legal Ethics, Law. Deskbk. Prof. Resp.]



§1.5-3(h) (2013-2014 ed.))

- ii. **Litigation and other expenses to be deducted from the recovery.** The agreement should also address whether these expenses will be deducted before or after the contingent fee is calculated. There is no prohibition in the Model Rules against a lawyer subtracting fees from the client's portion of the award *after* his own fee is deducted from the total. [Legal Ethics, Law. Deskbk. Prof. Resp. §1.5-1(k) (2013-2014 ed.))]
- iii. **Expenses for which the client will be responsible for whether or not the client is the prevailing party.** The lawyer and client may agree that some expenses, such as fees charged by expert witnesses, will be the responsibility of the client regardless of whether the client obtains an award. Any such agreement should be captured in the written fee agreement.
- iv. **Example – Varying Percentages and Expenses.** A lawyer and client entered into a fee agreement with the following terms:
 - 1. A fee of 15% of anything recovered before filing of a complaint; 20% of anything recovered after filing a complaint but before commencement of a trial; 25% of anything recovered after commencement of a trial;
 - 2. Reimbursement of the lawyer's out-of-pocket expenses such as travel, photocopying, and telephone use;
 - 3. None of the out-of-pocket expenses or other fees for which the client is responsible will be deducted from any recovery prior to the application of the contingency percentage.

[Alioto v. Hoiles, 341 F. App'x 433 (10th Cir. 2009)]
- b. **In the absence of a written fee agreement, an oral agreement for a contingency fee will normally be unenforceable.** However, some courts may award the lawyer quantum meruit recovery to compensate him for the value of the services performed if he otherwise acted properly and competently. [Legal Ethics, Law. Deskbk. Prof. Resp. §1.5-3(a) (2013-2014 ed.))]
- c. **A written contingency agreement should contemplate related matters not covered by the contract.** Unless a contingency agreement clearly identifies other matters for which the attorney may collect fees in relation to the representation, a court will generally not allow any additional recovery.
 - i. **Example – No contingency recovery for related matters not in original agreement.** In a California dispute, an attorney was unable to recover a contingency fee on a "related matter" because the engagement letter did not contemplate a fee payable for such services. The lawyer was retained to aid the client in divesting shares of a corporation. Over the course of the representation, the lawyer also facilitated the divestiture of the shares of certain family members of the client, services that the court determined were for a "related matter" not covered by the original agreement. California law specifically requires a statement identifying any related matters that may arise from the clientattorney relationship under a contingency arrangement. Because no such statement was included, the client was able to void the entire contract and the attorney was only entitled to recover quantum meruit fees for the actual value of the work performed for the client only. In awarding the fees, the jury was prohibited from



considering the contingency arrangement because the contract was void. [*Alioto v. Hoiles*, 341 F. App'x

433 (10th Cir. 2009)] ii. **Example – No separate recovery for additional efforts**

required to collect judgment. A lawyer unsuccessfully argued that, in addition to a percentage of a client's recovery, he was entitled to additional fees for his efforts to recover the client's settlement. The court stated that an attorney may protect himself and provide for attorney fees in the event that additional efforts are necessary by doing so explicitly in the retainer agreement. Otherwise, a contingency fee agreement will not be read to exclude collection of the settlement proceeds or judgment. [*In re Martin*, 67 A.3d 1032 (2013)]

3. Conclusion of contingent matters and collection of fees

- a. **Early Settlement.** There is no obligation for an attorney to solicit an early settlement offer on behalf of the client when he is providing services under a contingency arrangement. Similarly, the lawyer may advise the client to reject any early settlement offers without violating any ethical duties. [ABA Formal Opinion 94-389 (Dec. 5, 1994)]
- b. **Early Termination.** When representation under a contingent fee agreement ends prematurely, it is very likely that the lawyer will receive no compensation for her services. If the termination is mutual, the parties can address whether the lawyer will be paid for any time or expenses incurred. When one party seeks to terminate, any compensation will depend on the circumstances of the termination and whether early termination was contemplated in the fee agreement. While a lawyer must have cause for withdrawing from representation, a client retains the absolute right to fire an attorney. [Legal Ethics, Law. Deskbk. Prof. Resp. §1.5-33(j) (2013-2014 ed)]
- c. **Fee Recovery.** If a court or jury awards attorney fees to a prevailing plaintiff in a contingent matter, the contingency agreement may be a controlling factor in the amount awarded.
 - i. **Example.** Attorney and client entered into a contingent fee agreement for representation in a harassment case. The jury awarded the plaintiff \$25,000.10 in damages as well as "reasonable attorney fees." In determining a reasonable fee, the court first determined a "loadstar" figure, which is calculated by multiplying the number of hours worked on the case by a reasonable hourly rate. That calculation was determined to be \$193,950. However, the court then looked to the reasonableness factors in 1.5(a), including whether the fee was fixed or contingent. Because of the contingent nature of the agreement, the court concluded that the reasonable attorney's fee as a compensatory award from the defendants was only \$10,100.10. The court noted that the lawyer himself devised the contingency contract and there was no good basis for disregarding that arrangement. [*Kava v. Boesch*, 2011 WL 486519 (Ohio, Feb. 10, 2011)]
- d. **Written Statement.** The Model Rules require that a lawyer, upon conclusion of a contingent fee matter, provide the client with a written statement stating the outcome of the matter. If there is a recovery in the matter, the statement must include the remittance to the client and the method of its determination. [Model Rule 1.5(c)]
- e. **Collection.** A contingency fee is payable only upon actual collection by a client.



- i. **Example.** If a settlement calls for future payments on a periodic basis, the attorney's fee is payable pro rata. The attorney is only entitled to the agreed percentage of each periodic payment if and when the payment is actually received. An attorney who attempts to collect the full contingency fee before payments are received may be liable for breach of contract, breach of fiduciary duties, and conversion of the client's assets. [Knight v. Aqai, 966 F. Supp. 2d 989 (N.D. Cal. 2013)]

4. Drafting tips and best practices

- a. Do not contract for a fee greater than 45% of the client's recovery.
- b. Ensure all aspects of the agreement are put in writing and signed by the client.
- c. Address matters that may arise from the representation contemplated by the fee agreement, including collection of the client's award.
- d. If new matters arise during the representation, capture any subsequent arrangement with the client in writing.
- e. Provide for alternative compensation in the event that the client terminates the agreement prematurely or causes the attorney to withdrawal.

1.5(e) – Division of Fees

1. A fee can be divided between lawyers who are not in the same firm

A division of a fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. Such an arrangement might be appropriate when neither lawyer could alone serve the client as well. A common example is when a lawyer is working under a contingency arrangement and brings on a trial specialist to help with the litigation [Comment 7 to Model Rule 1.5]. Generally, the Model Rules do not regulate how fees are divided by lawyers working in the same firm, and Rule 1.5(e) does not prohibit the division of fees to be received in the future for work done when the lawyers were previously associated in a law firm. [Comment 8 to Rule 1.5]. Note that in bankruptcy law, fee sharing must be disclosed in advance in most cases.

However, if a fee is going to be shared with an outside lawyer, the following conditions must be met under Model Rule 1.5(e):

- e. **The division must be proportionate to services performed or the lawyers must assume joint responsibility.**
 - i. **Proportionate to Services Performed.** An agreement between lawyers whereby one lawyer pays the other based on the second lawyer's actual contribution to the case, such as hours expended, would be permitted. However, a lawyer cannot simply refer a client to an outside lawyer and in return collect a large portion of the total fee (divisions referred to as "forwarding fees" or "referral fees") unless joint responsibility is assumed.
 - 1. **Example.** A lawyer agreed to represent a client in a personal injury matter on a contingent basis. Five days after the representation began, the lawyer's employment relationship with his firm was terminated. The client chose to retain the lawyer's services in the matter. After the case concluded, the lawyer's



former firm attempted to collect 95% of the attorney fees earned in the settlement pursuant to a provision in the client's employment agreement with the firm. The court refused to honor the employment agreement in part because remitting 95% of fees earned would violate Rule 1.5(e)'s requirement that a division of fees between lawyers not in the same firm must be made in proportion to the services performed by each lawyer. The agreement also violated public policy because it interfered with the client's absolute right to choose counsel; the agreement made it financially infeasible for the attorney to stay on the case. [Hackett v. Moore, 160 Ohio Misc.2d 107 (2010)]

- ii. **Joint Responsibility.** Because the drafters of the Model Rules wanted to encourage the referral of clients when a different lawyer may handle a matter more competently, the Rules allow for "referral fees" when each lawyer assumes joint responsibility for the legal services as a whole. "Joint responsibility" for the representation "entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." [Comment 7 to Model Rule 1.5] This means that both lawyers can be held responsible for legal malpractice purposes. Such a rule discourages lawyers from referring clients to incompetent lawyers in return for a large portion of the total fee collected. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-4(c) (2013-2014 ed.)]
- f. **The client must agree in writing to joint representation and the share each lawyer will receive.** Like contingency arrangements, division of a legal fee triggers a departure from the general rule that a fee agreement does not need to be in writing. Without the client's written consent, a court will generally find a fee sharing agreement between lawyers to be unenforceable and the second lawyer will not be able to recover fees from the client.
 - i. **Example.** A lawyer represented a client in a matter to recover property seized by police. The client executed a limited power of attorney authorizing respondent alone to seek the return of the property and agreed to pay the lawyer a flat fee plus 30% of anything recovered. The lawyer brought in another attorney who was not a member of his firm to assist as co-counsel in return for a portion of the fee. The lawyer never provided the client with a writing regarding the co-counsel's participation or the agreement entered into between the two lawyers. The client did not consent to the arrangement. When the client told the second attorney that he did not want his services, the lawyer claimed he was owed \$5,000 for his efforts and obtained a lien against any money recovered by the client. The court held that the initial lawyer's actions violated the requirements of 1.5(e) because there was no disclosure of or consent to the division. [Disciplinary Counsel v. Jackson, 127 Ohio St.3d 250 (2010)]
- g. **The total fee must be reasonable.** Consistent with the requirements of Rule 1.5(a), the total amount of fees paid to all attorneys working on a matter must be reasonable.
 - i. **Example.** Client retained lawyer to defend him in a breach of contract suit. The lawyer was to be paid 45% of the client's recovery under a contingency agreement. The lawyer sought the assistance of additional counsel who were familiar with the jurisdictions where the proceedings were held. At the conclusion of the matter, the lawyer retained 45% of the client's recovery per the contingency agreement, and then charged the client an additional amount for the hours worked by the co-counsel. In total, the



lawyers tried to collect 67% of the client's recovery. The court held that even if the first attorney's individual fee was reasonable, it became unreasonable when taking into account the fees charged by the additional counsel in the case, a violation of Rules 1.5(a) and 1.5(e). [*In re Martin*, 67 A.3d 1032 (2013)]

2. Drafting tips and best practices

- a. Ensure that any arrangement to divide fees among lawyers practicing in different firms is captured in writing and agreed to by the client.
- b. Before making an arrangement to share fees, consider whether the whole fee charged to the client will be reasonable after all attorneys are paid.

Collecting Fees

1. Terms and types of payment

A lawyer has some flexibility in arranging the terms of payment with the client as well as the form. However, a lawyer should remember that she has a duty to bill a client exactly in the manner in which the lawyer and client agreed at the outset of the representation. Additionally, other ethical rules may be implicated by certain payment structures and methods.

- a. **Advanced fees are permitted.** A lawyer may require advance payment of a fee to ensure the availability of funds, but the lawyer must return any unearned portion. [Comment 4 to Rule 1.5] The lawyer should adhere to Rule 1.5(b) and communicate how an advanced fee will be drawn down and where the funds would be held. Under Model Rule 1.15, the lawyer must place the payment into a client trust account and can only make withdrawals as fees are earned or expenses are incurred.
 - i. **Sample Language.** In a contingency agreement for representation in a corporate matter, the following language was included: [t]he reimbursement of out-of-pocket expenses, which include such items as transcripts, depositions, first-class travel and accommodation, photocopying, telephone, Westlaw time, etc. In connection with these costs, you have already advanced \$100,000 which will be deposited in a cost fund account for your benefit, and which will be used to finance the costs as they are incurred. We shall send you a monthly statement of the costs drawn from the account. You agree to maintain this cost fund at a level of \$50,000. At the conclusion of the case, anything remaining in the cost fund will, of course, be returned to you. [*Alioto v. Hoiles*, 341 F. App'x 433 (10th Cir. 2009)]
 - ii. **Example – Violation of Rule 1.15.** A lawyer withheld \$1,500 in fees from loan proceeds to be delivered to a client and placed the funds in the operational account of the lawyer's firm. The client disputed the lawyer's actions and demanded a return of the withheld funds. The court concluded that the \$1,500 was for an advance fee rather than a fee earned, and as such, it should have been placed in the client's trust account and returned as unearned at the conclusion of the representation. [*In re O'Brien*, 26 A.3d 203 (2011)]



- b. **A lawyer may accept property in exchange for services.** Under Model Rule 1.8(i), an attorney is prohibited from acquiring a proprietary interest in the cause of action or subject matter of the litigation for which he is providing services. However, an attorney is not prohibited from otherwise accepting property in payment for services, such as an ownership interest in an enterprise. [Comment 4 to Model Rule 1.5] Such an arrangement may implicate Rule 1.8(a), which places limitations and conditions on any business transactions a lawyer enters into with a client.
 - i. **Example – Securities as a Legal Fee.** In a New York Ethics Opinion, the State Bar Association concluded that a lawyer was permitted to accept an equity interest in a client as long as the acceptance did not otherwise create a conflict of interest for the lawyer, result in an excessive fee in violation of Rule 1.5, or violate the conditions of Rule 1.8 (requiring that terms be fair, reasonable, and fully disclosed in any business transactions with clients). Whether a fee is excessive should be evaluated at the time the fee is set because, much like a contingency fee, the lawyer risks that the business venture will fail and the securities will have no value. The terms of any such agreement should be fully disclosed to the client, who should also be advised that she can seek independent counsel to review the agreement. [NYSBA Ethics Opinion 913 (Mar. 22, 2012)]
- c. **Terms should not induce lawyer to improperly curtail services for client.** Comment 5 to Model Rule 1.5 explains that a lawyer should not enter into an agreement whose terms might induce the lawyer to improperly curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. The Comment also notes, however, that it is proper to define the extent of services in light of the client's ability to pay. And finally, consistent with the reasonableness requirements in 1.5(a), a lawyer should not exploit fee arrangements based primarily on hourly charges by using wasteful or unnecessary procedures to collect higher fees. [Comment 5 to Rule 1.5]

2. Other Guidelines for Billing and Invoicing

- a. The Model Rules do not discuss billing procedures or standards. However, the adequacy of documentation on invoices tends to be central to disputes over legal fees. Compliance with published billing guidelines also impact
- b. Bankruptcy
 - i. A rise in high-profile, high legal fee corporate bankruptcies, particularly in the energy, entertainment and retail sectors (e.g., Caesars Entertainment, Toys R Us, iHeart Media, Nine West) has meant an increased workload for U.S. Bankruptcy Courts, the U.S. Trustee Program (USTP), and others integral to the bankruptcy process.



- ii. The USTP’s mission is to promote efficiency and protect integrity in the bankruptcy system, which involves independently assessing and advising Bankruptcy Courts on whether professional fee applications in a case comply with the six-factor “reasonableness of compensation” test in Section 330 of the Bankruptcy Code (unless the professional has been appointed under Section 328, which curtails certain types of reviews of fees).
- iii. Fee examiners, a specialized class of experts knowledgeable about both bankruptcy law and legal fee examination, are frequently engaged by Bankruptcy Courts and the USTP, particularly in larger bankruptcy cases governed by the USTP’s 2013 fee review guidelines (the “2013 Guidelines”).
- iv. The 2013 Guidelines enumerate the overarching goals of the USTP, which are to measure “reasonableness of compensation” using client-influenced market standards, not just bankruptcy standards, and create increased transparency, predictability, accountability, and self-governance through uniform expectations.
<https://www.federalregister.gov/documents/2013/06/17/201314323/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>
- v. The 2013 Guidelines highlight concrete types of problematic billing practices (poor staffing, unapproved rate increases, transitory professionals, block-billing or lumping of time, vague or repetitive entries, among others) that professionals should avoid; the Guidelines conceptually resemble many billing guidelines established by clients for their outside counsel.

c. Assessing the Reasonableness of Legal Fees with Data Analytics and Software Tools.

Intelligently developed data analytics tools have emerged to empower a legal professional to quickly and critically analyze legal spend and invoice data. The result of this analysis helps to benchmark and measure the following three key aspects of outside counsel’s performance, which are the greatest value drivers.

- i. Staffing Efficiency
 - a. Outside counsel’s staffing mix should be optimized to ensure the highest value in hourly billing arrangements. This means that the most competent, lowest cost (the “lowest reasonable biller”) legal professional should handle skill-set-appropriate tasks in an industry benchmarked amount of time.



- b. Each task in a line item entry handled by outside counsel can be assessed for skill set appropriateness using automated data analytics tools.
- c. Legal professionals -- whether a billing partner or inside counsel -- no longer need to be frustrated by a partner or senior legal professional working on tasks well below his or her pay grade or an attorney handling work outside of his or her expertise. Because many tasks handled by outside counsel recur with sufficient frequency on an industrywide basis, benchmarks can be developed in terms of costs, time and skill set required for individual tasks

ii. Workflow Efficiency

- a. Legal professionals should be encouraged to and rewarded for optimizing process management.
- b. Workflow efficiency means (i) defining the parameters of the workflow process, (ii) setting standards for task and responsibilities, (iii) continually evaluating the process and (iv) identifying opportunities for improvement.
- c. Workflow efficiency measures process management, seeking to eliminate waste, friction, and redundancy in a legal team's processes.
- d. Intelligently designed analytics tools can pinpoint when multiple attorneys participate in a single phone call or meeting and identify the frequency with which repeated tasks recur and whether their recurrence is delivering real client value

iii. Billing Hygiene

- a. Clarity and accountability in billing are paramount when it comes to understanding the tasks handled during each billable hour.
- b. Invoices for legal services often contain line items that run the gamut from being vague and cryptic (e.g., "review file," "attention to tax issue," "consider negotiation strategy") to



being overly complicated to the point of lacking readily discernable value.

- c. Billing hygiene means recording accurate time with constructive, informative and easily understood entries.
 - d. Good billing hygiene is crucial for a current understanding of the price and value of services rendered. Equally as important, it affords a legal professional the ability to mine data in a meaningful way that informs the predictability and certainty of future legal expenses.
- d. Practical challenges with legal invoicing.
- i. Adequacy of documentation is most relevant in hourly fee agreements where the lawyer must account for all of her time charged. If two parties to a transaction agree to a contractual fee shifting provision, the party that must pay legal fees will likely scrutinize all attorney invoices and dispute any vague entries.
 - ii. **Fees may be reduced for inadequate documentation.** In certain fee disputes, it will be difficult for a lawyer to show that his fee was reasonable if he has not adequately documented the basis of the fee charged. If a time entry does not detail the topic of research or a telephone call, a court cannot determine whether the fee charged for that time was reasonable. The entry could be for an entirely unnecessary task or violate 1.5(a)(1), which considers the novelty and difficulty of the questions involved.
 - iii. **“Block entries” may result in reduction of fees collected.** Lawyers commonly engage in the practice of “block billing” – a time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks. A lawyer challenged on an invoice will have difficulty proving that the total time is reasonable because he cannot show that the time spent on any single task was reasonable.
 - a. **Example.** A client won a civil rights suit against a municipality. Pursuant to a federal statute permitting a prevailing plaintiff to recover reasonable attorney fees from a defendant, the client submitted attorney bills as evidence supporting the hours worked and rates claimed. A total of \$2,228,017.50 in legal fees was claimed, in addition to \$157,901.47 in expenses. The defendant disputed the fees because the documentation contained many vague entries and block billing. For example, one block entry for 4.5 hours contained the following description: Trial preparations; Telephone Kim; Telephone call from Telephone call to Van Sickler, to Lopez, Alejandro; Telephone Kim; Telephone call from Lopez call to Van Sickler, Van Sickler, Kim; Kim; Telephone call call to



Van Sickler, Joseph R. The court commented that the entry “gives us no idea what was discussed in these conversations or how long each conversation should reasonably have taken, assuming it was necessary at all.” Another vague entry for 2.5 hours read “[c]onduct legal research.” Given the extent of the vague entries and block billing, the court reduced the plaintiffs’ total fee award by 30%. [Duran v. Town of Cicero, Not Reported in F.Supp.2d (2012)]

3. Fee disputes

Fee disputes can arise for a variety of reasons. Some may be the result of an overcharge by the attorney. Others, however, result from a lack of understanding by the client of the basis for the fee and the factors that go into the charge. Disputes can also arise from a client’s failure to pay a fee, whether the fee had been contested or not.

- a. **Procedures may be required by the lawyer’s bar or by contract.** Comment 9 to Model Rule 1.5 provides that if a procedure has been established for the resolution of fee disputes, such as arbitration or mediation, the lawyer must comply with the procedure when it is mandatory. Even when the procedure is voluntary, the Model Rules still encourage the lawyer to consider submitting to it. Procedure may be mandated by the bar association that the lawyer is a member of. In other situations, the law may provide a procedure for determining a lawyer’s fee, such as a class or person entitled to a reasonable fee as part of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. [Comment 9 to Model Rule 1.5]
 - i. **ABA Model Rules for Fee Arbitration.** The ABA has adopted a separate set of rules for fee arbitration. If a client requests arbitration, then the program makes the arbitration mandatory for the lawyer. [Rule 1 of ABA Model Rules for Fee Arbitration]
- b. **Disputed fees in possession of the lawyer must be kept separate.** Under Model Rule 1.15(e), when a lawyer is in possession of property in which two or more persons, one of whom may be the lawyer, claim an interest in, the property shall be kept separate by the lawyer until the dispute is resolved.
 - i. **Example.** An attorney received a client’s settlement award, from which he withdrew his fee. The attorney remitted the remaining funds to the client along with a statement detailing the distribution of the settlement fees. The client immediately disputed the division of the funds, but the lawyer did not place his claimed portion into a trust. The court determined that the lawyer violated Rule 1.5(a) by charging an unreasonable fee and Rule 1.15 for comingling funds after the client disputed the fee. [*In re Martin*, 67 A.3d 1032 (2013)]
- c. **Fee agreements will be construed against the lawyer.** If there is any ambiguity in a fee agreement, a court will interpret the contract in favor of the client. Generally, a court should construe the agreement as a reasonable person would in the circumstances of the client. [Legal Ethics, Law. Deskbk. Prof Resp. §1.5-2(a) (2013-2014 ed.)]
- d. **A lawyer has the burden of persuasion in any proceeding to collect a disputed fee.** The lawyer, not the client, must show the existence and terms of the fee agreement. The lawyer must also show that the fee is reasonable. If the lawyer has put the fee agreement in writing, she will be more likely to satisfy her burden in a collection matter. [Legal Ethics, Law. Deskbk. Prof Resp.]



§1.5-2(b) (2013-2014 ed.))

- e. **A lawyer may contract for the recovery of costs incurred in collecting fees due.** At least one jurisdiction has issued an ethics opinion stating that it could be ethically permissible to include a provision in the retainer agreement or engagement letter providing for the attorney's ability to recover actual costs and reasonable outside counsel attorney's fees if a collection action is instituted against the client. The right to recover costs and attorney's fee should be reciprocal, such that the client is also able to seek the same costs and reasonable fees in defending the lawyer's action. The letter or agreement should also advise the client of his right to seek the advice of an independent attorney prior to executing the agreement. [Delaware State Bar Association Committee on Professional Ethics, Opinion 2009-2]

4. Drafting tips and best practices

- a. Avoid vague entries and block-billing as a best practice. Clear and detailed entries will help ensure collectability.
- b. A fee agreement should be drafted to protect both the client and the lawyer. An agreement that offers reciprocal rights will be more likely to be found fair and enforceable by a reviewing court.
- c. Consider providing for a dispute resolution process in the event of a fee dispute, as well as a provision allowing for recovery of actual costs and attorney's fees.
- d. Always advise the client that she can seek the advice of independent counsel prior to executing a fee agreement.

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Reimagining “Reasonableness” Under Section 330(a) in a World of Technology, Data, and Artificial Intelligence

by

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By 2030 we will see significant legal work being done by machines. As exponential growth of technology consumes the world, the legal industry is especially appeti[z]ing. As a result, legal services will be fundamentally different than today in terms of both job function and the way legal services are provided.¹

Vizzini: HE DIDN'T FALL? INCONCEIVABLE.

Inigo Montoya: You keep using that word. I do not think it means what you think it means.²

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¹ Joseph Raczynski, *Legal Geek's Uncertain Decade: The future of legal technology and digital transformation*, THOMSON REUTERS (Aug. 3, 2020), <https://www.thomsonreuters.com/en-us/posts/legal/uncertain-decade-pt4-digital-transformation/> (UK spelling in original).

² THE PRINCESS BRIDE (Twentieth Century Fox 1987), <https://www.imdb.com/title/tt0093779/quotes/qt0549857>.

TABLE OF CONTENTS

INTRODUCTION: SECTION 330(A) AND REASONABLENESS
 WHY HOW WE DO WHAT WE DO MATTERS.....255
 PART 1: SECTION 330’S LEGISLATIVE HISTORY 260
 PART 2: JUDICIAL INTERPRETATION OF
 REASONABLENESS 266
 PART 3: MODERN LEGAL PRACTICE,
 REASONABLENESS, AND SECTION 330.....272
 A. Reasonableness and the Concept of Billing Judgment.....272
 B. The World of Artificial Intelligence in the Practice of Law
277
 C. When Worlds Collide: Does Artificial Intelligence Change
 the Meaning of “Reasonable”?.....282
 D. Should “Reasonable” Mean Something Different in
 Consumer Cases?.....286
 Part 4: WHICH PLAYERS IN OUR BANKRUPTCY ARENA
 SHOULD CALL FOR CHANGE? 293
 PART 5: WHY REIMAGINING REASONABLENESS IS
 (MOSTLY) A GOOD IDEA 297
 A. Connecting the Overriding Law and Policy of § 330 with
 21st Century Technology 297
 B. A Proposed Analytic Construct For Bankruptcy Courts
 Under a Reimagined § 330 308
 CONCLUSION.....312

INTRODUCTION: SECTION 330(A) AND REASONABLENESS
 WHY HOW WE DO WHAT WE DO MATTERS

Transformations in the legal industry’s supply chain caused by legal technology and innovative service delivery models have triggered the need for courts to reimagine how to assess the reasonableness of legal fees under 11 U.S.C. § 330. In nearly every other industry, when there are changes or fluctuations in supply chain costs, it is typical for the market price paid by end-users or consumers to fluctuate as well. Market forces organically dictate the reasonableness of the market prices in light of current production cost and demand. In contrast, the legal industry hasn’t kept up with a unified, market-driven supply cost and demand approach when deciding how to use technology to serve client needs. To date, clients haven’t consistently forced lawyers to evaluate the cost of new technology against the efficiency benefits that the technology may have when compared to

human labor. This article posits that it's time to factor in the choice to use, or not to use, technology when determining the reasonableness of fees and expenses under 11 U.S.C. § 330. We believe that the newest technology should be part of our toolbox—in particular, artificial intelligence (AI).

When we talk about the use of AI in the law, what do we mean? Both of us like Professor Harry Surden's definition:

What is AI? There are many ways to answer this question, but one place to begin is to consider the types of problems that AI technology is often used to address. In that spirit, we might describe AI as using technology to automate tasks that “normally require human intelligence.” This description of AI emphasizes that the technology is often focused upon automating specific types of tasks: those that are thought to involve intelligence when people perform them.³

The real questions in today's legal industry are when a bankruptcy professional should start a task by turning first to AI and, when a lawyer uses AI, how does that choice affect a reasonable fee under § 330 for that work?

Ever since the arrival of email,⁴ technology has changed the way that lawyers communicate and deliver work product. Legal research previously entailed poring through heavy books in a law library. Now legal research relies on the likes of Lexis/Nexis, Westlaw, and Fastcase. Document

³ Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. L. REV. 1305, 1307 (2019) (footnotes omitted); see also *id.* (“What makes these AI tasks rather than automation tasks generally? It is because they all share a common feature: when people perform these activities, they use various higher-order cognitive processes associated with human intelligence.”). Here's another way to think about AI:

In the broadest sense, AI, also often referred to as cognitive computing, is an aspect of computer science that models software on human thought processes generally regarded as intelligent. This category encompasses, for example, expert systems, machine learning, natural language processing, robotics, and computer agents that perform tests to evaluate data and offer results. AI made its first major news splash in the late 1990s when IBM's “Deep Blue” computer won several chess matches against a world champion. Not to be outdone, in 2011, IBM's Watson computer (on which the ROSS legal research system is based) successfully competed in the game show *Jeopardy!* Indeed, AI's headway into daily life in 2017 is remarkable: just ask your virtual assistant Siri or the Amazon Echo on your kitchen countertop.

Dyane O'Leary, *AI is a GO*, 26 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 33, 33 (2018) (footnote omitted).

⁴ Email actually started in the 1970s, but it took off in the late 1980s. See *Email timeline*, THE GUARDIAN (Mar. 13, 2002), available at <https://www.theguardian.com/technology/2002/mar/13/internetnews> (last visited Dec. 25, 2022).

review relies more on search terms entered in an e-discovery tool⁵ than on battalions of associates in document production rooms. Mergers and acquisitions use data rooms and digital signature technology. Manilla folders and accordion racks⁶ lined up on conference room tables for manual signatures are just so yesteryear. Gone, too, is the luxury of ample time to complete tasks.⁷ Legal artisans now operate in a world in which the practice of law has become the business of delivering legal services.⁸

The mandate to use advanced technologies: Model Rule 1.1 comment 8. When delivering advice, services, and work product to clients nowadays, lawyers are using technology continuously and at every step of the service delivery chain.⁹ If the need for lawyers to inject technology into their daily practice was ever in doubt, all doubt has been removed by the fact that almost all states now impose on lawyers a duty of technological competence.¹⁰ No state bar has specified the types of technology that lawyers must know how to use or the exact technological acumen required, other than the famously vague comment 8 to Model Rule 1.1: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with

⁵ For a nice description of how AI-assisted discovery works, see, e.g., Surden, *supra* note 3, at 1329–30. Our colleague Joe Regalia has pointed out that eDiscovery often is not a “thing” for smaller practices. See comments on our earlier draft from Professor Joseph Regalia (Jan. 12, 2023) (on file with authors).

⁶ We recognize that we’re dinosaurs who can remember what accordion racks looked like, but the rest of you can see one at https://www.amazon.com/Flexifile-Expandable-Organizer-Slot-14118/dp/B0006HWLNQ/ref=pd_lpo_1?pd_rd_i=B0006HWLNQ&psc=1. We also remember staying at the printers for nights on end—not to mention what happened on that first trip to the printers, when we realized *why* the offices had showers, beds, food, and toothbrushes.

⁷ Our colleague, Professor Marketa Trimble, has cautioned us that our memory of days gone by, with its limitless deadlines, is likely inaccurate. Email from Marketa Trimble to Nancy Rapoport (Jan. 21, 2023) (on file with authors).

⁸ We thank Judge Christopher Klein for this artful rephrasing of an earlier draft paragraph. See email from Hon. Christopher M. Klein to Nancy Rapoport (Jan. 28, 2023) (on file with authors).

⁹ Try to live without your phone for an entire workday. See, e.g., AMERICAN BAR ASSOCIATION COMMISSION ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 27–28 (2016) (describing innovations in document automation and the use of artificial intelligence), available at https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf.

¹⁰ MODEL R. PROF’L CONDUCT 1.1 cmt. 8. Cf. Bob Ambrog, *Another State Adopts Duty of Technology Competence for Lawyers, Bringing the Total to 40*, LAWSTATES (March 24, 2022), <https://www.lawnext.com/2022/03/another-state-adopts-duty-of-technology-competence-for-lawyers-bringing-total-to-40.html>. For a quick reminder of what the duty of technological competence means for lawyers, see *The Ethics of Artificial Intelligence and Law*, LEXCHECK, <https://www.lexcheck.com/resources/the-ethics-of-artificial-intelligence-and-law-lc> (last visited Aug. 8, 2022) (“While lawyers cannot know all the intricacies of AI systems, they are required to possess basic competencies. Attorneys using AI are responsible for monitoring the training and application of the algorithm. Just as a lawyer oversees subordinates like junior lawyers and paralegals, the same oversight is required in monitoring the performance of AI-based tools. Some tasks may not be appropriate for AI handling, so the lawyer must determine where to draw the line between automation and augmentation.”).

relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”¹¹ Legal industry commentators have offered guidance, stating that lawyers should be proficient in “case management software with a calendaring system; document management software; research tools; billing software; email and other communication systems; a PDF system with redacting capabilities; and the MS Office Suite, particularly MS Word.”¹²

The dilemma: Will increasing the use of technology cost lawyers some income? Today’s conventional wisdom recognizes that technology facilitates better lawyering. Technology has made the practice of law today faster, advice more accurate, and deliverables more efficiently produced than ever, freeing lawyers to focus their time and energy on high-level strategic advice and high-value work rather than on recurring and mundane tasks.¹³ With the increased use of technology, it stands to reason that the amount of time and resources that lawyers need to spend on certain types of tasks should shrink. But if the time and resources that a lawyer needs to get the work done are decreasing while lawyers are charging by the hour, shouldn’t the cost of at least some of those more mundane legal services decrease?¹⁴ Based on the recent 2021 profitability reports from law firms, that reasonable inference does not seem to be the case.¹⁵ It’s possible that that

¹¹ MODEL R. PROF’L CONDUCT. 1.1 cmt. 8 states: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” The comment is famous, we think, because of the “I’m not a cat” video that went viral. For a description of the video, see, e.g., Daniel Victor, *I’m Not a Cat, Says Lawyer Having Zoom Difficulties*, N.Y. TIMES (Feb. 9, 2021, updated May 6, 2021), <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html> (last visited Dec. 5, 2022).

¹² IVY B. GREY, ETHICAL DUTY OF TECHNOLOGICAL COMPETENCE; WHAT LAWYERS NEED TO KNOW 4, https://www.wordrake.com/tech_competence-thank-you?submissionGuid=cade7bb2-8c2b-4bbc-b97e-58e8ae60d552.

¹³ Neither of us misses the long nights at the printer’s as we waited to read the latest document revisions, or the long rows of accordion files for closings, or the manual redlining using rulers.

¹⁴ After all, Model Rule 1.5(a) requires fees to be reasonable. See MODEL R. PROF’L CONDUCT 1.5(a) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses....”). The idea that *not* using AI when the use of AI is the best way to keep fees reasonable isn’t unique to us. See, e.g., *The Ethics of Artificial Intelligence and Law*, LEXCHECK, <https://www.lexcheck.com/resources/the-ethics-of-artificial-intelligence-and-law-lc> (last visited Aug. 8, 2022) (“ABA Model Rule 1.5 requires lawyer fees to be reasonable. Increasingly, technological implementations reduce labor hours, which saves lawyers from unnecessary work and saves clients from unnecessary fees. As AI technology becomes more widespread in law, it may become difficult for lawyers to bill their clients a reasonable fee without leveraging artificial intelligence technologies.”) (emphasis added).

¹⁵ See Press Release, *ALM’s 2022 Global 200 Reveals Stellar Performance in Key Financial Metrics* (Sept. 20, 2022), https://www.alm.com/press_release/alms-2022-global-200-reveals-stellar-performance-in-key-financial-metrics/ (“Law.com International and The American Lawyer have released

law firms are making the same or more money—even in the face of adopting technology that makes them more efficient—because the increasing hourly rates¹⁶ are outpacing the time savings in the “time x rate” economic model.¹⁷ Make no mistake: we are not advocating for the proposition that lawyers should make less money. We see no reason why lawyers who work more efficiently by leveraging technology should be paid any less than lawyers who rack up the hours as a result of *not* leveraging technology efficiently. But this leaves us with an interesting dilemma: Why should lawyers who leverage technology to be efficient be compensated less than their

the 2022 Global 200 report, providing a detailed look at the top-grossing law firms from around the world. Gross revenue for The Global 200 totaled \$185.6 billion for fiscal year 2021, an increase of 14.7% compared with fiscal year 2020.”).

¹⁶ See, e.g., Debtors’ Application for an Order Authorizing the Retention and Employment of Paul, Weiss, Rifkind, Wharton & Garrison LLP as Attorneys for the Debtors and Debtors in Possession Nunc Pro Tunc to the Petition Date, *In re Revlon, Inc.*, Case No. 22-10760, (Bankr. S.D.N.Y. No. 22-10760) ECF No. 152 at page 10, paragraph 15: “15. The current standard hourly rates for Paul, Weiss’s attorneys and paralegals range as follows:...Partners[,] \$1,530 to \$2,025[;] Counsel[,] \$1,525[;] Associates[,] \$550 to \$1,280[; and] Paraprofessionals[,] \$135 to \$435.” Professor Richard Susskind has this to say about the pitfalls of hourly billing:

The shortcomings of hourly billing are well illustrated by an anecdote involving my daughter. When she was 12, she asked me for a summer job. I needed some administrative work carried out and she agreed to take on the task. She asked me how much I intended to pay her and I responded, unreflectively, that I thought I would pay her a certain amount per hour. She thought about that for a few seconds, smiled, and then said: ‘Well, I’ll take my time then.’ If a 12-year-old can see the shortcomings of hourly billing, then it puzzles me that major international corporations cannot also see the problem here. Hourly billing is an institutionalized disincentive to efficiency. It rewards lawyers who take longer to complete tasks than their more organized colleagues, and it penalizes legal advisers who operate swiftly and efficiently. All too often, the number of hours spent by a law firm bears little relation to the value that is brought. A junior lawyer who expends 50 hours on a task can sometimes provide much less value than half-an-hour of the work of a seasoned practitioner (drawing on his or her lifetime of experience).

RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 17 (2d ed. 2017).

¹⁷ Or is it that the technologies are not being used to their fullest capacity by attorneys? As Joe Regalia has pointed out to us,

Usually, I hear the pitch as: (1) you can get tighter realization, [and] with many practice areas dipping below 80%, this is a big difference; (2) [AI can help with] access to underserved legal markets and needs with lower costs of service; (3) [AI frees up] more time spent on high-value tasks that you can charge more for to make up the difference; (4) more internal cost savings on all the tasks that clients are already not paying for under guidelines and task billing; (5) what we’ve been hearing about forever but is still sporadic, which is alternative billing that allows lawyers/firms to keep more of what’s left over from whatever permutation of fixed fees or budgets.

See Regalia comments on earlier draft, *supra* note 5.

counterparts who don't?¹⁸ And how should bankruptcy professionals find the right balance between humans and computers? Section 330 focuses on the reasonableness of fees and expenses, but doesn't yet focus our attention on the human-computer split. It's time to revisit what "reasonable" means. Just as the standard of care in negligence has evolved with respect to technological advancements, so too should § 330's reasonableness assessment.¹⁹

To provide a more robust picture of § 330 and its roots, Part 1 discusses the legislative history of § 330. Part 2 maps the evolution of the case law since the enactment of § 330. Part 3 highlights how technological advancements and innovations in today's legal industry call for a change to a court's current § 330 assessment.²⁰ Part 4 discusses how various constituents in the legal industry might call for change to make it a reality. Finally, Part 5 talks about how the practice of bankruptcy law will benefit if courts' § 330 analysis starts account for advancements in legal technology.

PART 1: SECTION 330'S LEGISLATIVE HISTORY

First, let's put § 330 in perspective. In the normal attorney-client relationship, the client can evaluate the cost of legal services and set rules to make sure that law firms are using technology and other innovations²¹ to ensure that the client is getting full value for every dollar paid.²² The client can always push the bill, metaphorically speaking, back across the table to the lawyer while asking for reductions. But what happens in the context of estate-paid professionals in a bankruptcy case?²³ Those professionals submit their fee applications to the court for the court's approval under §

¹⁸ After all, efficient lawyers can pass through the cost of investing in technology, either as a per-use rate or as a component of overhead, which will affect their hourly rate. We don't shrink at seeing Westlaw or Lexis charges on bills any more, and we're sure that Westlaw and Lexis are faster than the way that we did research, back in the dark ages. One of us can even remember the tiny keyboard of the first Lexis machine at school. Moreover, as our friend Scott Bovitz has pointed out, "A good lawyer's income won't drop because that lawyer will handle more client matters in the extra time that comes from quicker legal work on existing matters." Email from J. Scott Bovitz to Nancy Rapoport, Dec. 25, 2022 (on file with authors).

¹⁹ See *Levine v. Russell Blaine Co.*, 273 N.Y. 386, 389 (Ct. App. N.Y. 1937) (allowing the litigant to prove "general usage or custom" in establishing the standard of care in an industry).

²⁰ We're leaving for another time a deeper discussion of process improvement generally, though Professor Joe Regalia has suggested that there are ways to save clients money by improving certain internal processes. See Regalia comments on earlier draft, *supra* note 5.

²¹ For example, using contract attorneys for certain tasks—with the appropriate conflicts-checking safeguards in place—rather than using the higher-priced in-firm attorneys for those tasks.

²² At the same time, the client can ensure that its trusted partner, its outside counsel, is also well-compensated for the value delivered. Most clients are calibrated to pay today's handsome market rates for outside counsel when the client perceives that it has received excellent service and value.

²³ In this article, we're primarily talking about those estate-paid professionals in large chapter 11 cases, but we'll touch on estate-paid professionals in other chapters, too.

330.²⁴ But other than the court (and maybe the United States Trustee, *and* maybe a fee examiner²⁵), there’s no one source monitoring the burn rate of professional fees.²⁶ Unless the court pushes the bill back across the table to the professional as part of the § 330 analysis, there’s no easy way for the parties in interest to put “reasonableness” in context.²⁷ But § 330 was enacted in 1994, nearly thirty years ago and well before the advent of today’s technology.²⁸ Notwithstanding technological innovations, bankruptcy courts have not established new standards for what constitutes

²⁴ After a bankruptcy court approves the employment of estate-paid professionals pursuant to 11 U.S.C. § 327 (and occasionally § 328, although that’s a whole other issue) or § 1103(a), the Bankruptcy Code authorizes the court to approve the payment of reasonable fees and reimbursement of actual and necessary expenses pursuant to 11 U.S.C. § 330(a). The Code also authorizes the payment of interim fees and reimbursement of interim expenses under 11 U.S.C. § 331. In large chapter 11 cases, courts often establish procedures for interim compensation. *See, e.g.*, Order Authorizing Procedures for Interim Compensation and Reimbursement of Professionals, *In re Revlon, Inc.*, (Bankr. S.D.N.Y. No. 22-10760 (DSJ)), ECF No. 259.

²⁵ Or a really angry creditor.

²⁶ And, as Judge Christopher Klein observed, when commenting on an earlier draft, “... nobody ever gives [judges] help. The various players entitled to be paid out of the administrative pot usually form a self-congratulatory mutual admiration society. There are, in effect, no natural enemies—unlike loser-pays regimes where every dollar hurts.” Email from Hon. Christopher M. Klein to Nancy Rapoport (Jan. 28, 2023) (on file with authors). In fact, “[w]hen I say natural enemies are not around, I am saying that the adversarial process does not function when it comes to fees (unless it is a fee that directly is coming out of the hide of the adversary). In other words, it is useless to expect the adversarial system to function as designed in the arena of bankruptcy fee awards.” Email from Hon. Christopher M. Klein to Nancy Rapoport (Jan. 29, 2023) (on file with authors).

²⁷ As one of us has explained elsewhere,

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 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).

²⁸ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4106 (1994).

“reasonable” fees in light of the technological innovations that have happened since the enactment of the Bankruptcy Reform Act.²⁹

When thinking through whether Congress or the courts should revisit § 330 in light of technological advances, we started with an analysis of § 330³⁰ and its legislative history. Before the Bankruptcy Reform Act of

²⁹ Bankruptcy Reform Act, Pub. L. No. 103-394, 108 Stat. 4106 (1994), reprinted in 1994 U.S.C.C.A.N. 4106.

³⁰ 11 U.S.C. § 330(a) provides:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) 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.

(4) (A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor’s estate; or

(II) necessary to the administration of the case. (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor’s attorney for representing the interests of the

1978, bankruptcy professionals were paid on a *quantum meruit* basis. Generally speaking, the *quantum* that was *meruit*-ed led to bankruptcy practitioners being underpaid as compared to their non-bankruptcy peers who practiced in more lucrative practice areas. Compensation considerations in the prior statutory scheme revolved around “conservation of the estate” and “economy of administration,”³¹ which relegated bankruptcy professionals to providing something akin to a “public service.” This systemic under-compensation led to suboptimal results for those who needed bankruptcy and insolvency advice and services, because the “best and brightest” professionals naturally gravitated to practice areas that better compensated them.

The legislative history of the Code’s 1978 overhaul reveals Congress’s desire to change the compensation parameters under § 330:

The compensation is to be reasonable, for actual necessary services rendered, based on the time, the nature, the extent,

debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

³¹ See NCBJ Special Committee on Venue (Hon. Terrence L. Michael, Hon. Nancy V. Alquist, Hon. Daniel P. Collins, Hon. Dennis R. Dow, Hon. Joan N. Feeney, Hon. Frank J. Santoro, Hon. Mary F. Walrath), *Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741, 812 n.371 (Winter 2019). That footnote reads:

In fact, the Bankruptcy Code sought to encourage the use of standard (national) rates in bankruptcy cases. See H.R. Rep. No. 95-595, at 330 (1977), reprinted in 19785963, 6286 U.S.C.C.A.N. (noting that section 330 was meant to overrule case law “which set an arbitrary limit on fees payable, based on the amount of a district court’s salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work. Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.”).

and the value of the services rendered, and on the cost of comparable services other than in a case under the bankruptcy code. The effect of the last provision is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, which set an arbitrary limit on fees payable, based on the amount of a district judge's salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration. If that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work. Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.³²

In particular, Senator DeConcini, when proposing the amendment to § 330, noted:

Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11. . . . Notions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code.³³

In the legislative overhaul, concepts of "conservation of the estate" and "economy of administration" gave way to a new process and reasonableness

³² H.R. Rep. No. 595, 95th Cong., 2d Sess. 329-30, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6286.

³³ 124 Cong. Rec. 33,994 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6505, 6511.

analysis under § 330. Now, under § 330, bankruptcy attorneys must prepare fee applications as a first step in getting paid from estate funds. Parties in interest (at least theoretically)³⁴ and United States Trustees³⁵ review those fee applications, and the bankruptcy court must review the fee applications to ensure compliance with § 330’s standards.³⁶ The approved fees and expenses are paid as an administrative priority.³⁷

Congress hoped that the change to the compensation structure would create an incentive for bankruptcy professionals to stay in bankruptcy practice, rather than transition to more profitable fields. Congress seems to have gotten its wish as top-flight bankruptcy practitioners at prestigious law firms are currently commanding hourly rates above \$1,500 per hour, at least based on recently filed fee applications.³⁸ We presume that these healthy hourly rates correlate to similarly equally healthy seven-figure annual compensation packages.

The legislative history makes clear that Congress wanted bankruptcy practitioners to be fairly compensated; however, Congress also envisioned that a lawyer’s (or other estate-paid professionals’) entitlement to compensation for services should remain bounded by the concepts of “reasonable,” “necessary,” and “actually rendered.” That’s where the intersection of § 330 and innovative technology intrigues us. We know that Congress’s intent was for bankruptcy practitioners to be fairly compensated. Now that the bankruptcy world has evolved so that practitioners *are* fairly compensated commensurate with their peers, the next question, which is not directly addressed in the legislative history, is:

³⁴ And not so theoretically for angry parties in interest.

³⁵ Even less theoretically.

³⁶ A bankruptcy court “*shall* consider the nature, the extent, and the value of such services, taking into account all relevant factors” ... in determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person....” 11 U.S.C. § 330(a)(3) (emphasis added).

³⁷ See 11 U.S.C. §§ 503(b), 507.

³⁸ See, e.g., *supra* note 16; see also Nancy B. Rapoport & Joseph R. Tiano, Jr., *Billing Judgment*, 96 AM. BANKR. L.J. 311, 312 n.4 (2022) [hereinafter *Billing Judgment*] (“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.”). As we were revising this article, Sullivan & Cromwell was asking the court in the FTX bankruptcy case to approve hourly rates of over \$2,100. See, e.g., Dietrich Knauth & Andrew Goudswaard, *FTX Could Pay Over \$2,100 Per Hour For Bankruptcy Lawyers*, REUTERS (“Bankrupt crypto exchange FTX has asked a U.S. bankruptcy judge for permission to pay its top restructuring lawyers as much as \$2,165 per hour, an unusually high rate for a company that cannot afford to repay all of its debts.”), <https://money.usnews.com/investing/news/articles/2022-12-22/ftx-could-pay-over-2-100-per-hour-for-bankruptcy-lawyers> (last visited Dec. 22, 2022). See also Roy Strom, *Big Law Rates Topping \$2,000 Leave Value ‘In Eye of Beholder,’* BLOOMBERG LAW, <https://news.bloomberglaw.com/business-and-practice/big-law-rates-topping-2-000-leave-value-in-eye-of-beholder> (last visited Jan. 12, 2023).

In light of technological advancements and the efficiencies created by them, what should “reasonable, necessary, and actually rendered” mean when legal professionals have an arsenal of technological weapons available to them?

For this, we must first look to recent case law on § 330.

PART 2: JUDICIAL INTERPRETATION OF REASONABLENESS

Although we know that reasonableness is in the eye of the beholder—the client or the court—we also know that lawyers’ bad choices can create unreasonable fees. In particular, bad choices about what level of professional should do which tasks and how long those tasks should take can catch the eye of the person charged with evaluating those fees. Before we discuss § 330 cases in particular, we’ll start with a case about reasonable fees in general.

In a fee-shifting case, *Hensley v. Eckerhart*,³⁹ the Supreme Court explained that bad staffing choices led to unreasonable fees:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services. The party seeking an award of fees should submit evidence supporting the hours work and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court also should exclude from this initial fee calculation hours that were not “reasonably expended.” ... 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...”⁴⁰

³⁹ 461 U.S. 424 (1983).

⁴⁰ *Id.* at 434 (emphasis added and footnote omitted).

Hensley v. Eckerhart, though itself not a § 330 case, set the basic standard for what is unreasonable (and thus not compensable).⁴¹ A thoughtful reading of the *Hensley* court’s “hours reasonably expended” analysis from 40 years ago translates to a modern day interpretation in which the use (or non-use) of technology impacts “hours expended” as logical part of a “reasonableness of fees” concept.⁴² And that concept of reasonableness necessarily extends to a § 330 review.⁴³ Courts have no problem determining, for example, that time spent on certain activities was excessive.⁴⁴ When it comes to analyzing the staffing of a matter, courts following the principle articulated in *Hensley v. Eckerhart* have the

⁴¹ In determining reasonableness under § 330, courts usually start with the language of that section, as they should, and then they apply the lodestar method, after which they adjust the fees for circumstances particular to the case. *See, e.g., In re Sarkis Investments Co.*, 2019 WL 9233005, *10 (Bankr. C.D. Cal. 2019) (describing the lodestar calculation as the presumptively reasonable fee and explaining that precedent allowed for downward adjustment in particular circumstances); *In re Tribeca Market, LLC*, 516 B.R. 254, 273 (S.D.N.Y. 2014) (“In tandem with a court’s review of these §§ 330 factors, ‘there is “[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a reasonable fee.”’ (citations omitted). *Cf. In re Schold*, 554 B.R. 287, 297 (Bankr. D. Mass. 2016) (in applying its circuit’s lodestar analysis—“by determining a reasonable billing rate and then multiplying it by the number of hours which appropriate tasks should have consumed”—“[t]he lodestar rate ought to take into account the type of work performed, who performed it, the expertise that it required, and when it was undertaken”).

⁴² We think this modern-day interpretation of *Hensley* is a natural extension of its principles. Indeed, the *Hensley* court surely would have concluded that the “hours reasonably expended” for an M&A transaction closing when *Hensley* was decided 40 years ago—before the advent of e-mail, document sharing technology, data rooms, electronic signature technology, videoconferencing, and wire transfer technology—would have been exponentially higher in 1983, as compared to 2023.

⁴³ *See, e.g., In re APW Enclosure Systems, Inc.*, 2007 WL 3112414, *4 (Bankr. D. Del. 2007) (unreported case) (“The court should hold an attorney in a bankruptcy case to the same standards of representation as a client would hold the attorney in a non-bankruptcy case. *See Busy Beaver*, 19 F.3d at 849–50 (noting that the legislative history of section 330 indicates that Congress intended the estate to be represented by the same quality of attorneys as in non-bankruptcy cases).”).

⁴⁴ *See, e.g., In re Duarte*, 2020 WL 6821723, *3–*4 (Bankr. D. Ariz. 2020) (disallowing fees for clerical work and excessive time spent on otherwise compensable work); *In re Sarkis Investments Co.*, 2019 WL 9233005, *27 (Bankr. C.D. Cal. 2019) (disallowing fees for such activities as preparing exhibits, given that the law firm had plenty of clerical staff to do that type of work); *id.* (disallowing fees for tasks that took too long, such as billing 2.3 hours to prepare a status report that “consist[ed] of three and a half pages of background information about Debtor [that was] largely devoid of detailed information, such as projected income and expenses of Debtor, that would require such a substantial amount of time to prepare” and explaining that “[s]uch a status report should require no more than one hour of work by a capable attorney”); *In re Straka*, 2018 WL 3816896, *2 (Bankr. D. Maine 2018) (disallowing several .1 time entries for “tasks that take only a few seconds to complete and that do not involve any legal judgment or skill”); *In re Digerati Tech., Inc.*, 537 B.R. 317, 354–55 (Bankr. S.D. Tex. 2015), *aff’d sub nom. Herrera v. Dishon*, No. 4:15-CV-227, 2016 WL 7337577 (S.D. Tex. Dec. 16, 2016), *aff’d sub nom. Matter of Digerati Techs., Inc.*, 710 F. App’x 634 (5th Cir. 2018) (disallowing fees for certain activities that involved sparse pleadings taking more time to write than the court deemed appropriate); *In re Teraforce Tech. Corp.*, 347 B.R. 838, 862 (Bankr. N.D. Tex. 2006) (observing that the law firm seeking fees “was ‘top-heavy’ in partner hours spent on the Case, as well as ‘bottom-heavy’ in associate hours[, and thus, that the firm’s] ratio of partner-to-associate hours is not what the Court would expect to see in a reasonably staffed case of this size and complexity.”).

discretion to determine how many legal professionals should work on particular tasks involved in a matter and how long various tasks should take.

Here's an example. In *In re Kern*,⁴⁵ the bankruptcy court listed several tasks for which the time billed exceeded the court's expectations as to the time required to complete the tasks:

In this court's experience, there are many examples of excessive time being spent on certain matters. For example,

- On August 7, 2020, [the fee applicant] billed 2.5 hours to review [a party]'s Motion for Relief from Stay.
- On August 18, 2020, [the fee applicant] billed 0.4 hours to prepare an amended Schedule E/F, then billed another 0.2 hours at \$500 per hour the following day to review the Order respecting the amendment.
- On August 20, 2020, [the fee applicant] billed 0.1 hours reviewing an email confirming a CourtSolutions appearance. (In this court's opinion, that should not have been charged at all.)
- On August 20, 2020, [the fee applicant] billed 2 hours to prepare a draft contract for the sale of real estate. However, the contract for the sale of real estate attached to the Motion to Sell was a form contract with certain specific information included.
- On August 25, 2020, [the fee applicant] billed 0.4 hours reviewing four emails confirming a hearing time change[.]
- On September 2, 2020, [the fee applicant] billed 0.3 hours to review three letters from counsel to [a party] sent to Debtor's tenants, which all contained the exact same language.
- For the two adversary proceedings Debtor filed in the case, [the fee applicant] billed 0.4 hours each to review the summons, instructions, blank form mediation order, and blank form scheduling order in an adversary proceeding.
- On October 14, 2020 and October 15, 2020, [the fee applicant] billed 0.1 hours to review the emails regarding subpoenas, which simply referred to the attachments;

⁴⁵ 2021 WL 3518806, *4-*5 (Bankr. D.N.J. 2021).

then an additional 0.2 hours to review the subpoena and notice themselves, for a total of 0.9 hours.

- In the administrative/routine tasks identified on Exhibit A, there are multiple instances of time being charged for “Review Docket Entries.”

The court in *Kern* reached its conclusion based on its extensive experience rather than on objective, industry benchmarks. Even though we do not question the court’s conclusions on the individual time entries, we note three important things. First, the examples highlighted by the *Kern* court relate to relatively simple tasks for which the court’s experience in seeing similar tasks over many years served to create a benchmark. Undoubtedly that matter also involved more complicated, nuanced tasks for which industry data could provide far more benchmarks of reasonableness. Second, the court never addressed whether the professionals could have used innovative technologies to begin (or to replace) human efforts for some of the work. Finally, even though § 330 assessments are squarely in the purview of the court, we cannot help but wonder whether the *Kern* court’s manual, experience-driven analysis was the best use of judicial resources or whether the time, resources, and energy of the bankruptcy bench could have been spent on higher-value activities.⁴⁶

In another example, *In re Stover*,⁴⁷ the bankruptcy court reduced some of the requested fees, explaining that:

[[M]any of the tasks that the Firm’s shareholders performed, especially the highest-rate billers, should have fallen to associates and paralegals. The court notes that the Firm’s three shareholders performed approximately 94% of the postpetition services. In contrast, the Firm’s two associates performed approximately 5% of the work, and the lone paralegal, less than 1%. ... Considering that approximately 1/3 of the 90.2 hours reflected in the Application involved preparing the petition, schedules, and SOFA, ... the court concludes that the Firm did not appropriately staff this matter. Associates and paralegals, rather than shareholders, could and should have performed much of the schedule preparation and revision. [[The senior attorney]]’s extensive and unchallenged experience and expertise justify his handsome rate reflected in the Application, but that same experience and expertise ought

⁴⁶ In Part 5 *infra*, we suggest that courts themselves should leverage technology, either directly or indirectly via the parties, to expedite, augment, and modernize the § 330 reasonableness analysis.

⁴⁷ 439 B.R. 683 (Bankr. W.D. Mich. 2010).

to have impelled him to delegate to less-expensive personnel many of the tasks he and other shareholders performed. Accordingly, the court has allocated much of the shareholder time to the associates and paralegal.⁴⁸

The conclusion that we've drawn from these cases is that the more routine the work, the less senior the person should be who does the work.⁴⁹ And

⁴⁸ *Id.* at 689 (footnote omitted).

⁴⁹ *In re Henson*, 637 B.R. 13, 18–19 (Bankr. S.D. Ohio 2022) (“The court reminds counsel that ‘the hourly fee awarded should be adjusted when a significant percentage of the total work completed is of such a routine nature. Compensation for routine work should be discounted.’ Thus, counsel need to push work down to the lowest available rate for which such work can be competently performed or otherwise adjust the billing accordingly so that clients are not excessively billed for the level of the work performed.”) (citation and footnote omitted); *In re Owsley*, 2021 WL 1270833, *9–*11 (Bankr. S.D. Tex. 2021), *aff’d in part, rev’d in part*, No. 2:19-BK-20060, 2022 WL 1434673 (S.D. Tex. Mar. 31, 2022), *aff’d sub nom. Matter of Owsley*, No. 22-40283, 2023 WL 2424592 (5th Cir. Mar. 9, 2023) (reducing excessive fees by 50%); *id.* at *12–*13 (disallowing fees that were clerical and did not require professional expertise); *In re Kern*, 2021 WL 3518806, *3 (Bankr. D.N.J. 2021) (“The court is truly at a loss as to why it has to again admonish [the fee applicant] for submitting a Fee App that once again provides for the charging of the highest possible hourly rate—\$500—for preparation of routine form pleadings, simple letters to parties and the court, and general administrative/clerical tasks.... That [the fee applicant] chooses not to utilize staff or a lesser hourly rate for these tasks is of [the fee applicant]’s own choice.”); *In re Mata*, 2020 WL 6370347, *9 (Bankr. S.D. Tex. 2020) (reducing excessive fees by 25% for “[b]illing almost four hours preparing a simple motion, which required no legal research or analysis....”); *In re Hanover*, 2020 WL 2554229, *4 (Bankr. E.D.N.Y. 2020) (reducing fees involving too many professionals and too much time for given tasks); *In re Houck*, 2020 WL 5941415, *15 (Bankr. W.D.N.C. 2020), *aff’d sub nom. Houck v. LifeStore Bank*, No. 5:13-CV-00066-DSC, 2021 WL 970495 (W.D.N.C. Mar. 8, 2021) (reducing fees for excessive work and overstaffing); *In re Mohsen*, 473 B.R. 779, 792 (Bankr. N.D. Cal. 2012), *aff’d*, 506 B.R. 96 (N.D. Cal. 2013) (“... Counsel’s belief that the DQ motion would result in a substantial recovery for the estate did not give Counsel free reign to devote many hours to a project that should have been accomplished in much less time. Attorneys have a duty to exercise good billing judgment when they apply for fees.”) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *In re Henry S. Miller Commercial, LLC*, 2010 WL 463882, *5 (Bankr. N.D. Tex. 2010) (“While this court has said many times in approving fee applications, that ‘you get what you pay for,’ and this court has no problem awarding substantial fees to a professional who works hard to significantly assist a client in the preservation or generation of value, or who crafts a creative solution to complex problems, the court does have a problem with awarding generous fees where no significant activity occurred, no value was generated, nothing was complex, no problems were meaningfully solved and, in fact, the case was mostly about preparing routine documents, protecting insiders, and billing.”) (footnote omitted). There are also plenty of “not for publication” or otherwise unreported cases that also illustrated the point that courts will reduce fees attributable to excessive billing. *See, e.g., In re Reynolds*, 2015 WL 1054800, *4 (Bankr. C.D. Cal. 2015) (not for publication) (“The reasonableness of the time expended is an integral part of the lodestar analysis. In that regard, the court finds that 20 hours spent preparing and filing the dismissal motion is extravagant given the issues raised by the involuntary petition. Nor is the court convinced that a declaration regarding service necessitates one full hour of attorney time. Accordingly, the court will reduce by 10 hours and .5 hours, respectively, the number of hours which reasonably should have been expended by Cohn Stewart in connection with the dismissal motion and declaration regarding service.”); *In re Acevedo*, 2014 WL 6775272, *6 (Bankr. W.D. Mich. 2014) (unreported) (“The court will not allow compensation at an attorney’s rate for tasks that clerical staff or paraprofessionals may perform.”); *In re Bowling*, 2014 WL 4290336, *6 (Bankr. D. Kansas 2014) (unreported) (“The Firm spent more time than was necessary to complete this case. Some of this is due

that conclusion lets us imagine a world in which AI takes the first cut at particular tasks, making AI, in certain circumstances, the more reasonable choice.⁵⁰ The trick, of course, will be in determining when the “lowest efficient biller”⁵¹ is a partner, a senior associate, a junior associate, a paralegal, a well-trained non-legal professional, or technology.⁵²

to the inefficiencies and inevitable duplication of services that occurs when four lawyers and several staff members ‘touch’ a file. Some of it is due to [the Debtor]’s failure or inability to respond timely to the trustee’s information requests. Some of it is simply duplicative.”); *In re Green*, 2013 WL 4603005, *2 (Bankr. E.D. Cal. 2013) (not for publication) (“The use of two attorneys in a Chapter 13 case is not per se impermissible. But total fees should not increase appreciably by the use of more than one lawyer, unless the size or complexity of the case is such that one lawyer could not reasonably be expected to handle it. This is not such a case. And the court finds that the use of two lawyers has, in fact, resulted in unnecessary duplication of efforts and unnecessary fees.”); *In re Kline*, 2003 WL 21790190, *1 (Bankr. W.D.N.C. 2003) (unreported) (“The matter litigated by the Trustee’s attorney here was the avoidance of a real estate lien where the deed of trust had been filed in the wrong county. ... [T]he matter was straight-forward and uncomplicated legally and procedurally, and should have been prosecuted far more efficiently than it was. It should not have required \$43,000 (or \$30,000) of attorney time to avoid the lien of a creditor who had filed its deed of trust in the wrong county and to obtain priority over other creditors whose secured claims were dependent thereon.”); *id.* at *2 (“Rather than obtaining efficiencies by using lower priced associates and paralegals to complete tasks, the Trustee’s methods of operating seem to duplicate efforts in many instances. Instead of the associates and paralegals in the Trustee’s office accomplishing a task, often their work consists of taking preliminary actions, preparation of a memorandum of what they did, review of the memo by the Trustee and finally an intra-office meeting to discuss the memo. This duplicative pattern is repeated throughout the fee application.”). This list of cases is far from exhaustive, and you get our point. Even when the lowest efficient biller isn’t around, that’s no reason for a more senior biller to bill time at a higher rate than the task itself requires, but that is a matter for another article that we’ve written. See *Billing Judgment*, *supra* note 38, at 348–49 (quoting *In re United Plastic Recycling, Inc.*, No. 15-32928, 2017 WL 4404780, at *6 (Bankr. M.D. 2017)) (unreported case). So if a senior biller shouldn’t bill at over \$1,000/hour to do basic legal research that a first-year associate should do, then a more junior person shouldn’t be doing work that a computer should do. And from what we’ve heard about the entering workforce these days, the junior people would rather do higher-order work anyway, having grown up on delegating certain work to their own computers.

⁵⁰ But see Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Rules of Professional Conduct in Accordance with a New Technological Era*, 39 CARDOZO L. REV. 1497, 1514–16 (2018) (discussing AI in relationship to the duties of competence, and observing that lawyers still have a duty to insure that the computer is doing the right research—“... if an AI tool performs legal research, was it asked the right questions? Did it grasp the legal issue? Did it research the pertinent jurisdiction?”).

⁵¹ One of us uses this term—“lowest efficient biller”—when she is acting as a fee examiner and asking professionals why they assigned particular professionals to various tasks. The lowest biller is not necessarily the best biller for a task. Neither of us wants to use a first-year associate for “bet the company” work. But we don’t want a partner billing time to research the definition of the automatic stay, either. The “lowest efficient biller” has the right level of experience to do the task accurately and expeditiously.

⁵² One of us just can’t resist adding this quote here:

Rear Admiral [Cain]: These planes you’ve been testing, Captain, one day, sooner or later, they won’t need pilots at all. Pilots that need to sleep, eat.... Pilots that disobey orders. All you did was buy some time for those men out there. The future is coming, and you’re not in it.

PART 3: MODERN LEGAL PRACTICE, REASONABLENESS, AND SECTION 330

A. Reasonableness and the Concept of Billing Judgment

In a recent article, we expressed our view that a component of every attorney's ethical obligations requires her to demonstrate good billing judgment. There is an adage that everyone *thinks* he or she has a sense of humor, but not everyone does.⁵³ Like that adage, everybody professes to understand the notion of "good" billing judgment, but not everyone does. In our *Billing Judgment* article, we defined the criteria by which courts and clients could measure good billing judgment as follows:

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.⁵⁴

There is an unmistakable connection between good billing judgment and the reasonableness of fees under § 330. Good billing judgment tends to be the predicate to reasonable fees.⁵⁵ More specifically, if a legal professional

....

Rear Admiral [Cain]: The end is inevitable, Maverick. Your kind is headed for extinction.

[Maverick turns around]

Maverick: Maybe so, sir. But not today.

TOP GUN: MAVERICK (Paramount Pictures 2022), https://www.imdb.com/title/tt1745960/quotes?ref_=tt_ql_sm (last visited Dec. 13, 2022). What's true of pilots and drones is also true of lawyers and robo-lawyers. The trick is to figure out when a human or a computer is the best choice for a first cut at a particular task. Indeed, if a court feels comfortable determining whether a second-year associate or a partner is the proper legal professional to handle a discrete task, it does not strain logic to conclude that a technology-savvy judge is equally capable of determining whether a task should be handled by a human being or whether the task should be partially or fully tech-enabled.

⁵³ For a great example of this adage, see MY BLUE HEAVEN (Warner Bros. 1998) ("Barney: Of course you have a sense of humor. Everyone thinks they do, even people who don't."), https://www.imdb.com/title/tt0100212/quotes?ref_=tt_ql_sm (last visited Dec. 22, 2022).

⁵⁴ *Billing Judgment*, *supra* note 38, at 315. After the article came out, we didn't hear any disagreement with our definition of billing judgment. That silence could mean that most people agreed with us and that the rest had no violently bad reactions to our definition—or it could simply mean that not enough people have read our article yet, and that the storm of protest is just around the corner. We prefer the first interpretation of the silence, but if anyone has a better definition of billing judgment than ours, we'd love to hear it.

⁵⁵ Of course, we acknowledge that billing by the hour could discourage good billing judgment by punishing the efficient worker. For just one example of the criticism of the billable hour, Susan Saab Fortney has pointed out that "hourly billing creates an incentive to overwork files and misrepresent time because the more hours an associate works, the more fees are generated." Susan Saab Fortney, *Soul For*

fails to exercise good billing judgment, there is a strong likelihood that the fees that the legal professional wants to collect will fall short of being reasonable under a § 330 analysis. Good billing judgment requires a lawyer to be conscientious and thoughtful about how legal services are delivered. A lawyer who demonstrates good billing judgment considers whether the use of technology or data analytics tools will be more efficient (and cost-effective) for a client, even if the number of billable hours for the matter decrease, along with a decrease in billable fees.⁵⁶ Clients may vary in how stringently they review their outside counsel’s legal fees, in the same way that bankruptcy courts might vary in how frequently they do a line-item review of fee applications. But the principles of what constitutes good billing judgment should apply uniformly regardless of who is reviewing and approving the legal fees. Here’s an example: In a case with mountains of first-level document review, an attorney who shows good billing judgment considers whether to engage an alternative legal service provider or an eDiscovery vendor to handle the first pass at document review, even if it means using a drastically downsized team of junior associates for document review.⁵⁷ Gone are the days when big discovery assignments used a scrum of newly minted lawyers to sift through warehouses of physical papers.⁵⁸

Historically, a § 330 analysis has required a court to review the legal services performed, the time spent on providing those services, the professionals’ hourly rates for those services, and the matter’s complexity. But that analysis doesn’t typically also ask if there could have been a better way to deliver legal services from a process and personnel management perspective, given technological advancements and personnel flexibility. Therein lies the crucial point of intersection between good billing judgment and a § 330 reasonableness analysis. Good billing judgment involves not just the “what” that is being done (i.e., a legal task), but also the “who” that should be doing it, and whether the “who” should be a carbon-based life form or a computer.

Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements, 69 UMKC L. REV. 239, 277 (2000) (footnote omitted).

⁵⁶ Again, though, why should the use of technology automatically result in lower fees? See *supra* note 18. Either the more efficient lawyers are more valuable, thus being able to justify increased hourly rates, or they could pass along the investment in technology to the client, either by direct charges or by a component of overhead that sneaks into the firm’s hourly rates.

⁵⁷ As our friend Randy Gordon puts it, “I don’t know any BigLaw firm that hasn’t replaced human document reviewers with software for the initial cut of things like privilege. I think this has probably reduced the size of some incoming associate classes. Software has also mostly taken over document management from paralegals—hence there aren’t many of them anymore.” Email from Randy Gordon to Nancy Rapoport, Dec. 28, 2022 (on file with authors).

⁵⁸ Well, “gone” for big matters, anyway. Technology costs money, too, so big investments in tech might not yet be cost-effective for small matters.

Simply put, the nature of the legal industry has changed, and § 330 must adapt with it. We've graduated from the era in which the practice of law was solely a profession⁵⁹ into an era in which the business part of delivering legal services has come into sharper focus. We've long lost the succinct "For services rendered," one-line bill,⁶⁰ and now clients expect us to bill by the hour to demonstrate exactly what services we *are* rendering.⁶¹

The shift from a one-line bill with a lump-sum figure and a pithy phrase to "I spent a tenth of an hour reviewing the docket" creates a corollary: it used to be impossible to measure reasonableness with the one-line bill, other than by one's own gut hunch. Now, there are actual data points: time entries. So, the old approach of using our own experience (and a gut hunch) is missing something important: comparative data. The ability to compare, both within and across a firm, how long something should take and who should do it should form part of the reasonableness analysis under § 330.⁶²

⁵⁹ And a "gentlemen's" profession, to boot, with all that *that* hoary old phrase entails. See, e.g., Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (1998) (discussing how, when she was a student at Yale Law School, she was in a course in which a law professor who "was a creature of habit. He readily acknowledged the presence of the few 'ladies' by then in attendance, but admonished those of us born into that other gender not to feel excluded by his greeting. We too, in his mind, were 'gentlemen.'").

⁶⁰ For a brief history of the switch from "for services rendered" flat rates to hourly billing, see, e.g., Jim Calloway, *A Brief History of Hourly Billing*, https://www.okbar.org/lpt_articles/a-brief-history-of-legal-billing/ (last visited Dec. 8, 2022).

⁶¹ The switch to hourly billing was designed to demonstrate efficiency and effectiveness. Jim Calloway describes the shift:

[S]omewhere it began. Some business client asked a lawyer why a certain matter that had been handled before had doubled or tripled in price this time. The lawyer responded [that] this matter was more complex and therefore took more time to complete. Then came the question that would prove fateful for the legal profession: "If you are billing me for the time you expended, why aren't you showing me the time you expended on the billing?" Upon reflection, that sounded fair to the lawyer. After all, it was a repeat client who always paid [its] bills requesting this change in the firm's practices. Although changes in the legal system often take a fair amount of time to catch on, as larger law firms, banks and insurance companies learned of this method, it became the standard practice. It was objective. Hours times the lawyer's hourly rate equals the bill.

Calloway, *supra* note 53. Want to blame a single lawyer for a system that now requires us to think in six minutes increments? According to WilmerHale, it was Reginald Heber Smith. The firm's publication, *Slice of History: Reginald Heber Smith and the Birth of the Billable Hour*, is worth a read. See *Slice of History: Reginald Heber Smith and the Birth of the Billable Hour*, WilmerHale.com, <https://www.wilmerhale.com/insights/publications/slice-of-history-reginald-heber-smith-and-the-birth-of-the-billable-hour-august-9-2010> (last visited Dec. 8, 2022). Professor Joe Regalia has pointed out that task-based billing and client-side e-billing software has increased the transparency of legal bills, thus enabling clients to get a clearer picture of a bill's reasonableness. See Regalia comments on earlier draft, *supra* note 5.

⁶² Cf. *Billing Judgment*, *supra* note 38, at 327 ("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

A § 330 analysis ought to borrow from the practical application of good billing judgment and evolve to reflect the way that law is practiced today, which often involves technology-enabled services and lower-cost alternative legal service providers.⁶³ Lawyers who bill by the hour are now expected to go beyond what services are being rendered, explaining why the services are being rendered in the manner delivered and why the legal professionals rendering the legal services were chosen to do so. And now, it also has become imperative to ask, “is a computer the best ‘first professional’ to use for this task”?⁶⁴

In practice, that question means that an attorney seeking fees under § 330 must be prepared to address what decisions prompted the use—or non-use—of certain technologies or alternative legal service providers. Likewise, bankruptcy judges must be willing to probe these choices when making a § 330 determination. Instead of evaluating only the *actual* time spent on providing the legal services, a reimagined analysis inquires whether the actual time and cost could have been reduced with the use of technology. Likewise, the hourly rate analysis should not just consider comparable *lawyer* rates in the relevant jurisdiction on a matter of equal complexity but should consider whether the introduction of technology or other types of professionals into the more routine aspects of the matter could have been more cost-efficient (i.e., a lower weighted average hourly rate) without any decrease in the quality of the work product.⁶⁵

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.”).

⁶³ In the 2013 U.S. trustee guidelines, the Executive Office of the United States trustee recognized that there is a way to shift work to less expensive providers: “Efficiency counsel is secondary counsel employed to handle more routine and ‘commoditized’ work, such as claims objections and avoidance actions, at lower cost to the estate than lead bankruptcy counsel.” *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases*, 78 FED. REG. 36248, 36256 (June 17, 2013/2013/06/28/Fee_Guidelines.pdf (last visited Dec. 8, 2022)).

⁶⁴ In an ideal world, that question comes *before* the partner in charge assigns the work. If a court or a fee examiner is asking that question, there’s a risk that the professional’s fees are about to be on the chopping block. *See, e.g., Billing Judgment*, *supra* note 38, at 313 (footnote omitted) (“Under a perfectly equitable system, an attorney with legitimate, but unrecoverable, time could travel to the past in a WABAC machine and rebill that time to some other matter. But WABAC machines don’t exist, and nobody else will be paying for that ‘lost’ time.”).

⁶⁵ Not everything has to be perfect in order to satisfy a lawyer’s fiduciary duty to her client, and sometimes, informed clients want to pay for just “good enough” services, rather than for “perfect” services. *Cf.* Robert Capps, *The Good Enough Revolution: When Cheap and Simple Is Just Fine*, WIRED (Aug. 24, 2009) (“As a result, what consumers want from the products and services they buy is fundamentally changing. We now favor flexibility over high fidelity, convenience over features, quick and dirty over slow and polished. Having it here and now is more important than having it perfect. These changes run so deep and wide, they’re actually altering what we mean when we describe a product as ‘high-quality.’”), <https://www.wired.com/2009/08/ff-goodenough/> (last visited Dec. 22, 2022);

And to take our point one step further, we think that practicing attorneys should use legal spend data to prove what is reasonable in today's legal environment, and that judges should require attorneys to prove reasonableness in this way.⁶⁶ We've all heard (or said) the line, "I've been involved in the practice of bankruptcy law for over 30 years, and I know what things cost." Although for many professionals, that statement may be mostly accurate, it may not be accurate for much longer. We know that countless aspects of the law change every time a new decision is handed down or a new law or regulation is enacted. We also know that technological developments are happening at a dizzying pace. Experience is a good initial barometer for cost, but legal spend data is an indispensable companion to that experience.

In essence, reasonableness analysis uses a shadow system, comparing actual fees to the reviewer's own internal database of "experience." Imagine how much more robust a reasonableness analysis could be if a court had true comparative data. With the press of a few buttons to query an extensive, up-to-date legal spend database, bankruptcy practitioners and judges could uncover the range of estimated fees for preparing a stay relief motion, or a skeleton of a typical disclosure statement or chapter 11 plan, or a debtor-in-possession financing motion, or countless other tasks and workstreams that occur regularly. Those estimates could be refined by

Carolyn Elefant, *What Does the "Good Enough" Phenomenon Mean for Solos?*, MY SHINGLE Blog (Sept. 1, 2009) ("[M]y take away from the *Wired* article isn't that cheap and simple means compromising standards. Rather, at the core of cheap and simple is to deliver value by providing the key features of a product that matter most to consumers."), <https://myshingle.com/2009/09/articles/client-relations/what-does-the-good-enough-phenomenon-mean-for-solos/> (last visited Dec. 22, 2022). Here's a take from an actual user of legal services:

Rosemary Martin, group general counsel and company secretary of Vodafone adds:

As a buyer of legal services, I look for value: not necessarily the cheapest option but the one that I think will deliver the outcome I am looking for, be that success in a case, speed in contract execution, or precision in defining the terms of a complex legal relationship.

NOAH WAISBERG & DR. ALEXANDER HUDEK, *AI FOR LAWYERS: HOW ARTIFICIAL INTELLIGENCE IS ADDING VALUE, AMPLIFYING EXPERTISE, AND TRANSFORMING CAREERS* 28 (2021) (italics in original) [hereinafter *AI FOR LAWYERS*]. Various firms, including Legal Decoder, have amassed verifiable data on a range of what certain tasks "should" cost. We're not saying that there should be a fixed rate for every type of legal task, but we do want you to be aware that many clients now have access to this type of information, and they're using that information in discussions with their lawyers. *Cf.* Regalia comments on earlier draft, *supra* note 5 ("You could imagine a database, accessible to courts, where there are standardized rates for tons of different legal tasks, organized by all the variables [a]nd then some push to get firms (probably pushed by clients) to use the standardized tasks. This has become so common in some practice areas where clients have already demanded it. And I think it's made a huge difference in the ability of clients to push back on fees.").

⁶⁶ We're willing to soften this thesis a bit to say that attorneys should have to prove reasonableness in this way in the larger cases. Don't stone us just yet.

ranges of assets, liabilities, creditors, and related parties to create more of an apples-to-apples review. With a good, up-to-date database, the estimates of cost ranges would adjust for innovative technologies and the use of alternative legal services providers far better than estimates using only “experience” as the barometer.

And yet, as the old advertisements said, there’s more.⁶⁷ Technology, data, and alternative legal service providers (or ALSPs) are only setting the stage for the need to reimagine § 330 entirely. Just think about what happens when AI evolves to assist legal practitioners with the delivery of more types of legal services.⁶⁸

B. The World of Artificial Intelligence in the Practice of Law

Lawyers who harness AI effectively don’t use it for the parts of law practice that rely on a lawyer’s judgment or specialized talent;⁶⁹ they use AI for those parts of law practice that can be routinized and done more efficiently (at least in a first cut) by machines.⁷⁰ In other words, as one of us

⁶⁷ See, e.g., Ronco, About Company, <https://www.ronco.com/pages/company> (last visited Dec. 8, 2022) (“Known for the legendary tagline ‘But wait . . . there’s more,’ Ronco has been creating innovative, cutting-edge kitchen appliances and accessories for almost sixty years.”).

⁶⁸ Noah Waisberg and Alexander Hudek have observed:

[W]e see a widening gap between the total demand for legal services and the share of that work that’s going to law firms. Much of that work is being retained by in-house departments or sent to ALSPs precisely because those organizations have been willing to apply technology to accomplish more with fewer resources. Law firms willing to make similar investments in technology might be able to claw back some of that gap.

AI FOR LAWYERS, *supra* note 65, at 23..

⁶⁹ See, e.g., SUSSKIND, *supra* note 16, at 65 (“It is true that much of the work of the oral advocate is highly bespoke in nature and it is not at all obvious how the efforts and expertise of the courtroom lawyer might be standardized or computerized. Indeed, oral advocacy at its finest is probably the quintessential bespoke legal service.”); see also Hilary G. Escajeda, *The Vitruvian Lawyer: How to Thrive in an Era of AI and Quantum Technologies*, 29 KAN. J.L. & PUB. POL’Y 421, 465–69 (2020) (describing the need for emotional intelligence and empathy in the practice of law, even as AI becomes more normalized in law, resulting in a “human-machine fusion,” and concluding that “the emotionally intelligent legal professionals who will thrive in a digital (eventually quantum) economy are those who will effectively use cognitive intelligence tools to serve their clients compassionately and solve their legal problems ethically and humanely.”); Rebecca Crootof, “Cyborg Justice” and the Risk of Technological-Legal Lock-In, 119 COLUM. L. REV. FORUM 233, 237–38 (Nov. 20, 2019) (observing that computers are good at detecting patterns but are not designed for judgment calls); Surden, *supra* note 3, at 1332 (“lawyerly tasks that involve abstract thinking, problem-solving, advocacy, client counseling, human emotional intelligence, policy analysis, and big picture strategy are unlikely to be subject to automation given the limits of today’s AI technology.”).

⁷⁰ Noah Waisberg and Alexander Hudek have made this point:

[T]here is more legal work than what law firms do. Technology has enabled more in-house legal departments to retain work in-house, avoiding the premiums that law firms have charged for routine or process-oriented work. An entire Alternative Legal Services (or NewLaw or Law Company) sector has been built

has heard Karim Guirguis from the American Bankruptcy Institute point out, “lawyers used to do things that robots could do, and now lawyers can concentrate on doing only those things that lawyers should do.”⁷¹ After all, not everything that a lawyer does actually involves unique, from-the-ground-up drafting:

To be sure, and I want to stress this, difficult problems do arise that undoubtedly require bespoke attention; but, far more frequently, lawyers are asked to tackle problems which bear a strong similarity to those they have faced in the past. Indeed, one of the reasons clients select one lawyer over another, or one firm over another, is precisely that they believe that the lawyer or firm has undertaken similar work previously. Most clients would be horrified to think, especially if they are being billed on an hourly basis, that each new piece of work they pass to law firms is set about with a fresh sheet of paper and embarked upon from scratch. On the contrary, clients expect a degree of standardization.⁷²

There are, in fact, many areas in which a computer is the correct choice for a first-cut analysis, with a lawyer reviewing the results of that first cut. A computer can sort through massive numbers of contracts⁷³ and conduct

up to handle some forms of outsourced legal work, much of which is process-driven and lends itself to technology-enabled services.

AI FOR LAWYERS, *supra* note 65, at 22. Or, as Daniel Susskind puts it, “[t]hink of a lawyer who is displaced from the task of looking through stacks of papers by an automated document review system, a piece of software that can scan legal material far more swiftly—and, in many cases, more precisely, too. The same lawyer can now turn her attention to other tasks involved in providing legal advice, perhaps meeting face-to-face with her clients or applying her problem-solving skills to a particularly tricky legal conundrum.” DANIEL SUSSKIND, *A WORLD WITHOUT WORK: TECHNOLOGY, AUTOMATION, AND HOW WE SHOULD RESPOND* 23 (2020).

⁷¹ Remarks by Karim Guirguis at the American Bankruptcy Institute’s Annual Spring Meeting’s session called *Let’s Chat[a]Bot It: Ethical Considerations of Artificial Intelligence and ChatGPT in Law Practice* (April 22, 2023) (panel discussion with Jason Brookner, Karim Guirguis, Michael Richman, and Nancy Rapoport).

⁷² SUSSKIND, *supra* note 16, at 27–28; *cf.* Surden, *supra* note 3, at 1319 (“[M]any modern AI systems are not fully machine-learning or knowledge-based systems but are instead hybrids of these two approaches.”) (footnote omitted).

⁷³ Consider the following example:

If, for example, a large tech company finds itself with a huge volume of procurement contracts that all have varying renewal dates and renegotiation terms, it would require hundreds of hours and a team of contract managers to review and track of all this information to ensure that no renewal or opportunity is missed.

AI software, however, can easily extract data and clarify the content of contracts. (It could quickly pull and organize the renewal dates and renegotiation terms from

due diligence that canvasses all of the necessary information (such as all of the contracts that might be assumed).⁷⁴ So why can't AI also do a first draft of simple pleadings that bankruptcy lawyers routinely file?⁷⁵ We make this

any number of contracts.) It can let companies review contracts more rapidly, organize and locate large amounts of contract data more easily, decrease the potential for contract disputes (and antagonistic contract negotiations), and increase the volume of contracts it is able to negotiate and execute.

Beverly Rich, *How AI Is Changing Contracts*, HARV. BUS. REV. (Feb. 12, 2018), <https://hbr.org/2018/02/how-ai-is-changing-contracts>; *id.* (“AI contracting software can, for example, identify contract types (even in multiple languages) based on pattern recognition in how the document is drafted. Because AI contracting software trains its algorithm on a set of data (contracts) to recognize patterns and extract key variables (clauses, dates, parties, etc.), it allows a firm to manage its contracts more effectively because it knows – and can easily access – what is in each of them.”); *see also* Rachel Vanni, *How AI Accelerates the Legal Contract Drafting Process*, KIRASYSTEMS.COM (May 27, 2020), <https://kirasystems.com/learn/how-ai-accelerates-the-legal-contract-drafting-process/> (describing how AI can be used to draft basic contracts and screen contract language for various terms and dates).

⁷⁴ Here's an illustration:

We will imagine a different AI-enhanced project [In] scenario 1, a firm bills its client \$200,000 for some junior lawyer work. In fact, the partner wrote off 20% of the amount their associates worked on this project before even sending the \$200,000 bill, because they didn't think the juniors worked efficiently, and they worried about upsetting the client and damaging their relationship. These write-offs are common. Despite this preemptive write-off, the client only paid 65% of the diligence fee, still feeling that the work wasn't done efficiently. (The client is right!) Eventually, after lots of haggling, the firm got paid \$130,000. Now, consider the AI-enhanced scenario 2. Here, the partner feels good about the efficiency of their team, so they bill all hours worked: \$250,000. Throughout the matter, and in delivering the bill, the partner explains how their firm is focused on efficiency, and the client is happier about the value of the work they received. To be conservative, we assumed only a 10-point jump in realization rate, though—if the partner is good at selling value—this might be higher. Here, because the bill was higher (due to no preemptive write-off) and because of the higher realization (collection) rate, the firm makes an extra \$45,500, despite us assuming that the AI cost \$10,000. That's 35% more revenue! And—to keep the numbers simple—we didn't even look at matter profitability here. Suffice it to say that throwing out hours—either because you don't bill them or the client doesn't pay for them—is bad for profitability. Changes in realization rates can really make an impact. If a firm has an industry average 89% realization rate, and has over \$1 billion (or \$10 million, for that matter) in revenue, the money (and profit) it is leaving on the table can be pretty *immense*.

AI FOR LAWYERS, *supra* note 65, at 33–34 (italics in original); *see id.* at 30 (“Lawyers can add value by using AI to increase the number of contracts they review in transactions. Some clients might be happy to get a lower diligence bill thanks to faster AI-enhanced contract review. But many should be very interested in getting twice the diligence for the same price they paid the last time they did a deal, or three times for 30% (or 50%) more money.”).

⁷⁵ For the ability of computer algorithms to take data and create bankruptcy forms, see our discussion of Upsolve, *infra* notes 108–125; *see also* <https://www.legalmation.com> for an AI-powered legal tech company that is already tackling this challenge in the area of general commercial litigation (“LegalMation’s ground-breaking AI system dynamically produces fully formatted responsive pleadings, discovery requests and responses and other documents, all tailored to the claims, allegations, and requests in the legal document uploaded, incorporating jurisdictional requirements as well as the

argument with some trepidation, because we're sidelining first- and second-year associates in favor of computers, but we'll address that issue in Part 5 below.⁷⁶ And we're not talking about AI in the future. We're talking about AI in the present.

In the legal sphere ... JP Morgan has developed a system that reviews commercial loan agreements; it does in a few seconds what would have required, they estimate, about 360,000 hours of human lawyers' time. Likewise, the law firm Allen & Overy has built software that drafts documents for over-the-counter derivatives transactions; a lawyer would take three hours to compile the relevant document, they say, while their system does it in three minutes.⁷⁷

In the now-classic LawGeex study, LawGeex pitted experienced lawyers against machines to spot issues in non-disclosure agreements. The machines won.⁷⁸ They might not have been perfect, but humans have never been

attorney's own style, and response strategy"), available at <https://www.legalmation.com> (last visited Dec. 23, 2022). For a discussion of how clients in large chapter 11 bankruptcies could insist that their professionals turn to AI when AI is appropriate, see Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases*, 28 ABI L. REV. 39, 88–90 (2019).

⁷⁶ One way to think about this sea change is by deciding *where* AI or other legal technology belongs in the process of serving clients: in automating certain functions that humans *could* do, but that computers can do faster and more efficiently; in using computers to do certain things that humans are just not great at doing ("like spot one little word in a mountain of millions of documents"; see Regalia comments on earlier draft, *supra* note 5), or in assisting tasks that humans should be doing but in ways that computers can speed up.

⁷⁷ SUSSKIND, *supra* note 70, at 82–83 (footnotes omitted). As to proprietary AI like Allen & Overy's Harvey, see David Wakeling, *Allen & Overy announces exclusive launch partnership with Harvey*, ALLEN & OVERY, <https://www.allenoverly.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey> (last visited Mar. 25, 2023), our friend Jeff Garrett has pointed out that such proprietary software may end up being a plus in a law firm's pitch to clients. See email from Jeff Garrett to Nancy Rapoport and Joseph Tiano (Mar. 24, 2023) (on file with authors). Jeff also pointed out that it only took four months for ChatGPT to go from failing a bar exam to passing one. This technology is moving fast.

⁷⁸ *Comparing the Performance of Artificial Intelligence to Human Lawyers in the Review of Standard Business Contracts*, LAWGEEX, <https://images.law.com/contrib/content/uploads/documents/397/5408/lawgeex.pdf> (Feb. 2018) ("US lawyers with decades of experience in corporate law and contract review were pitted against the LawGeex AI algorithm to spot issues in five Non-Disclosure Agreements (NDAs), which are a contractual basis for most business deals.... Following extensive testing, the LawGeex Artificial Intelligence achieved an average 94% accuracy rate, ahead of the lawyers who achieved an average rate of 85%."). Our friend Lila Anderson (who has a Ph.D. in Physics) suggested that the studies would be even more powerful if they told us if the mistakes that the machines made were of the same type as the human-made mistakes. She's right. Email from Lila Anderson to Nancy Rapoport, Dec. 23, 2022 (on file with authors).

perfect, either.⁷⁹ The point is that machines, in this context, were better than humans.⁸⁰ Other studies on computer-versus-human in document reviews had similar results.⁸¹ Different clients have different needs, and some of those needs have little to do with getting the “right” result—instead,

⁷⁹ And new technology may make humans less perfect as well. Professor Trimble’s 2022 editorial on the effects of AI on human intelligence refers to the “Google effects on memory”: that we’re losing our desire to memorize certain facts because we know that we can look up those facts. (Neither of us, for example, has the other’s cell phone number memorized.)

With the internet becoming “a primary form of external or transactive memory, and with memory stored collectively outside ourselves”, there is less need to remember information that is stored on the internet. Another study showed that the Google effects could be even more pronounced when internet users trust that the information they need will be reliably available on the internet in the future.

Marketa Trimble, *Artificial Intelligence and Human Intelligence*, GRUR Int’l, Vol. 72, Issue 1, at 1–2 (Jan. 2023). Technology isn’t just changing what we do. It’s changing how we think.

⁸⁰ Cf. Rhys Dipshan, *Law Firm Automation Will Survive the Pandemic*, NAT’L L.J. (Aug. 3, 2022), <https://www.law.com/nationallawjournal/2022/08/03/law-firm-automation-will-survive-the-pandemic-405-08030/?kw=Law%20Firm%20Automation%20Will%20Survive%20the%20Pandemic> (in comparing computer results and human results, “... Baker McKenzie’s [[Ana-Maria]] Norbury says that those worries need to be put into proper context. ‘If you’ve got humans reviewing documents, humans will make mistakes. It’s inevitable, I think. That’s interesting to think about as we look at the idea that we want things to be perfect. Yes, technology is not completely perfect and that’s an issue. Well, humans aren’t perfect either. So you have to factor that into the commercial angles if we are driving efficiency.’”). If you’re still worried that AI will ruin the practice lives of lawyers, here’s an instructive example from history. Professor Arthur Daemmrich has pointed out that the invention of the automatic pin making machine, which moved society away from the bespoke and slow hand-making of pins, had significant positive effects. As pins became less expensive, clothing also became less expensive (in part thanks to the cheaper pins and in part thanks to the new textile-making machines), and the demand for new clothing increased. (“Lower-cost pins produced by “intelligent” machines invented by Howe, Bagshaw, and others made it cheaper to produce cloth, combs, and other items. In turn, these industrial and consumer goods made possible greater consumption and supported overall economic growth, even while reducing demand for child labor.”). That’s not the whole story, of course, and the relationship of faster pin-making to cheaper goods had its own social complications. But the market finds its way, eventually. That’ll happen, too, with AI and legal services. See Arthur Daemmrich, *Technology and Employment: pin making and the first industrial revolution long tail*, MEDIUM (Mar. 25, 2019) (on file with authors).

⁸¹ Consider the following example:

[[W]]e did our own study in which we included a group of highly qualified lawyers and had them all do the exact same document review task. We then looked at the results to see how often they agreed with one another and how often they disagreed. As it turned out, they only agreed with each other 70% of the time, which is a shockingly low number. Another interesting part about that experiment was that we also trained our system to replicate the behavior of each person. When we measured how often the resulting individual AI systems disagreed with each other, it matched roughly what we saw in the humans, which was quite an interesting observation. It basically showed that we can capture individual human differences in knowledge. This means that based on the beliefs and attitudes of whoever is training the system, the results may differ, which takes us back to carefully selecting who will be providing the expertise and making sure they are clear on what they are trying to get the AI to learn.

AI FOR LAWYERS, *supra* note 65, at 76–77 (footnote omitted).

some of those needs often include a lawyer's ability to listen actively to what the client is saying and providing the client with a way of being heard more broadly. Our point is not that AI is destined to replace lawyers. Our point is that AI should replace some tasks that lawyers are currently doing in order to free lawyers up to do things that AI can't do.⁸²

Thus, the issue for bankruptcy judges is going to be when estate-paid professionals should save the estate money and increase efficiency by turning to AI for certain tasks. As a recent conference discussing Casetext's own CoCounsel AI, the general conclusion was "AI will not replace lawyers, but lawyers who use AI will replace lawyers who don't."⁸³ It's not that AI is *coming*. AI is *here*, and it's time to figure out the relationship of AI to the reasonableness of fees.

C. When Worlds Collide: Does Artificial Intelligence Change the Meaning of "Reasonable"?

Even though our last section generally endorsed the use of AI to drive better results for clients, AI poses multiple challenges for attorneys in private practice. Before specifically delving into AI's place in a § 330 analysis, it's important to address a few views on why attorneys are disinclined to use AI. If we can identify when it is reasonable not to use AI, it logically follows that attorneys should at least consider using AI in other aspects of handling a client's matter.

First, a reality check: we've been using AI already, and for a long, long time.⁸⁴ For one thing, we use research databases. We use Westlaw or Lexis or Fastcase or other databases because finding sources is faster when done by computer than by sitting in a musty area poring over books and pocket parts.⁸⁵ Neither of us worked in a law firm when Lexis first came out, so neither of us knows if lawyers were gnashing their teeth then, worrying about losing the ability to bill time by researching the old-fashioned way. Maybe they did. But they figured out how to make up that

⁸² Anyone who has ever been frustrated by a chatbot or having to say "representative" during a customer service phone call knows what we mean.

⁸³ Jean O'Grady, *CaseText CoCounsel Event—Professor Stephen Gillers's Keynote Declares "The end of legal services as we know it,"* DEWEY B STRATEGIC (Mar. 23, 2023), <https://www.deweybstrategic.com/2023/03/casetext-cocounsel-event-professor-stephen-gillers-keynote-declares-the-end-of-legal-services-as-we-know-it.html> (last visited Mar. 25, 2023).

⁸⁴ We've been using other technology for a long time, too. See, e.g., J. Scott Bovitz, *The Lawyer's Toolkit: A 30-Year Retrospective*, AM. BANKR. INST. J. 84 (June 2011).

⁸⁵ In case you don't remember (or never knew about) pocket parts, see https://en.wikipedia.org/wiki/Pocket_part (last visited Dec. 25, 2022). Yes, there are some reasons to use books and go to libraries, including that happy serendipity when a nearby book gives someone a fresh idea. We're not arguing that you should get rid of books. We're just saying that there's a time and place for the use of technology, too.

lost billable time. eDiscovery isn’t new, either.⁸⁶ So there’s no need to treat AI as something new and scary.

Now, let’s dispense with the over-blown concern that AI is going to replace lawyers.⁸⁷ Legal services are not going to be provided entirely by robots for a myriad of reasons, but mostly because there is a very personal element to legal services that requires trust, empathy, and countless other interpersonal and intellectual skills that machines cannot replicate. Thus, the “rise of the robo-lawyers” fear⁸⁸ is a bit of a red herring. A more legitimate reason not to use AI is that the current state of some AI poses realistic concerns about accuracy, security, cost, or matter-appropriateness.⁸⁹ ChatGPT isn’t ready to draft good pleadings, and it likely won’t be ready to draft great ones for a while.⁹⁰ In those instances, an

⁸⁶ See, e.g., *eDiscovery*, DRUVA, <https://www.druva.com/glossary/what-is-ediscovery-definition-and-related-faqs/> (last visited Dec. 25, 2022) (“Discovery refers to the first phase of litigation during which the parties to a dispute must provide each other with all relevant case evidence, including records and information. Electronic discovery, or eDiscovery, refers to discovery in which the information sought is in electronic format. This data is typically called electronically stored information or ESI.”).

⁸⁷ Cf. *supra* note 52.

⁸⁸ For a fun and relatively recent discussion of robo-lawyering, see Gary Marchant & Josh Covey, *Robo-Lawyers: Your New Best Friend or Your Worst Nightmare*, 45 No. 1 LITIGATION 27, 27–28 (Fall 2018) [hereinafter *Robo-Lawyers*] (“AI will not evolve quickly enough in the near future to replace all lawyers. Rather, AI is replacing certain *types* of legal work and already has done so. AI’s speed in completing certain tasks reduces the time human lawyers need to spend on those tasks. In the aggregate, that phenomenon reduces the need for human lawyers.... So there will be, and already has been, some displacement. But human lawyers are still indispensable, and technically proficient lawyers likely will be in even higher demand.”).

⁸⁹ See, e.g., Zeynep Tufekci, *What Would Plato Say About ChatGPT?*, N.Y. TIMES (Dec. 15, 2022) (“[O]n trickier topics or more complicated concepts, ChatGPT sometimes gave highly plausible answers that were flat-out wrong — something its creators warn about in their disclaimers.”), <https://www.nytimes.com/2022/12/15/opinion/chatgpt-education-ai-technology.html> (last visited Dec. 15, 2022). If you’d like to read an actual law review article co-written by ChatGPT, see Andrew Perlman and ChatGPT, Open AI’s Assistant, *The Implications of OpenAI’s Assistant for Legal Services and Society* (December 5, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197 (last visited Dec. 22, 2022). For one of the eeriest experiences of an AI interaction that we’ve seen, check out <https://twitter.com/i/status/1602353465753309195> (@DoNotPay founder Joshua Browder’s tweet, “[t]he first ever Comcast bill negotiated 100% with AI and LLMs”), available at <https://twitter.com/jbrowder1/status/1602353465753309195> (last visited Dec. 28, 2022); see also *Company Prepping ‘Robot’ Lawyer Uses AI to Negotiate Lower Bills*, CREDITOR COLLECTIONS TODAY, <https://www.creditorcollectionstoday.com/edition/weekly-garnishment-fair-debt-collection-2022-12-17/?open-article-id=22760160&article-title=company-prepping-robot-lawyer-uses-ai-to-negotiate-lower-bills&blog-domain=accountsrecovery.net&blog-title=account-recovery> (last visited Dec. 28, 2022).

⁹⁰ See, e.g., Aimee Furness & Sam Mallick, *Evaluating the Legal Ethics of a ChatGPT-Authored Motion*, LAW360, available at <https://www.law360.com/articles/1567985/evaluating-the-legal-ethics-of-a-chatgpt-authored-motion> (Jan. 23, 2023). Both of us are waiting to see what happens when people use ChatGPT and an earbud to feed lines to someone at the podium in court. See, e.g., Stephanie Wilkins, *Is ChatGPT Ready for Its Day in Court? Experts Say No Way*, LAW.COM, available at

attorney has a reasonable basis not to use AI, and the decision not to use AI would be reasonable under § 330. But what happens when AI is, in fact, accurate, secure, cost-effective, and matter-appropriate?

AI measurably changes the analysis when it comes to automating tasks previously handled in a completely manual fashion by lawyers. The mere existence of AI in the legal sphere creates an economic tension in the minds of many legal professionals who think that using AI will undermine their personal economics. It's very easy to imagine an attorney asking the question, "Why do I have to spend money on this AI tool that will decrease the number of hours that I can bill, thus reducing my compensation?"⁹¹ If that economic tension persists to the point where a lawyer refuses to use AI in a particular matter for fear of lower fees, it raises significant concerns that the lawyer's bill for that matter may not pass muster under a § 330 reasonableness analysis, not to mention running afoul of that lawyer's own state ethics rule on the reasonableness of fees.⁹²

Although we understand, and even sympathize, with the instinct that using AI will reduce our income, maybe that assumption isn't true. The

<https://www.law.com/legaltechnews/2023/01/19/is-chatgpt-ready-for-its-day-in-court-experts-say-no-way/> (Jan. 19, 2023) (Foster J. Sayers III, general counsel and chief evangelist at contract management company Pramata, agreed. "One of the things we benefit from relative to having people who are members of the bar [arguing in court] is that they are accountable for ethical standards, and if they do not follow them, there are penalties, right? They're no longer allowed to practice law," he said. "When you have a technology [acting in court], then what's that accountability?"). We agree: using a robo-lawyer to practice runs afoul of the unauthorized practice rules (see MODEL R. PROF'L CONDUCT 5.5)—or it would if the robo-lawyer were an actual, well, lawyer, as Rule 5.5(a) states that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." (emphasis added). So if a lawyer programmed the robo-lawyer to appear in court, the lawyer could be charged with a Rule 5.5(a) violation. The robo-lawyer itself, being non-sentient, wouldn't be. So ChatGPT itself won't be taking lawyer jobs away and, like any other tool, should be used judiciously (and ethically). But we wouldn't mind it if ChatGPT could Bluebook this article accurately, and we're willing to bet that our editor agrees.

⁹¹ See *Robo-Lawyers*, *supra* note 88, at 31 (discussing the likely decrease in billable hours when lawyers use AI for certain tasks). For a blunter take, here's this thought:

There's another piece to this puzzle; we didn't cover realization rates in the example above. We suspect the lawyer might have an easier time getting paid in full in the AI-enhanced situations. Improved realization rates are a core way hourly billing lawyers can do better financially through doing more efficient work. On average, US Biglaw firms have an 89% realization rate. That means that after discounting off their standard rate and reducing the hours billed to accommodate client demands, firms are leaving on average 11% of their potential billings on the table. Beyond that, many clients will write off additional charges, resulting in an even lower collected realization rate. In fact, this overall number hides important details. Clients often view partners—even very expensive ones—as good value. (As clients ourselves sometimes, we generally think they're right.) On the other hand, some clients refuse to pay for junior lawyers.

AI FOR LAWYERS, *supra* note 65, at 32–33.

⁹² See *supra* note 14 (discussing MODEL RULE 1.5).

fallacy of the billable hour is the assumption that all billable hours charged by a particular professional deliver identical value. The brainpower behind some billable hours is well worth the \$1,500-or-more per hour price tag, but having a \$1,500-per-hour professional fill in the blanks on a form⁹³ does not deliver the same hourly value.

Look at the use of AI this way: We no longer use a telephone book to look up a phone number or address. We use a search engine, and we do so to save time that we can devote to more interesting things. A minute of our time spent looking through a phone book⁹⁴ takes a millisecond or less of search engine time. We measure the value of what we’re doing not by how long it takes us to look up a phone number; we measure the value of using the number that we’ve found.⁹⁵

That’s why every hour of billable time—even when billed by the same professional—isn’t equally valuable. (It’s also why we think that the billable hour bears very little relationship to the actual value that the professional is providing to the client.⁹⁶) AI tools are not replacing high-value lawyering;

⁹³ Presumably because there are no lower-billing professionals available to do that work for her.

⁹⁴ After locating one.

⁹⁵ Nor do we shy away from using our telephones, even though law firms feared that telephones could compromise client confidentiality when telephones first became a communication tool:

As the world moved into the late twentieth century, the landline eventually gave way to the cordless phone, the cellular phone, and the smartphone. With each iteration of the phone, not only would the instruments for client communication change but concerns about the security of the communication and client confidentiality would arise. The confidentiality concerns and general resistance to change would often cause the legal profession to pause before embracing a new technology. Often late to the party, the legal profession would arrive armed with ethics advisory opinions on the permissibility and protocols for the newest technology. In fact, lawyers often adopted new technology at the urging of clients who had already adopted the technology, discovered safeguards, and insisted on their lawyers’ participation.

Jan L. Jacobowitz, *Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond*, 23 VAND. J. ENT. & TECH. L. 279, 289 (2021) (footnote omitted).

⁹⁶ See, e.g., *Billing Judgment*, *supra* note 38, at 312–13 (discussing the problems with the billable hour); Nancy B. Rapoport, *Using General Counsel to Set the Tone For Work in Large Chapter 11 Cases*, 88 FORDHAM L. REV. 1727, 1728–29 (2020) (discussing specific examples of billable hour abuse) [hereinafter *General Counsel*]; Nancy B. Rapoport, *Client-Focused Management of Expectations For Legal Fees in Large Chapter 11 Cases*, 28 AM. BANKR. INST. L. REV. 39, 61–63 (2020) (arguing that billable hours do not reflect value to the client); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Leveraging Legal Analytics and Spend Data as a Law Firm Self-Governance Tool*, 13 J. BUS. ENTREPRENEURSHIP & L. 171, 179–80 (2019) (discussing various mistakes made in time entry); 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 n.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.”) (citing 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, 86 (2014)); Stephen L. Rispoli, *The Walking Dead: Psychological Biases That Keep the Billable Hour Alive*, 43 J.

instead, AI tools are automating tasks which, if done manually, may not justify the \$1,500-per-hour rate. There is a tension between AI and reasonable billing only if one believes the billable hour fallacy.⁹⁷

Indeed, when AI promises to be more efficient, more accurate, sufficiently secure, and cost-effective for a client, lawyers who choose not to use AI or other technology for certain tasks are on the wrong side of § 330's reasonableness standard. A lawyer should never put personal economics ahead of the client's best interest (including charging a reasonable fee under § 330). Moreover, a § 330 analysis, like virtually everything else in the law, should adapt to the current state of play, not cling to a bygone era informed only by experience and a gut hunch. Indeed, the § 330 analysis should not look at time-by-rate figures for a body of work that was considered reasonable in a pre-AI era and conclude that the same time-by-rate figures are reasonable now, when AI tools should have been used to keep costs down. Practitioners and judges should not only consider their personal experience and a gut hunch of what is reasonable under § 330, but also acknowledge the limitations of knowledge and gut hunches when comparing costs from a non-AI era to today's legal industry.

At the end of the day, the worlds may collide, but they are destined to co-exist peacefully. To comply with § 330, lawyers need to be incentivized and fairly compensated when using AI that is cost-effective and reliable. And the converse is true: professional compensation should be scrutinized carefully and considered unreasonably high when there is an unjustified failure to use safe, secure, reliable, and cost-effective AI. As AI gains more industry acceptance, practitioners and courts will wind up having to consider the possible use of AI as being a precondition for reasonableness.

D. Should "Reasonable" Mean Something Different in Consumer Cases?

A relatively recent survey of consumer lawyers⁹⁸ indicated that 79.02%

LEGAL PROF. 187, 188–89 (2019) ("The billable hour, by contrast, is inefficient and does not encourage innovation."); Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005) (discussing the increase in billable hour expectations); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000) (discussing the stressors associated with billable hours).

⁹⁷ In fact, this analysis raises another question: should law firms be able to charge a higher hourly rate above the "normal" hourly rate when lawyers are handling only higher value work? Right now, a hourly rate takes into account a mix of low value tasks as well as high value work. If the low value tasks are stripped away, that invites the question whether the high value work justifiably commands a higher hourly rate. We suspect that market forces will dictate the ultimate answer here.

⁹⁸ RONALD L. BURGE, UNITED STATES CONSUMER BANKRUPTCY LAW ATTORNEY FEE SURVEY STATES REPORT 2017–2018 (Jan. 19, 2020), available at <https://www.nclc.org/images/pdf/litigation/tools/report-atty-fee-survey.pdf>; for an earlier, more comprehensive fee study, see

of consumer bankruptcy law firms practice in groups of four or fewer lawyers.⁹⁹ Given that, “on average, attorneys charge \$1,313 to assist with chapter 7 cases and \$3,792 for chapter 13 cases,”¹⁰⁰ we imagine that there is not a lot of available cash to invest in developing AI tailored to their work. As authors Noah Waisberg and Alexander Hudek point out, “solo and small firms are a lot like the masses, where the technology needs to be useful and cost-effective, so much so that it just becomes part of what they do.”¹⁰¹

LOIS R. LUPICA, THE CONSUMER BANKRUPTCY FEE STUDY FINAL REPORT (Dec. 2011), available at https://abi-org.s3.amazonaws.com/Endowment/Research_Grants/CFSFinalReport_Final_Dec7.pdf. For an excellent compendium of research on consumer bankruptcy law issues, see <http://www.consumerbankruptcyproject.org/>; see also Pamela Foohey, Robert M. Lawless, & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573 (2022).

⁹⁹ This study observed:

As it appears to be across all niche areas of Consumer Law, sole practitioners still dominate the niche area of Consumer Bankruptcy Law by a wide margin. 46.5% of all survey participants reported being solo practitioners, which nevertheless is a significant decrease from the last survey when it was 57.4%. When two and three and four member firms are added, small firms who primarily practice Bankruptcy Law make up 79.02% of all Consumer Bankruptcy Law firms, down significantly from the last survey when it was 87.6%. On the other hand, the percentage of large firms (5 or more attorneys) has increased to 20.98%, from 12.4% of Bankruptcy Law firms have 5 or more attorneys.

In such a small firm circumstance, law office economics are often more important to the practitioner than they may be to large law firms who may count on a larger and more varied client base for its necessary financial support. Consumer Bankruptcy Law has always meant dealing with a different kind of clientele than typical large law firm practices, and often involves a one-time attorney-client relationship necessitated by a single legal problem.

BURGE, *supra* note 98.

¹⁰⁰ Foohey et al., *supra* note 98, at 589.

¹⁰¹ AI FOR LAWYERS, *supra* note 65, at 45 (2021).

For these firms, AI can be part of other tools¹⁰² that the firms already use.¹⁰³ The technology has to be simple,¹⁰⁴ along the lines of a Turbo Tax-type of program, and it has to be of a type that augments—rather than substitutes for—a lawyer’s own judgment.¹⁰⁵ And unlike our recommendations for

¹⁰² There are plenty of tools out there:

While legal research is a major area of AI innovation, machine learning and other forms of AI are emerging, including predictive coding, which “uses natural language and machine learning techniques against the gigantic data sets of e-discovery.”

Other companies are focused on predictive outcomes. Premonition mines data to “find out which attorneys win before which judges.” Lex Machina “mines litigation data, revealing insights never before available about judges, lawyers, parties, and the subjects of the cases themselves, culled from millions of pages of litigation information.”

Neota Logic uses AI to power expert systems that help companies manage compliance with laws and regulations. Other companies use AI to help manage contracts – from contract review to contract drafting, from contract classification to contract interpretation.

What Solo and Small Firms Should Know About Artificial Intelligence, PREMONITION.AI (Feb. 6, 2017), available at <https://premonition.ai/solo-small-firms-know-artificial-intelligence/>. Randy Gordon has pointed out to us that one of the ethics risks of machine learning is “[w]hat happens when an AI program learns something from confidential information and then incorporates it into the way it ‘thinks?’”. Email from Randy Gordon to Nancy Rapoport (Dec. 28, 2022) (on file with authors) (citing to an observation that he heard from Milan Markovic). For a fun read about the fears of technology undermining the duty of confidentiality, see Jan L. Jacobowitz, *Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond*, 23 VAND. J. ENT. & TECH. L. 279, 289–90 (2021) (discussing the fear that the telephone and fax would compromise client confidentiality).

¹⁰³ AI FOR LAWYERS, *supra* note 65, at 45–46 (“For example, Casetext has its Cara tool, so that if you want to quickly look at cases that you can cite in order to respond to a brief, you can just upload your opponent’s brief and it will spit out a profile of the case law that you need to respond to. It’s super useful, super easy to use, and powered by a machine learning algorithm on the back end. That’s one effective way of using AI. It’s also affordable and easy to use, making it a good value.”); *see also id.* at 46. There is one company for example that has developed a program that will generate all necessary case discovery documents from a complaint. This would be a huge cost saving for small firms. Sure, using AI to help with “back-end” operations—such as automating email responses or running a targeted marketing campaign—is a huge benefit to solos, but ultimately, I’d like to get to the point where AI applications can be used to improve the quality of the substantive work that solos and smalls do because that above all would increase meaningful access to justice.”). We know that this type of infrastructure investment isn’t inexpensive, but then, neither is a tool like Westlaw or Lexis, and law firms have managed to find ways to deal with those costs. *See supra* note 18.

¹⁰⁴ AI FOR LAWYERS, *supra* note 65, at 46 (“Like many of my colleagues, I am a busy practicing lawyer so I don’t have time to spend a day learning something new. Nor do I have a tech consultant on staff to help me out. So to make my technology selections, I apply a 10-minute rule. This means that if I can’t figure out how to use a tech product in 10 minutes, I will probably not employ it in my practice.”) (quoting Carolyn Elefant).

¹⁰⁵ As one of our friends, lawyer Billy Brewer, puts it, “I view technology in the same way I view paralegals. They are not only a useful tool, but also a crucial one in putting an attorney in position to provide legal services in an efficient and cost-effective way, but the attorney has to be in control.” Email from William Brewer to Nancy Rapoport, June 27, 2022 (on file with authors).

BigLaw,¹⁰⁶ where we *are* recommending that courts presume that certain types of tasks are best started by machines, SmallLaw and SoloLaw shouldn’t have to justify their use of humans to initiate work (other than with the same type of billing judgment justifications that all lawyers must use).¹⁰⁷

But what of the Upsolves of the world—the algorithms that do most of the heavy lifting of preparing a consumer bankruptcy filing? The Legal Services Corporation touts Upsolve as a “TurboTax for Bankruptcy.”¹⁰⁸ Legal aid organizations can use it to “slash[] the time it takes [them] to help someone file for bankruptcy from about 9 or 10 hours to 90 minutes.”¹⁰⁹ Is it a tool that makes lawyers more efficient, or is it itself so “intelligent” that its use constitutes the practice of law?

The concept of the “practice of law” is fuzzier than you’d think.¹¹⁰ One of us typically explains the practice of law as the application of legal principles to the particular facts of a client’s needs.¹¹¹ But states differ on

¹⁰⁶ See *infra* notes 177–186 and accompanying text.

¹⁰⁷ At least not yet. At some point, though, the consumer side of practice will have much more cost-effective software, thus justifying a machines-first approach for certain tasks. But this point is relevant for BigLaw, Mid-SizeLaw, SmallLaw, and SoloLaw alike: sometimes, AI will actually find more valuable information than a human would:

Corporates who deploy legal AI tend to realize value in two ways. Many use AI to do work more efficiently. Since—for most businesses, apart from those that bill hourly—there’s a strong view that doing the same work in less time is better, this is a pretty easy way to realize a return on investment. *The more interesting way corporates find value is by being able to use AI to uncover information they wouldn’t have been able to find without it.* This can enable companies to make better, more informed business decisions and nimbly respond to environment changes. Here, the benefits can be hard to measure, but enormous.

AI FOR LAWYERS, *supra* note 65, at 34–35 (emphasis added).

¹⁰⁸ For Legal Aid Organizations, Upsolve Offers a Way to Do Bankruptcies 10 Times Faster and Help More People, LEGAL SERVICES CORP.GOV, available at <https://www.lsc.gov/i-am-grantee/model-practices-innovations/technology/legal-aid-organizations-upsolve-offers-way-do-bankruptcies-10-times-faster-and-help-more-people>. That webpage’s splash screen has the subheading to which we refer: “Dubbed as a ‘TurboTax for Bankruptcy,’ Upsolve is an up-and-comer in the burgeoning legal tech scene and [is] increasingly popular among LSC grantees.” *Id.* Upsolve uses the same TurboTax reference: “Upsolve is a nonprofit tool that helps you file bankruptcy for free. Think TurboTax for bankruptcy.” UPSOLVE.ORG, available at <https://upsolve.org/learn/on-boarding-guide-for-legal-aid-staff/>.

¹⁰⁹ For Legal Aid Organizations, Upsolve Offers a Way to Do Bankruptcies 10 Times Faster and Help More People, LEGAL SERVICES CORP.GOV, available at <https://www.lsc.gov/i-am-grantee/model-practices-innovations/technology/legal-aid-organizations-upsolve-offers-way-do-bankruptcies-10-times-faster-and-help-more-people>.

¹¹⁰ And the unlicensed practice of law is an ethics violation. See MODEL R. PROF’L CONDUCT 5.5.

¹¹¹ That would be the one of us who gets to teach for a living. And Professor Roy Simon explains the concept beautifully: “What activities constitute the unauthorized practice of law? The phrase ‘unauthorized practice’ is inherently ambiguous. The classic test of unauthorized practice is the exercise of legal judgment by a nonlawyer, especially the application of law to a particular set of facts.” ROY D. SIMON, JR., SIMON’S NEW YORK RULES OF PROF’L CONDUCT ANN. § 5.5:9.

what they consider to be the practice of law,¹¹² as the Second Circuit observed in *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*.¹¹³ In that case, the issue was whether a contract attorney conducting document review was practicing law (and thus not entitled to argue for overtime pay), and the court came up with an *anti*-Turing Test¹¹⁴ of sorts: if a machine can do what the human is doing, then the task doesn't involve the practice of law.¹¹⁵ But not every court agrees, and, in particular, not every court agrees when Upsolve is involved.¹¹⁶

In a massive opinion, the bankruptcy court in *In re Peterson*¹¹⁷ concluded that Upsolve's program did indeed constitute the practice of law in Maryland. Upsolve's software, which is limited to extremely simple

¹¹² See, e.g., RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.5-3 (2021–2022 ed., July 2021 update) (“What constitutes the unauthorized practice of law is a matter of state law.”).

¹¹³ 620 F. App'x. 37, 42 (2d Cir. 2015) (not for publication).

¹¹⁴ For the world's pithiest discussion of the Turing Test, see *infra* note 144. We're still a little freaked out by the Bing AI that fell in love with a reporter. See, e.g., Aaron Mok & Sindhu Sundar, *People are sharing shocking responses from the new AI-powered Bing, from the chatbot declaring its love to picking fights*, INSIDER (Feb. 16, 2023), <https://www.businessinsider.com/bing-chatgpt-ai-chatbot-argues-angry-responses-falls-in-love-2023-2> (last visited Mar. 25, 2023).

¹¹⁵ The court explained:

The gravamen of Lola's complaint is that he performed document review under such tight constraints that he exercised no legal judgment whatsoever—he alleges that he used criteria developed by others to simply sort documents into different categories. Accepting those allegations as true, as we must on a motion to dismiss, we find that Lola adequately alleged in his complaint that he failed to exercise any legal judgment in performing his duties for Defendants. *A fair reading of the complaint in the light most favorable to Lola is that he provided services that a machine could have provided.* The parties themselves agreed at oral argument that an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law.

Lola, 620 F. App'x at 45 (emphasis added). See also Michael Simon, Alvin F. Lindsay, Loly Sosa, & Paige Comparato, *Lola v. Skadden and the Automation of the Legal Profession*, 20 YALE J. L. & TECH. 234, 251 (2018) (“Though it was developed more than half a century before the Second Circuit's questioning at the *Lola* oral argument, the Turing Test's line of questioning seems strikingly familiar. Indeed, both Alan Turing and the Second Circuit realized that machines would not only replicate rote tasks, but would also be increasingly able to engage in more complicated data processing.”). We imagine that having to make that argument (“I exercised no judgment whatsoever”) had to have been embarrassing for the plaintiff.

¹¹⁶ For a discussion of Legal Zoom and the practice of law, see, e.g., Jordan Bigda, *The Legal Profession: From Humans to Robots*, 18 J. HIGH TECH. L. 396, 406–07 (2018). That article argues in part that the ethics rules for artificially intelligent lawyers should mimic the rules for paralegals: that AI-lawyers should be able to work anywhere, as long as they report to lawyers licensed in the proper jurisdiction. See *id.* at 425.

¹¹⁷ *In re Peterson*, 2022 WL 1800949 (Bankr. D. Md. 2022).

chapter 7 cases¹¹⁸ and which creates forms based on the user’s answers to specific questions, generates the exemptions for the user—and the application of the law of exemptions to the facts of a specific user’s situation was—in the court’s opinion—constituted the practice of law.¹¹⁹ The court observed:

The Court acknowledges that Upsolve’s mission may indeed be in line with the spirit and purpose of protecting prospective debtors from incompetent representation. However, good faith and pure intentions alone do not negate the “character of the act.” By selecting exemptions for users, the manner in which Upsolve’s software operates embodies the character of practicing law and application of legal knowledge when considering the intended constrictions of Maryland’s practice of law regulations and the facts and circumstances presently before the Court. For these reasons, the Court finds that Upsolve engages in the unauthorized practice of law by presenting limited exemption options to users and by selecting exemptions for Upsolve users via its software.¹²⁰

Fair enough: if the practice of law is the application of the law to specific facts, then yes, Upsolve’s algorithms that select appropriate exemptions could constitute the practice of law. But, in *Upsolve, Inc. v. James*,¹²¹ a district court decided that New York’s unauthorized practice of law provisions might infringe on Upsolve’s First Amendment¹²² right to give basic legal advice. We can’t read too much into this opinion, as the court was only ruling on Upsolve’s motion for a preliminary injunction that would prevent New York’s Attorney General from targeting Upsolve for violating the unauthorized practice of law rules.¹²³ But the *James* court did rule that

¹¹⁸ See *id.* at *7 (“Upsolve represents that these criteria [[described in the opinion]] allow only individuals with ‘straightforward, routine,’ ‘uncomplicated,’ ‘simple, no-asset Chapter 7 cases’ to use the software.”).

¹¹⁹ See *id.* at *42, *44, *46–*48.

¹²⁰ *Id.* at 50.

¹²¹ 604 F. Supp. 3d 97 (S.D.N.Y. 2022).

¹²² Yes. We were surprised that this argument carried the day, too.

¹²³ 604 F. Supp. 3d at 102. As the court explained,

At the outset, the Court underscores that an abstract “right to practice law” is not at issue in this narrow challenge. The Court does not question the facial validity of New York’s UPL rules to distinguish between lawyers and non-lawyers in most settings, and to regulate all sorts of non-lawyer behavior.⁶ Instead, the issue here is a narrow one: whether the First Amendment protects the precise legal advice

the type of advice that Upsolve gives at least has a chance of being considered protected speech.

At its core, Plaintiffs' action is indisputably speech, not conduct. "If speaking to clients is not speech, the world is truly upside down." The Court shall not ignore common sense by construing Plaintiffs' legal advice as something it is not.

That logic applies seamlessly to the statute at issue here. On its face, New York's UPL rules "may be described as directed at conduct" of acting as a lawyer, "but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." In other words, Plaintiffs' violation of the law "depends on what they say" to their clients. If [Upsolve's] Justice Advocates provide non-legal advice about a client's debt problem (by, for example, advising that person to cut down on spending to pay off debts), the UPL rules do not apply. But if they provide legal advice about how to respond to the client's debt problem (by advising that person on how they should fill out the State-Provided Answer Form, based on their specific circumstances), the UPL rules forbid their speech. Their actions are therefore, by definition, content-based speech.¹²⁴

Why does the Upsolve conundrum about the unauthorized practice of law matter? For most of what we're suggesting—that § 330 should require lawyers to use AI for some of their work, if they want to keep their fees reasonable—Upsolve's fight against UPL rules doesn't matter at all.¹²⁵ There are other creative options out there to help those without means to file for bankruptcy protection, such as the United States Bankruptcy Court for Central District of California's "Don't Have an Attorney" web page.¹²⁶ But

that Plaintiffs seek to provide, in the precise setting in which they intend to provide it. The Court holds that it does.

Id. at 111–12.

¹²⁴ *Id.* at 114 (citations omitted).

¹²⁵ Personally, we'd rather have a smart algorithm help someone than have a *bad* lawyer try to do it, but that's a topic for another day. In a perfect world, good lawyers would be able to solve all pro bono needs. But we're not in a perfect world. And here's a thought: What if a local rule required Upsolve and Upsolve-like services to disclose, at the bottom of all petitions and schedules, that a computer drafted the documents with minimal review by an attorney, and also required the service to provide contact information for the reviewing attorney, in case something went wrong with the petition and schedules? Would that be a good compromise?

¹²⁶ <https://www.cacb.uscourts.gov/dont-have-attorney> (last visited Dec. 26, 2022). Hat tip to Scott Bovitz for pointing us to this website.

as AI develops, the issue of whether it constitutes the practice of law *will* have a bearing on just what types of AI lawyers should use in particular situations.

PART 4: WHICH PLAYERS IN OUR BANKRUPTCY ARENA SHOULD CALL FOR CHANGE?

It’s pretty clear that the stage is set for a change to a court’s § 330 analysis, but absent a legislative mandate requiring a technology assessment, the question is “Who will catalyze the change?” Some constituency in the bankruptcy industry must be the change agent here. There are four natural candidates for being this catalyst: (1) mega-debtors;¹²⁷ (2) creditors, lenders and other stakeholders funding the operations of the debtor-in-possession; (3) the United States Trustee Program; and (4) bankruptcy courts.

One might think that a mega-debtor faced with massive legal spending would want to control professional fees. What seems beyond peradventure is that the debtor is economically motivated to control professional fees, making it the ideal constituency to catalyze change in the § 330 analysis. As one of us has written before, the general counsel or in-house legal department of the debtor could create guardrails around reasonable fees and should be inclined to so do.¹²⁸ In practice, it is rare for a mega-debtor, specifically the general counsel of a mega-debtor, to self-initiate professional fee cost-control measures.¹²⁹ We suspect that several dynamics of the

¹²⁷ People can quibble over how large a debtor has to be to be a “mega-debtor.” One option is to use the definition in the United States Trustee Program’s 2013 Guidelines. *See* Appendix B Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases, 78 FED. REG. 36,248, 36,249 (June 17, 2013) (“chapter 11 cases where the debtor’s petition lists \$50 million or more in assets and \$50 million or more in liabilities, aggregated for jointly administered cases and excluding single asset real estate cases as defined in 11 U.S.C. 101(51B)”). Another way to define a mega-case (and thus a mega-debtor) is to look at a court’s definition. *See, e.g., Mega Cases and Designated Cases with Omnibus Hearing Dates and Times*, United States Bankruptcy Court for the District of Nevada, <https://www.nv.uscourts.gov/case-info/mega-cases/> (last visited Dec. 30, 2022) (“Mega cases are single case or set of jointly administered or consolidated cases that involve \$100,000,000 or more, 1000 or more creditors or a hold a high degree of public interest.”). And yet another possibility is to define a mega-case as one in which the resources of a bankruptcy court are stressed too thin. We’re willing to bet that people know mega-debtors when they see them. *Cf. Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (the famous Justice Stewart line in his concurrence, which is “I know it when I see it.”).

¹²⁸ *General Counsel*, *supra* note 96, at 1732.

¹²⁹ *See, e.g., Billing Judgment*, *supra* note 38, at 319–22 (no single entity is pushing the too-high bill back across the table to the professional); 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, 365 n.27 (2021) (same); 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*, Harvard Law School 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/>

bankruptcy process cause inaction by the estate in terms of professional fee cost control. Because, in particular, big bankruptcies are highly intense, one-off transactional matters, incumbent executive teams of a debtor rarely have extensive experience in bankruptcy and spend much of their time trying to rectify a distressed situation while conducting day-to-day business. This frenzy leaves little time to learn the macro-concepts in a bankruptcy process, let alone the intricacies of the professionals' bills. A lack of domain expertise and the significant time constraints for decision-making mean that the estate becomes heavily reliant upon the debtor's professional team. Therein lies the conflict. The group most suited to help the estate review professionals are the professionals whose fees will be scrutinized and questioned. Even though the debtor itself is incentivized to control professional fees, the practical reality is that the debtor rarely does it.¹³⁰ If the debtor isn't undertaking to control professional fees on its own account, we see little chance that mega-debtors will catalyze a change in the § 330 analysis.

Those with a passive, economic interest in the bankrupt estate, such as DIP financiers, legacy secured creditors (especially those paying for professional fees out of a cash collateral carve-out), unsecured creditors, and stockholders are the second constituency that could operate as the change

(same); *General Counsel*, *supra* note 96, at 1732 (same); Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases*, 28 AM. BANKR. INST. L. REV. 39, 43 (2020) (same); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Leveraging Legal Analytics and Spend Data as a Law Firm Self-Governance Tool*, 13 J. BUS. ENTREPRENEURSHIP & L. 171, 176–77 (2019) (factors that drive legal bills skyward); 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, 1273–74 (2019) (same); Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. LAW 117, 139 n.116 (2012) (same); Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. LAW 263, 265 (2010) (“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 professional makes his billable decisions. And sitting at another table, far away, is the bankruptcy court.”) (footnotes omitted).

¹³⁰ A good lawyer partners with the client to choose the right means for each task. *See* MODEL R. PROF'L CONDUCT 1.2 (“... 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”). As one of our favorite lawyers puts it:

A lawyer must be able to provide efficient and effective service to the client. It will be up to the lawyer and the client to determine when artificial intelligence is helpful and when it is a hinderance. And that lawyer must be able to explain her work and billing choices to the fee examiner and the court. Also, if I can’t handle something efficiently, there is a service that will do it for my client (e.g., ACE attorney service, remote deposition services, certificateofservice.com). I tell the client why I have chosen the outside vendor. They never complain.

Email from J. Scott Bovitz to Nancy Rapoport, Dec. 25, 2022 (on file with authors).

agent for a more robust § 330 analysis. These economic stakeholders often see any money exiting the debtor to pay professionals as being “their” money, which they prefer to remain in the debtor’s hands to fund operations and growth, rather than paid to third-party professionals. When there’s a carve-out to pay professionals, one would think that there’d be a compelling reason to want to control fees. But the challenge is that economic stakeholders tend to have only indirect influence in the bankruptcy process. Creditors can object to fees, and some do (especially when there are other internecine battles going on behind the scene), but most don’t. An unsecured creditors’ committee or secured creditor with the purse strings will grumble, but not protest too loudly. (After all, the committee’s professionals are filing fee applications, too.) Members of this group of funders often have disparate interests and, much like the debtor, they take strategic advice on bankruptcy matters from the very same professionals whose fees will be scrutinized.

The United States Trustee Program (USTP) is the third constituent that could catalyze a change in § 330. After all, the USTP is charged with safeguarding the integrity of the bankruptcy process and reviews fee applications as a component of that mission.¹³¹ But the primary reason that we don’t see the USTP as the change agent is that the USTP tends not to be an “activist” in the bankruptcy process. It’s a watchdog, for sure, but it argues for enforcing the Bankruptcy Code and Rules, rather than reimagining them. That said, the USTP has created guidelines for large cases,¹³² so nothing’s stopping the program from considering guidelines about the use of technology.

This leaves bankruptcy courts themselves as the last constituent to catalyze a change in the § 330 analysis. Of our four possibilities, we think

¹³¹ See PL 116-325, Bankruptcy Administration Improvement Act of 2020, available at <https://www.congress.gov/116/plaws/publ325/PLAW-116publ325.pdf>. In respect of the United States Trustee Program, Congress recited the following findings when passing legislative to raise the quarterly fees payable to the USTP in Chapter 11 cases:

FINDINGS.—Congress finds the following:

- (1) Because of the importance of the goal that the bankruptcy system is self-funded, at no cost to the taxpayer, Congress has closely monitored the funding needs of the bankruptcy system, including by requiring periodic reporting by the Attorney General regarding the United States Trustee System Fund.
- (2) Congress has amended the various bankruptcy fees as necessary to ensure that the bankruptcy system remains self-supporting, while also fairly allocating the costs of the system among those who use the system.
- (3) Because the bankruptcy system is interconnected, the result has been a system of fees, including filing fees, quarterly fees in chapter 11 cases, and other fees, that together fund the courts, judges, United States trustees, and chapter 7 case trustees necessary for the bankruptcy system to function.

¹³² See *supra* note 63.

that bankruptcy courts are best positioned to make the needed change in the legal standard of how professional fees are evaluated. First, they can tap into their own experience¹³³ to contextualize whether innovations and technological advancements are appropriate in a case. Second, bankruptcy courts are well-positioned to require evidence on the use or non-use of innovations and technology and can also require the parties to provide industry-wide evidence about the net effect of certain technology. Last, these courts are already familiar with undertaking a § 330 analysis. They are best suited to develop a thoughtful interpretation of § 330 that factors new methods of delivering services into account.

There are countervailing forces, though. Article I judges serve 14-year terms,¹³⁴ and if they'd like to seek reappointment, then they have to think carefully about how they do their jobs, because part of the reappointment process involves public comment.¹³⁵ We aren't saying that judges are making their decisions with reappointment at the top of their minds, but judges are human, and we'd bet that the concept of reappointment factors in, at least a bit, as they're figuring out *how* to phrase rulings that could be controversial. Are judges ready to push back by asking fee applicants for a technology component to fee applications? More specifically, are those lawyers who are choosing a venue going to avoid jurisdictions that request such information in fee applications?

Maybe the gut hunch that judges have that they *know* (overbilling) when they see it¹³⁶ is right in the small cases but less so in the big ones, given the immense volume of professional fees.¹³⁷ In essence, we believe that, for

¹³³ Yes, after they've been on the bench a while, their experience may be attenuated. So is ours. But fee applications have a way of updating the canon of current bankruptcy practice. We see what's happening in cases in part by reading time entries across a wide variety of cases.

¹³⁴ See 28 U.S.C. § 152(a)(1) (setting forth the 14-year term).

¹³⁵ See, e.g., Thomas M. Horan, *The Selection and Appointment of Bankruptcy Judges*, 34 AM. BANKR. INST. J. 48 (Mar. 2015). On a similar note, a judge that wishes to return to private practice after time on the bench may be disinclined to make waves over fees amongst members of the bankruptcy bar.

¹³⁶ Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) ("I know it when I see it") (Stewart, J., concurring); see also *In re Lynch*, 2017 WL 416782, *8 (Bankr. N.D. Ohio 2017) (unreported case) ("This Court has more than twenty years' experience in evaluating attorney fee applications and, thereby, assessing the competence and quality of work of attorneys who practice before it. After reviewing the evidence presented and evaluating Hyde's work in this case and the adversary case, the Court can only conclude that she took advantage of [the client], a client who had a benefactor with the resources to pay her fees.").

¹³⁷ For an example of a bankruptcy court that was able to see unreasonable billing without the need for any complicated data analysis, see, e.g., *In re Spurluck*, Case No. 21-31957, United States Bankruptcy Court for the Southern District of Ohio, Docket No. 38 *2 (Aug. 1, 2022) (disallowing a portion of a fee application in a chapter 13 case for which the professional had requested the full no-look amount, with the court explaining that "[h]ere, the court does not find that the actual and necessary work required to effectively represent the Debtor in this case supports an award of the maximum allowable flat fee as

a § 330 analysis, every bankruptcy judge should expect legal professionals and other estate-paid professionals to use industry-accepted innovations and technology or explain to the reasons for its not doing so. Courts should use legal spend analytics tools, whether *sua sponte* or via a court order to the parties, to calculate the time and cost savings resulting from the use or non-use of today’s technology. Gut hunches as to reasonable time and cost from a bygone era when technology was not part of the day-to-day fabric of delivering services is not the way to fulfill the legislative mandate of § 330. Bankruptcy courts should use data to augment their own experience.

PART 5: WHY REIMAGINING REASONABLENESS IS (MOSTLY) A GOOD IDEA

If you want to view paradise
Simply look around and view it
Anything you want to, do it
Want to change the world?
There’s nothing to it....¹³⁸

We’re “[b]uilding a plane while flying it.”¹³⁹

A. Connecting the Overriding Law and Policy of § 330 with 21st Century Technology

If, as the two of us believe, AI will become an increasingly common part of the practice of law because its proper use allows lawyers to be more efficient,¹⁴⁰ then the case law surrounding § 330 should evolve to recognize

reasonable compensation.”) Judge Christopher Klein has pointed out to us that there is already a mechanism for creating efficiencies, including technological efficiencies: fixed fees put the pressure on professionals to maximize profit by minimizing waste. See email from Hon. Christopher Klein to Nancy Rapoport (Jan. 28, 2023) (on file with authors).

¹³⁸ Leslie Bricusse & Anthony Newley, *Pure Imagination*, WILLY WONKA AND THE CHOCOLATE FACTORY (Paramount Pictures 1971).

¹³⁹ Cf. *On Building a Plane While Flying It*, available at <https://maisonbisson.com/post/on-building-the-plane-while-flying-it/> (Mar. 26, 2019); available at <https://adland.tv/adnews/eds-airplane-2000-060-usa> (the EDS “building an airplane while flying it” advertisement).

¹⁴⁰ Here, in a nutshell, is the tension between what clients say they want and what true efficiency might dictate:

There’s also a cost factor that comes into play. [Here is a] true story of a senior attorney at a major firm, Matt, who explained that he could do the contract review project in two hours and that it would take an associate two days. “But the client doesn’t feel like paying me to do the project in two hours at \$1,000 an hour, so junior lawyers do it instead in two days,” explained Matt. Of course, this was not as cost-effective to the client. If it was going to take Matt two hours or cost \$2,000

that efficiency.¹⁴¹ It will be up to bankruptcy courts to determine when lawyers should have used AI to perform certain tasks (much as it is up to the courts to monitor the current use of technology like Lexis or Westlaw), and thus it will be up to the professionals who are submitting fee applications to justify when they used humans (rather than AI) and when they used humans *after* doing a first cut at the task by using AI.¹⁴² Billing judgment is still billing judgment.¹⁴³ For that matter, judgment is judgment,

and an associate would charge \$300 an hour but it would take roughly 16 hours, or \$4,800, Matt was not saving the client money by having associates do the work.

AI FOR LAWYERS, *supra* note 65, at 134–35; *see also id.* at 135 (“The truth is, however, even if you had the top partners at Biglaw firms doing the reviews, it would still be problematic because they couldn’t cover as much ground as AI. They’re still human, and they would still have to read the contracts. While they would likely have a better idea of what to look for and where to find it, the stuff you’re looking for is not always where it’s supposed to be. For example, Noah once saw a change of control clause in a notice section, and that’s not something you’d expect. It shouldn’t have been there, but it was. Either way, a senior partner is still not faster than AI.”).

¹⁴¹ Those lawyers who love the billable hour—in other words, those who aren’t paying attention to mounting fees—will likely hate any analysis that encourages such efficiency. But those lawyers who have found their way to fixed fees, at least for some matters, will want to be as efficient as possible. *See, e.g.,* AI FOR LAWYERS, *supra* note 65, at 34 (“In a fixed-fee situation, lawyers who can generate the same amount of output with less effort are going to make more profit. Fixed-fee work can even be very profitable for firms, even at lower prices, if the firms get more efficient. Happily, there tends to be lots of room for more efficient work in law practice.”).

¹⁴² Our friend Ivy Grey suggested one such application of AI:

A lawyer can write the first draft of the complaint in MS Word, then a secretary can insert field codes for payee, amount, dates, and address and automatically generate individual preference complaints using the mail merge function. Since the list of preference targets is already in an Excel file (probably), the mail merge should take just a few minutes. If we discover an error in the template later, we can re-run the merge without re-doing all of the work. If a firm primarily handles preference actions, then document automation tools like Woodpecker or LawYaw would be better than MS Word. But if the firm is handling these types of actions quarterly, then MS Word is best because it is already available and it’s free. Any paralegal or legal secretary would know how to set up this workflow. The lawyer just needs to know what to assert. Then the lawyer can spend more time drafting the underlying complaint, negotiating for payment, and writing any follow up briefing. Letters, briefs, and memos could be improved by using a tool like WordRake to edit for clarity and brevity.

Email from Ivy Grey to Joseph R. Tiano, Jr. and Nancy Rapoport (Jan. 2, 2023) (on file with authors). Ms. Grey also pointed out that repetitive work done by humans should at least trigger an inquiry by a fee examiner. *Id.* (“If I were a fee examiner, I would start every review by looking for huge batches of repetitive documents and mercilessly slash those fees. Drafting individual preference complaints for these matters should be a non-starter—unless the recovery amount exceeds a high threshold, as determined case-by-case. Any settlements could also be handled similarly.... This approach could also work for first day filings and proofs of claim forms, which all start with the same generic template.”).

¹⁴³ *See, e.g., Billing Judgment, supra* note 38 (passim); *see also* AI FOR LAWYERS, *supra* note 65, at 168 (2021) (“AI isn’t just about automating junior lawyer work. More experienced lawyers need to pay close attention, too. Ultimately, the most valuable attribute of most senior lawyers is their judgment. AI can help senior lawyers make better decisions in less time (sometimes through assisting their juniors to do more, higher-quality work). Senior lawyers who don’t take advantage of this change put themselves at a real competitive disadvantage.”).

period.¹⁴⁴ We’re guessing that most bankruptcy courts have no problem with lawyers who do a first cut of discovery via computer searches. As we’ve said, computers don’t get tired, or hungry, or distracted,¹⁴⁵ and they can process mountains of data in a short time, leaving the subsequent analysis of that data to humans.¹⁴⁶ As Mark Cohen and Richard Susskind noted in an interview:

¹⁴⁴ Even though there were some scary stories about potentially sentient AI, see, e.g., Nitasha Tiku, *The Google engineer who thinks that the company’s AI has come to life*, WASH. POST (June 11, 2022), available at <https://www.washingtonpost.com/technology/2022/06/11/google-ai-lamda-blake-lemoine/>, we still don’t have computers that can reliably pass the Turing Test (roughly speaking, the test that Alan Turing proposed to see if computers were sentient), see *The Turing Test*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 4, 2021), <https://plato.stanford.edu/entries/turing-test/>; see also Cade Metz, *A.I. Is Not Sentient. Why Do People Say That It Is?*, N.Y. TIMES (Aug. 5, 2022), <https://www.nytimes.com/2022/08/05/technology/ai-sentient-google.html>. And, in an aside that only a Rice alumna would love, Twinkies can’t pass the Turing Test, either. See Tanya Barrientos, *This One Takes the Cake: On-Line Twinkie Test*, WASH. POST (Dec. 7, 1995), <https://www.washingtonpost.com/archive/lifestyle/1995/12/07/this-one-takes-the-cake-on-line-twinkie-test/8924747b-01e0-4628-bab3-a60f8df760b4/>.

¹⁴⁵ We all make mistakes:

[[T]]here’s the random error component, which is simple; people at any size law firm are often doing this work for hours and hours. So, by the time it gets to 4:00 in the morning, for the second or third night in a row, they are no longer very sharp. There are also the distractions in life, such as having a fight with their girlfriend or boyfriend, or working with March Madness or the World Cup on TV in the background. Contract review is a high-focus task, and the glut of data to review makes it nearly impossible for even the sharpest humans to maintain a high level of concentration for long periods of time. Even after drinking several Red Bulls. The point is, people screw up.

AI FOR LAWYERS, *supra* note 65, at 135. And, yes, we’re going to cite TOP GUN: MAVERICK again here. See *supra* note 52.

¹⁴⁶ See, e.g., Beverly Rich, *How AI Is Changing Contracts*, HARV. BUS. REV. (Feb. 12, 2018) (“AI contracting software can quickly assess risk in contracts (performing the risk analysis much faster than a team of lawyers) by identifying terms and clauses that are suboptimal. And it can reduce the risk of human error in contract drafting and review.”), <https://hbr.org/2018/02/how-ai-is-changing-contracts>. Richard and Daniel Susskind point out how we should look at the should-a-machine-be-doing-this task issue—not as “if the machine can’t get it 100% correct, it’s worthless to use a machine,” but rather, “can a machine be significantly better at this task than a human can be?”

[[It is a mistake]] to expect more of our machines than we expect of ourselves. If we hear, for example, that an online diagnostic system is capable of making a correct diagnosis 80 per cent of the time, our instinct seems to be to declare that the 20 per cent of incorrect diagnoses is intolerable, rather than to compare that error level with human beings’ current capabilities. We see this spirit in many of the objections of this chapter. Those who object often demand that the people and systems that replace the professions should attain a level of moral virtuosity, for example, or a degree of empathy that palpably outstrips those who currently work in the professions. As Voltaire would caution, in reforming or transforming the professions, we should not let the best be the enemy of the good. Frequently, the question that should be asked of a proposed new system or service is not how

The legal industry's openness to the full spectrum of people, cultures, legal professionals, professional support roles, and technologies will be paramount to its future sustainability, [[Cohen and Professor Richard Susskind]] added. And while the horizon could be fabulous for most, in practice, lawyers in the future will be working to enable legal machines, far more so than today. Fighting that concept is inevitable for some and losing that battle is almost certain. The winners in this legal evolution are those that find a way to adapt. The positive note of adapting is that with the support and efficiency of legal technology, lawyers can focus more time and energy on higher value tasks and client care.¹⁴⁷

AI isn't perfect, of course. Just ask Mariya Yao, whose article on the meme "Chihuahuas or blueberry muffins" should be a classic.¹⁴⁸ But we can imagine a world in which AI becomes part of a law firm's standard first cut at routine tasks:

Meet ROSS, a new junior associate. He can read over one million pages of law in a second. He knows every court in every federal circuit. He understands with ease legal

it compares to traditional service, but whether it would be better than nothing at all.

RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 359–60 (2022 ed.) (footnote omitted). When we consider the "don't let the perfect be the enemy of the good," though, there is an intangible part of the equation: when we just prefer to have a human do the work.

However, ... for certain kinds of activity we may prefer to engage human beings even if they perform less impressively than machines. We may do so because we value the effort and imagination expended by fellow human beings over the outcome. Precisely because it was crafted by a human being, we may prefer to buy a sculpture by a person, even though a robot could do a better and cheaper job. In the professions, though, our general view is that this (often nostalgic) preference for the old ways of working will be too high a price to pay, especially if the quality of service is demonstrably lower than that provided by a machine.

Id.

¹⁴⁷ Joseph Raczynski, *Legal Geek's Uncertain Decade: The future of legal technology and digital transformation*, THOMSON REUTERS (Aug. 3, 2020), <https://www.thomsonreuters.com/en-us/posts/legal/uncertain-decade-pt4-digital-transformation/>.

¹⁴⁸ Mariya Yao, *Chihuahua or muffin? My search for the best computer vision API*, Free Code Camp (Oct. 12, 2017), <https://www.freecodecamp.org/news/chihuahua-or-muffin-my-search-for-the-best-computer-vision-api-cbda4d6b425d/>; see also Scott Stump, *Goofy New Internet Meme Asks, 'Is this a Chihuahua or muffin?'*, TODAY.COM (Mar. 11, 2016), <https://www.today.com/pets/goofy-new-internet-meme-asks-chihuahua-or-muffin-t79456> (showing the meme itself in all of its glory); Ahffan Kondeth, *Solving the famous problem of Puppy vs Muffin by deep learning — Web App on Google AppEngine/Fastai*, MEDIUM.COM, <https://medium.com/@ahffank/solving-the-famous-problem-of-puppy-vs-muffin-using-a-simple-web-application-on-google-app-a3264e2be49c> (June 30, 2020).

research questions posed to him in plain language, and answers within seconds. He thrives on feedback from his supervisor to improve his accuracy and performance. He gets smarter with each completion of a task. And, I almost forgot: he doesn’t take vacations, doesn’t get tired, doesn’t get frustrated, doesn’t require health insurance, doesn’t waste time reviewing irrelevant authority, doesn’t care about work/life balance, and doesn’t bill at an exorbitant hourly rate—only, ROSS isn’t human.¹⁴⁹

Let’s posit that there will be some tasks that, in the future, bankruptcy courts will want AI to perform, in order to fit within § 330’s reasonableness analysis. We highlight some of those tasks below as we propose an analytic structure for a § 330 analysis. For now, it’s important to point out that the use of technology should not be forced into situations where it does not advance a client’s cause, and we need to heed technological limitations and risks. Likewise, we’re mindful that technology cannot and should not replace legal professionals; instead, it should augment how they deliver legal services and it should change how legal professionals are trained.¹⁵⁰ Most senior lawyers cut their teeth on the old way of document review or contract drafting: We spent weeks in warehouses sifting through files, and we used form files to begin drafting contracts. We didn’t start with having a computer hand us legal research, document analysis or first drafts. So how will we train our junior colleagues to tell good “discovery sifting” from bad, or to determine which parts of a computer-generated draft are

¹⁴⁹ O’Leary, *supra* note 3, at 33 (footnote omitted).

¹⁵⁰ Teny Sahakian reports that AI may eventually cost paralegals and more junior lawyers some jobs.

While implementing AI more for these [basic, paralegal-level] functions will boost efficiency and cut costs for law firms, [Bryan] Rotella said he’s concerned that moving to rely on technology for these essential tasks will strip legal assistants and young lawyers of the training they need to gain experience.

....

Rotella, who specializes in providing personal counsel to businesses, said if law firms have less need for paralegals to do their labor-intensive, entry-level tasks, it could be difficult for recent graduates to find employment even with a degree. He predicted that this development could have a serious impact on the number of law students.

Teny Sahakian, *How AI could keep law students in debt forever*, FOX NEWS (Mar. 22, 2023), <https://www.foxnews.com/tech/ai-keep-law-students-debt-forever> (last visited Mar. 25, 2023). Jeff Garrett agrees: “... I wonder if needs for newer associates will be drastically reduced. If AI gets to the point that it is very good and very fast, it may only require a paralegal to double check things. With law firms posting record-profits after laying off lots of people during COVID, I could see law firms leaning more heavily on AI as an alternate source of work associates used to do.” Email from Jeff Garrett to Nancy Rapoport and Joseph Tiano (Mar. 24, 2023) (on file with authors).

worthwhile?¹⁵¹ In other words, are we creating a generation of new lawyers who won't be able to do what we can do now, because they never did those tasks manually first?¹⁵²

It's a little disingenuous of us to say that the tasks that the junior lawyers will take on will be more "bespoke" and thus more interesting than the routine tasks that taught the two of us how to be lawyers,¹⁵³ because that argument skips over the problem: *someone* has to teach new lawyers the necessary, but unglamorous, skills that undergird the AI algorithms. When people describe the world of the junior lawyer in an AI-enhanced environment, here's what they envision, in transitioning from the old way of doing things to the new way:

A junior lawyer reads through agreements, page by page, looking for consistent data points (e.g., change of control, assignment, restrictive covenants). Or the old way of doing discovery: junior (or temporary) lawyers scan document after document, saying which are relevant, or which are

¹⁵¹ Significant innovation seems to occur first in the legal research and writing fields. For a discussion of how a legal research course teaches students how to interpret research algorithms, see Annalee Hickman, *How to Teach Algorithms to Legal Research Students*, 28 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 73 (2020). Realize, too, that our duties of supervision (MODEL R. PROF'L CONDUCT 5.1 for supervision of lawyers and MODEL R. PROF'L CONDUCT 5.3 for supervision of non-lawyers) will continue. Even if computers do a first draft of something, a lawyer is going to have to check it for accuracy. See *id.* R. 5.3. And even if a junior lawyer checks the computer's work, a more senior lawyer will have to check the junior's work. See *id.* R. 5.1.

¹⁵² Back in the day of the first Texas Instruments scientific calculators, *cf.* *Texas Instruments Timeline*, <https://education.ti.com/en/snapapp/timeline> (indicating that the Texas Instruments Scientific Calculator first came out in 1974), one of us wasn't allowed to use the calculator at all until she first did a "real" calculation by hand.

¹⁵³ As one commentator has explained,

There are also concerns over automation leading to less job security. To be sure, automation has also led to some firms laying off staff, especially those in administrative and support roles. But firms say it is also helping them retain staff as well, given that employees are performing fewer tedious, rote tasks and by extension, are less stressed.

"Data and the 'Great Resignation' shows that employees are experiencing significant burnout. Our attorneys and resources across the firm are looking towards technology and automation now more than ever to eliminate manual tasks that are time-consuming and burdensome. Our automation efforts save our team's attorneys hundreds of hours and improve the quality of their work life[.]"

[Vedika] Mehera [Orrick's innovation adviser] says.

Rhys Dipshan, *Law Firm Automation Will Survive the Pandemic*, NAT'L L.J. (Aug. 3, 2022), <https://www.law.com/nationallawjournal/2022/08/03/law-firm-automation-will-survive-the-pandemic-405-08030/?kw=Law%20Firm%20Automation%20Will%20Survive%20the%20Pandemic>; see also SUSSKIND, *supra* note 71 ("Lawyers, for instance, may argue that no machine could stand and deliver a stunning peroration to a gripped jury—and they may well be right about that. But machines today certainly can retrieve, assemble, and review a wide range of legal documents, tasks that make up a big part of most lawyers' jobs—and, in the case of junior lawyers, almost their entire jobs.").

privileged. Today, thanks to AI, things are different. In contract review, AI directs lawyers to passages that might be relevant, as opposed to spending significant time finding the passages in the first place. Rather than spending lots of time trying to find on-point wording (and sometimes missing it), AI makes users consider whether “Customer will buy 100% of its requirements of paper from Dunder Mifflin” is an exclusivity obligation.¹⁵⁴

But if computers make that first cut, how will junior lawyers be able to cull good clauses from bad ones? Will law firms continue to train their junior lawyers and simply write off the billable time attributable to training?¹⁵⁵ Do we expect law schools to somehow pick up the slack—law schools that, for the most part, have very few tenure-stream professors who still have a hand in the “real world”? Law schools *are* changing, because there are more courses that involve the “law and technology” moniker.¹⁵⁶ And the American Bar Association now requires law schools to provide experiential learning.¹⁵⁷ But even with the American Bar Association’s

¹⁵⁴ AI FOR LAWYERS, *supra* note 65, at 13. There will still be room for lawyering judgment after AI does a first cut of a task—and lawyers should use their judgment, rather than blindly accept a draft that AI spits out. Junior lawyers can learn from AI as they develop that judgment, much the same way that the two of us learned from the massive editing that senior lawyers gave to our work when we first started practice. It is possible to develop a schema that distinguishes good from bad. We’re just adding a step that speeds up part of the process.

¹⁵⁵ Richard Susskind suggests this possibility, though he points out that writing off that time “would directly reduce the profit of those firms that rely on the pyramidal structure.” SUSSKIND, *supra* note 16, at 169; *see also* SUSSKIND & SUSSKIND, *supra* note 146, at 345 (“There is a related point here—that in this era of cost-consciousness, when recipients of professional work are asking for more professional work at less cost, they are not as willing as in previous years to pay for the time of budding professionals who are learning their trade by working with the recipients of their work. In short, recipients are increasingly unhappy about paying for the training of their external providers.”). And Michael Richman has suggested (in a hallway conversation at the American Bankruptcy Institute’s Annual Spring Meeting in April 2023) that part of the training will involve law students proofreading any AI-generated first drafts for accuracy, including cite-checking any cited cases and double-checking any asserted facts.

¹⁵⁶ SUSSKIND & SUSSKIND, *supra* note 146, at xxxiii (“[S]lowly but perceptibly, law schools around the world are acknowledging that a legal education would be incomplete without exposure to developments in technology. Courses, centres, and professorships are now being dedicated to legal technology and transformation.”).

¹⁵⁷ ABA Standard 303(a)(3) requires law schools to offer

one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:

- (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
- (ii) develop the concepts underlying the professional skills being taught;
- (iii) provide multiple opportunities for performance; and

new rule about experiential learning, both of us doubt that the minimum of six credit hours that law schools must provide will replace the two or more years that the two of us spent learning the ropes.

What do we see, in terms of the practice of law? We see AI helping already skilled paralegals provide more helpful drafting to the lawyers on their teams. We predict a decrease in the need for contract attorneys to do first-cut analysis, in favor of using AI for the first cut.¹⁵⁸ And we're already seeing many practitioners resent the heck out of the law schools who are graduating people with an enormous gap in their knowledge—with plenty of theory but little practice experience. Sadly, we also see law graduates with hundreds of thousands of dollars of loans looking back at their law schools and toward their employers, saying, “What now?”

Something has to give.¹⁵⁹ Lawyers and law students have been using AI for years,¹⁶⁰ and several law schools are developing robust “law and technology” programs that cover everything from AI to process improvement to an understand of off-the-rack, useful technology.¹⁶¹ Those

(iv) provide opportunities for self-evaluation.

https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalOfLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf.

¹⁵⁸ Cf. SUSSKIND & SUSSKIND, *supra* note 146, at 344 (“[M]uch of the routine and repetitive work of today’s aspiring professionals will be undertaken in new ways, for example, by para-professionals, offshoring, or online service. Are we not therefore depriving young professionals of the work upon which they currently cut their teeth? If we source much of the basic work in alternative ways, on what ground will young professionals take their early steps towards becoming expert?”).

¹⁵⁹ Cf. William Butler Yeats, *The Second Coming* (“Things fall apart; the centre cannot hold....”), <https://poets.org/poem/second-coming>.

¹⁶⁰ When was the last time you started a research project by heading to the law library and looking at cases? For that matter, when was the last time you crossed the threshold of a law library?

¹⁶¹ See, e.g., Katrina June Lee, *A Call For Law Schools to Link the Curricular Trends of Legal Tech and Mindfulness*, 48 U. TOL. L. REV. 55, 70–71 (2016) (“Law school curricula and programs relating to legal technology can take many different forms, from robust programs that involve extensive collaboration with legal tech industry companies to individual courses that include some aspect of legal tech.”) (footnote omitted); see also *id.* at 72–73 (“Legal design is also trending as part of legal technology education. The Legal Design Lab at Stanford Law School is one prominent trailblazing example. The Legal Design Lab is an interdisciplinary team “working at the intersection of human-centered design, technology & law to build a new generation of legal products and services” and to train law students and professionals.”) (footnote omitted); AMERICAN BAR ASSOCIATION COMMISSION ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 26 (2016) (“Many law schools are now educating law students about innovation in legal services delivery. For example, a number of law schools now offer courses on e-discovery, outcome prediction, legal project management, process improvement, virtual lawyering, and document automation.”) (footnote omitted), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf.

programs include “coding for lawyers”¹⁶² and Law and AI seminars,¹⁶³ but these incremental innovations are lagging the need for much better prepared law graduates. Law schools are notorious for not wanting to change,¹⁶⁴ and yet change is crucial at this juncture.¹⁶⁵ Some overhaul of the curriculum is necessary,¹⁶⁶ and that overhaul should include courses that help students understand communication and the digital world,¹⁶⁷ the use of (and evaluation of the benefits of) AI in providing legal services, and project management (to determine when and how to use AI, and by whom that AI will be used).¹⁶⁸ Fundamentally, if a law school wants to do more than turn out law professors and appellate judges,¹⁶⁹ its faculty will have to refine a curriculum to include these components:

In anticipation of the AI age, future legal training should place an educational premium on (i) methodology over specific, ever-changing substantive matters, (ii) multi-

¹⁶² See Alfredo Contreras & Joe McGrath, *Law, Technology, and Pedagogy: Teaching Coding to Build a “Future-Proof” Lawyer*, 21 MINN. J.L. SCI. & TECH. 297, 321–330 (2020) (describing their “coding for lawyers” module at the University of Minnesota Law School); see also Kevin D. Ashley, *Teaching Law and Digital Age Legal Practice With an AI and Law Seminar*, 88 CHI.-KENT L. REV. 783, 790–801 (2013) (describing an AI and Law seminar).

¹⁶³ See Brendan Johnson & Francis Shen, *Teaching Law and Artificial Intelligence*, 22 MINN. J.L. SCI. & TECH. 23, 28 (2021) (“Based on this review of all published Law & AI course offerings in ABA approved law schools in the United States, we find that, through the 2019–20 academic year, 26% of the approximately top 200 ranked U.S. law schools offer (or recently offered) a Law & AI course. But only 13% of schools appear to offer more than one Law & AI course.”); see also courses discussed *supra* note 162.

¹⁶⁴ Cf. Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 370 (2006) (observing that the faculty is in charge of the curriculum, although the administration is in charge of making sure that the curriculum passes regulatory muster).

¹⁶⁵ Brendan Johnson & Francis Shen, *Teaching Law and Artificial Intelligence*, 22 MINN. J.L. SCI. & TECH. 23, 42 (2021) (“There is thus an urgent need for law school curricular leadership to innovate, to form stronger interdisciplinary collaborations with AI expertise, and to create new courses that address key issues at the intersection of law and AI.”); see also Melanie Reid, *A Call to Arms: Why and How Lawyers and Law Schools Should Embrace Artificial Intelligence*, 50 U. TOL. L. REV. 477, 482–83 (2019) (“With fewer future opportunities for junior attorneys since AI will replace the mundane tasks entry level attorneys typically performed in the past, law schools need to prepare their students to become expert, senior attorneys the day they graduate. This will require a shift in curriculum and a willingness to engage with the AI technology currently available to better prepare law students for the future legal landscape.”).

¹⁶⁶ But see *infra* note 175.

¹⁶⁷ See, e.g., Iantha M. Haight, *Digital Natives, Techno-Transplants: Framing Minimum Technology Standards for Law School Graduates*, 44 J. LEGAL PROF. 175, 197 (2020) (“Attorneys must be competent to protect their own data and information, manage their legal practices and tasks, and also be able to advise their clients to do the same.”).

¹⁶⁸ Project management itself will become a larger part of a good lawyer’s repertoire, in part because good project managers create efficient workflow.

¹⁶⁹ Cf. *infra* note 175 for a link to the T-14 law schools. Stanford is doing some great things in this area. See, e.g., CodeX, <https://law.stanford.edu/codex-the-stanford-center-for-legal-informatics/>. Note that we haven’t canvassed the other highly ranked law schools to see what they’re doing.

dimensionality and cross-disciplinary over linear legal analysis, (iii) originality and creativity over repetition and processing, (iv) ethical judgement and adaptability requiring complex normative assessment over technical legal provisions, (v) social context understanding and strategic thinking over detailed grasp of each individual transaction, (vi) client management and interpersonal skills over mechanical and isolated due diligence tasks, and (viii) robust mastery of legal technological innovations, such as AI. In particular, the training of future lawyers should concentrate on the ethical considerations of using AI outputs and the need to override AI for ethical reasons.¹⁷⁰

More law schools will have to develop a curriculum that guides law students toward understanding a world that will change repeatedly throughout their working lives. Those graduates who want to thrive will have to ask themselves regularly, “Is the way that we’re doing this now still the best way to do it?”¹⁷¹ And law schools and law firms will still have to find ways—for law firms, probably non-billable ways—to give recent graduates a glimpse into how those tasks that algorithms perform actually work.¹⁷²

The problem is that law schools and law firms will find themselves in a staring contest, and we don’t know which sector will blink first. Even though recent law graduates still need to learn how to practice law in general, their ability to understand what algorithms to program for which

¹⁷⁰ Dessislav Dobrev, *The Human Lawyer in the Age of Artificial Intelligence: Doomed for Extinction or in Need of a Survival Manual*, 18 J. INT’L BUS. & L. 39, 41 (2018) (footnote omitted).

¹⁷¹ AI FOR LAWYERS, *supra* note 65, at 56 (quoting Mary O’Carroll, Director of Legal Operations at Google and President of the Corporate Legal Operations Consortium, in her list of questions for change managers); *see also id.* at 134 (describing some of the skills that BigLaw and SmallLaw practitioners will have to learn).

¹⁷² This step is an important piece of the puzzle:

Secondly, although this may seem duplicative and inefficient, when large collections of tasks are being sourced beyond an organization, young professionals may be required, in parallel, to take on samples of these tasks themselves. Even though this work could be undertaken more quickly, to a higher quality, and at lower cost by some alternative provider (human or machine), some exposure to the manual conduct of this work can be a vital learning experience. Just as we insist that our schoolchildren learn to perform arithmetic by hand and in head, despite the existence of calculators, so too with young professionals. In part, this will help them to learn their trade. In part, this could perhaps be integrated within working practice as some form of quality-control mechanism. In any event, and in contrast with today, no longer will recipients of professional services be willing to pay for this parallel learning process.

The final piece of our alternative jigsaw is e-learning.

SUSSKIND & SUSSKIND, *supra* note 146, at 347–48.

tasks will depend in part on how lawyers have done things manually in the past.¹⁷³ Many tenure-stream law professors have been out of law practice for too many years to provide useful real-world examples. There are adjunct professors, though, and the beauty of adjunct professors is that they are teaching that which they are currently doing “in real life.” But the American Bar Association places limits on the proportion of adjunct professors teaching across the curriculum.¹⁷⁴

The process of elimination would then have AI training fall to law firms, but the training time will be non-billable time, and the firms would have to decide how much time and effort they want to spend on that training. So we’re back to that staring contest: law firms could start to put the pressure on law schools by choosing to interview only those students who have demonstrated some understanding of AI and its implications.¹⁷⁵ We don’t have the solution yet, but clearly, as AI takes over certain tasks, and as

¹⁷³ See *supra* note 172, for an example.

¹⁷⁴ See Standard 403(a), AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2017-2018, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalOfLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.pdf (“The full-time faculty shall teach substantially all of the first one-third of each student’s coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all of the credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrollment at the law school.”).

¹⁷⁵ Yes, law firms could put the pressure on even at the T-14 schools. For a listing of the perennial T-14 law schools, including some schools that jump onto and off of that list, see, e.g., <https://7sage.com/top-law-school-rankings/>. Law firms *could* do that, but they likely won’t, at least at the higher part of the rankings ladder for both schools and firms. The top firms and the top law schools share a belief that smart law graduates can learn to do anything. They can, usually, but someone still has to teach them. For an interesting take, we turn again to the comments that Professor Joe Regalia made on an earlier draft of this article:

I have quite a lot of opinions/ideas on this point. One is that law firms are more open to flexible and innovative training than they ever have been in the past (we know that well at Write.law!). But at the same time, training funding is a weird place: Some firms are increasing it dramatically; others are cutting it to the same degree. Same goes for other sectors beyond firms. It’s clear that clients are no longer the way to pay for training—that ship has generally sailed, I think.

One option is private-sector solutions, of which there are a few so far, like Write.law (we do tech and tech skill training). And we have a few competitors. Another [option] could be some law schools taking the lead in creating a top-notch, standardized virtual program that other law schools can opt into. I’ve been a supporter of that for a long time.

Another is the creation of stand-alone programs at individual law schools. [Oklahoma] has a great example of this approach. Kenton Brice has spearheaded a program that requires so many hours of tech and innovation training, and the offerings are, frankly, incredible. No one graduates without fundamentals. Same with a handful of other schools who are already paving the way. It’s what I’ve tried to build with our own UNLV Virtual Lawyering Bootcamp, as well.

Regalia comments on earlier draft, *supra* note 5.

bankruptcy courts consider the use of AI in determining the reasonableness of fees under § 330, there will have to be a sea change in how new lawyers learn the ropes.

B. A Proposed Analytic Construct For Bankruptcy Courts Under a Reimagined § 330

It's never been our style to advocate that others adopt our innovative ideas without offering an analytic construct by which those ideas can be implemented. Traditional notions of economic fairness dictate that attorneys and other bankruptcy industry professionals know and understand the framework by which their professional fees will be evaluated. We propose that a court's § 330 analysis should incorporate current AI innovations and technological advancements.¹⁷⁶ We're not asking anyone to rewrite § 330. The legislative intent, the Code itself, and policy underlying § 330 already dictate that all aspects of reasonableness, including the 21st century technological advancements, should be considered in the equation. Our proposal simply requires the court to assess the professionals' technology and data use throughout the matter, using the existing § 330 factors. After all, § 330(a)(3) already requires a court to consider:

... 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

¹⁷⁶ Given that one of us runs a technology company that makes a first cut of fee review a matter of weeks instead of months (and the other one of us uses that technology in her fee reviews), we can't resist mentioning that courts should consider how fee examiners use technology in their work as well.

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.¹⁷⁷

The use of AI and data can fold neatly into this framework:

The time spent on such services	Could the use of reasonably accessible technology and data have accomplished the task faster and better? Would the use of technology have reduced the number of hours billed to a client/debtor? Would the use of comparative data have helped the assigning lawyer assign the work to the “lowest efficient biller”? ¹⁷⁸
The rates charged for such services	Did the professional assign the work to the lowest efficient biller? When taking into account the cost of technology, was the blended cost of the reduced volume of legal professional time and technology less than the cost of legal professionals alone?
Whether the services were necessary or beneficial at the time that they were rendered	Could a computer have performed the task faster and better, in the early stages of discharging the task?
Were the services performed within a reasonable amount of time commensurate with the work?	Could a computer have performed the task faster and better, perhaps with human help as the task became more complicated? Would the use of industry benchmarks help the assigning lawyer assign the work to the “lowest efficient biller”?

A court could certainly ask these questions of those professionals filing

¹⁷⁷ 11 U.S.C. § 330 (emphasis added).

¹⁷⁸ We may not have coined this phrase, but we use it all the time. And one of us is pretty sure that her co-author actually did coin the phrase.

fee applications.¹⁷⁹ Better yet, though, there could be a local rule that requires the parties to proffer evidence to answer these questions.¹⁸⁰

In a previous article, we suggested that professionals—or courts, by local rule—could require that professionals mine the available data to choose the lowest efficient biller for a task:

Law firms that tout their expertise in large, complicated matters have a treasure trove 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. 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

¹⁷⁹ And courts have asked more explicit questions of professionals in similar contexts. For example, in *In re Elieff*, the bankruptcy court required the fee applicants to reorganize the fee applications so that the court could see, in chart form, “each and every pleading and notice that the applicant prepared and filed, with each item referring the docket number ... [[and]] organize by name and billing rate ... the hours spent and billed by each attorney or paraprofessional in preparation of each pleading and notice referenced in the initial chart[.]” among other tasks. *In re Elieff*, Case No. 8:19-13858-SC, United States Bankruptcy Court for the Central District of California, Docket No. 1348 at 2. Thanks to Judge Clarkson for pointing out to us that courts not only have this power but use it. Email from Hon. Scott C. Clarkson to Nancy Rapoport (Dec. 26, 2022) (on file with authors).

¹⁸⁰ Here’s one way that a professional could address these factors in a fee application: When analyzing “the time spent on such services” under subsection (A), the professional could discuss how the time spent on such services would change, if at all, by using technology. In analyzing “the rates charged for such services” under subsection (B), the professional could discuss how the weighted average of rates would have changed if the task had been assisted by technology or an alternative legal services provider.

this as not just “budget to actual” but as “prior cases to budget to actual.”¹⁸¹

Therefore, in a more robust § 330 analysis, a court could ask the professionals, as a part of their fee applications, to discuss the cost-benefit choices of the use (or non-use) of technology and data in different phases of the case, with an eye toward answering whether the professional’s delivery of services and advice was best done “the old-fashioned way” or whether a judicious use of technology and data could have provided services and advice that would have been more efficient, cost-effective, reliable, and valuable. And, just like a court requiring the use of data to establish the likely lowest efficient biller, a court could ask the professionals to use data to compare how much a task was likely to cost with currently available technology versus the same task’s costs using only humans. For example, we can imagine that there would be no savings at all in asking a robo-lawyer to appear at a hearing, but there could be substantial savings for using a computer to search for documents, rather than by asking a bevy of first-year associates to hang out at a hearing just in case a senior lawyer needed to find something quickly.¹⁸² In essence, by requiring professionals to provide a cost-benefit analysis along with comparative data (demonstrating the cost of the task with and without technology), the court could assure itself that “the services [really] were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed.”¹⁸³

We know: when it comes to smaller cases, including most consumer cases, asking professionals to conduct this extra work in their fee applications is too burdensome to be realistic, and so we’re suggesting that, for certain sizes of cases, courts should not require this additional analysis.¹⁸⁴ In those smaller cases, this analysis surely would be helpful, but we’re mindful that the burden on the parties may outweigh the benefits. In large and mid-sized bankruptcies, though, this type of analysis should be mandatory. The types of technologies that would be important for this analysis are those that replace recurring, low-level, time-intensive tasks, such as initial legal research, docketing, initial document review, initial discovery (such as the culling of responsive documents), claims management, and fee

¹⁸¹ *Billing Judgment*, *supra* note 38, at 347 (footnotes omitted). We also suggested slightly more intrusive “nudges” to get firms to use big data: by using comparative data across law firms, *id.* at 350–51, or by having courts enact a local rule requiring such analysis, *id.* at 352–53.

¹⁸² Yes, we’re on the same side of the bifocal divide as many of you, so we know that there would need to be at least one computer-savvy person at the hearing to do those searches.

¹⁸³ See *supra* note 177.

¹⁸⁴ At least until we can suggest a way to make the drafting of fee applications much easier than it is today. We are, of course, working on that.

application preparation.¹⁸⁵ For those tasks, the professionals can use already existing “legal spend analytics” tools¹⁸⁶ to augment the analysis. The point, of course, is to honor the concept of “reasonableness” that § 330 requires.

CONCLUSION

The wonderful thing about jurisprudence in the United States is that the law adapts to aspects of the world that were, in the words of Vizzini,¹⁸⁷ previously “inconceivable.” Just as software can “think” and “do” many of the tasks that humans are doing, data analysis can help professionals fine-tune their own gut hunches. Adaptions happen in every aspect of law every day, but § 330 has remained largely static since its adoption, even as technology has outpaced everything else in society at lightspeed. If we are to respect the legislative intent of § 330, it’s time for bankruptcy courts to adopt a natural, market-driven analysis of § 330 to factor in technology as part of a reasonableness analysis. Doing so advances the overarching principles of the Bankruptcy Code and still allows professionals to deliver excellent bankruptcy advice by professional services, while they are still receiving quite handsome “reasonable compensation.” This new way to view § 330 is the right economic result for all constituents involved.

¹⁸⁵ See *supra* note 184.

¹⁸⁶ Companies such as Legal Decoder, Litera, BigHand, Brightflags, Laurel, and Intapp have been taking different approaches to help clients and their law firms make better sense out of legal-spend data to ensure that outside counsel are providing optimal pricing, budgeting, and efficiency.

¹⁸⁷ In the movie *THE PRINCESS BRIDE*, Inigo Montoya responds to Vizzini with the classic lines, “You keep using that word. I do not think it means what you think it does.” See *supra* note 2. The classic line in the book, in response to the word “inconceivable,” is “‘You keep using that word!’ the Spaniard snapped. ‘I don’t think it means what you think it does.’” WILLIAM GOLDMAN, *THE PRINCESS BRIDE: S. MORGENSTERN’S CLASSIC TALE OF TRUE LOVE AND HIGH ADVENTURE* 105 (2007 ed.). The Spaniard is, of course, Inigo Montoya.

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LEVERAGING LEGAL ANALYTICS AND SPEND DATA AS A LAW FIRM SELF-GOVERNANCE TOOL

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

INTRODUCTION	171
I. EXTERNAL FORCES RESHAPING TODAY’S LEGAL INDUSTRY.....	173
II. DECISIONS THAT TEND TO DRIVE UP THE COST OF BILLS....	175
III. WHY WOULD SMART, WELL-RUN LAW FIRMS MAKE BAD CHOICES ABOUT BILLING?	177
IV. LEGAL ANALYTICS AS A WAY TO COUNTERACT BAD GUT DECISIONS	182
A. <i>Avoiding Pricing Misfires</i>	183
B. <i>Optimizing Matter Staffing</i>	183
C. <i>Improving the Workflow Process</i>	184
V. PROACTIVE MANAGEMENT OF THE COSTS OF REPRESENTING A CLIENT	185
CONCLUSION.....	186

INTRODUCTION

In a world in which even top-tier law firms are fighting a multi-front battle for clients,¹ and only the most profitable parts of medium-sized

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¹ See Joseph Tiano, *Law Firms Using Their Data Edge to Deliver What Clients Want*, LINKEDIN (Jan. 17, 2017), <https://www.linkedin.com/pulse/law->

law firms are absorbed into megafirms, many law firms are missing an opportunity to increase profitability by self-assessing their performance with legal analytics.² Just as advances in data-centric technologies made certain old-economy jobs obsolete—for example, slide rules gave way to phone apps that can do the same types of calculations³—attorneys who budget and bill based on gut hunches rather than data-driven analyses will be hard-pressed to strike the right balance between ethical obligations to keep fees reasonable and the ability to make a good living. Nearly every industry study concludes that clients expect their law firms to be technologically savvy, adopt new service-delivery models, improve the economic relationship between attorney and client, and employ best billing practices.⁴

The most forward-thinking law firms are coping with client pressure to deliver better and more predictable value by leveraging—as a self-governance and self-assessment tool—hundreds of billions in “legal spend” data.⁵ Understanding the component cost of each aspect of legal service delivery can offer valuable insights into pricing and evaluating the

firms-using-data-edge-deliver-what-clients-want-joseph-tiano/. In particular, they’re competing for the types of clients who are willing to pay four-figure hourly rates. *Id.*

² *Id.*

³ Reed Albergotti, *How Apple uses its Apple Store to copy the best ideas*, WASH. POST: TECH. (Sept. 5, 2019, 5:00 AM), <https://washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-best-ideas/>. Taxis are giving way to Ubers, and Uber’s self-driving cars may make their own drivers obsolete. See Colin Lalley, *Will self-driving cars replace Uber and Lyft drivers?*, POLICYGENIUS (June 2, 2017), <https://www.policygenius.com/blog/will-self-driving-cars-replace-uber-lyft-drivers/>.

⁴ Bob Ambrogi, *Tech-Savvy Firms More Profitable Now, More Prepared for the Future, Finds Survey of U.S. and EU Legal Professionals*, LAWSITES (Apr. 3, 2019), <https://www.lawsitesblog.com/2019/04/tech-savvy-firms-more-profitable-now-more-prepared-for-the-future-finds-survey-of-u-s-and-eu-legal-professionals.html>; see also Eric Sigurdson, *The Evolving Legal Service Delivery Model: A 2018 Survival Guide for BigLaw and Traditional Law Firms - building a new business model*, SIGURDSON POST (Jan. 14, 2018), <http://www.sigurdsonpost.com/2018/01/14/the-evolving-legal-service-delivery-model-in-the-fourth-industrial-revolution-a-2018-survival-guide-for-biglaw-and-traditional-law-firms-building-the-new-law-firm-business-model/>.

⁵ See 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, 1269–70 (2019) [hereinafter Rapoport & Tiano].

services.⁶ Law firms that use, protect, and promote the use of legal spend data or legal analytics can differentiate themselves from the countless other firms that also have well-credentialed, hard-working professionals. In other words, using big data internally can give law firms a competitive edge and business development advantage.

Our essay has five parts: (i) a discussion of how external forces are reshaping the economics of today's legal industry; (ii) examples of the types of decisions that tend to drive up the cost of bills in contravention of ethical duties; (iii) a discussion of possible reasons for those decisions (including a short discussion of social science explanations); (iv) a description of how attorneys can use data analytics tools to self-govern their staffing and deliver and bill for their legal services; and (v) recommendations for how clients and law firms can benefit from proactive management on the front end of legal costs.

I. EXTERNAL FORCES RESHAPING TODAY'S LEGAL INDUSTRY

Until just recently, attorneys in the United States practiced law as quasi-monopolists. For several generations of lawyers, a law school degree and a bar license, coupled with state ethics rules, precluded meaningful competition from anyone except other attorneys.⁷ A lawyer's competitive edge was tied largely to substantive legal knowledge, strategic advocacy skills, experience, business development skills, and reputation.⁸ Legal services were consultative, qualitative, and advisory.⁹ Clients weren't hyper-focused on hourly rates or the costs of legal services.¹⁰ If you were a pretty good lawyer, you could make a good living for thirty, forty, or fifty years, often with the same law firm. We like to call this period, which lasted until the 1990s, the "Golden Age" of the legal industry.¹¹ As with other "Golden Ages," though, the legal industry's "Golden Age" has been overtaken by relentless, converging waves of competition, conflict, technological advancements, and culture change.¹² Notions deemed inconceivable during the Golden Age, such as client pricing pressure, disaggregation of legal services, delivery of legal

⁶ *Id.*

⁷ Mark A. Cohen, *The Golden Age of The Legal Entrepreneur Why Now and Why It Matters*, FORBES (June 1, 2018, 5:57 AM), <https://www.forbes.com/sites/markcohen1/2018/06/01/the-golden-age-of-the-legal-entrepreneur-why-now-and-why-it-matters/#611f03087803>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* Good times to be a lawyer, for sure. *Id.*

¹² *Id.*

services by non-lawyers, and outside investment in the legal industry, have changed the practice of law from a noble profession into the ultra-competitive business of delivering “legal solutions.”¹³

Two distinct offerings of “legal solutions” have emerged in today’s legal industry: (1) the practice of law and (2) the business of delivering legal services.¹⁴ Clients now receive a hybrid qualitative/quantitative service by which the mass customization and legal analytics provided by third party industry disruptors influence the traditional practice of law.¹⁵ Litigators are using e-discovery tools to expedite document review, law firms created self-service templates for early-stage venture capital transactions, and companies like LegalZoom,¹⁶ Fastcase, and RocketLawyer developed technologies that empower non-lawyers to undertake routine legal tasks. These disruptive technologies push the legal industry in the right direction from an efficiency perspective, reducing the time it takes to analyze an issue or handle a task.¹⁷ Alternative legal service providers (ALSPs) destabilized the rate side of the economic equation by offering competent, lower-cost professionals and processes capable of handling high-volume legal work at a steep discount from the fees of major law firms.¹⁸ Amid these innovations, law schools (until just recently) graduated law students at a pace that has created a supply/demand mismatch for legal services.¹⁹ All of these developments irreversibly affected the legal industry’s competitive landscape by altering the time that it takes a lawyer to do his or her job (and the overall costs), thereby precipitating a reevaluation of legal fees.²⁰ Although a client has always had a major interest in assessing the balance between fees and the value of legal services, law firms must also now monitor their activities if they hope to stay competitive.²¹ Forward-thinking law firms are leveraging data analytics tools to show

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Steven J. Harper, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/25/opinion/toomany-law-students-too-few-legal-jobs.html>.

²⁰ See Cohen, *supra* note 7.

²¹ Josh Becker, *4 Ways that Law Firms Benefit from Legal Analytics*, LEXISNEXIS (2018), <https://www.lexisnexis.com/pdf/legal-analytics/Legalanalyticwhitepaper.pdf>

clients that they understand those tactical decisions that can make legal fees skyrocket.²²

II. DECISIONS THAT TEND TO DRIVE UP THE COST OF BILLS

The biggest reason that the bottom line of a legal bill tends to go ever-skyward is the failure to analyze, in real-time, the myriad of daily decisions—staffing and tasks—that the representation of a client entails. We’ve written before about some of the social science behind faulty law firm decision-making.²³ Those social science reasons for costly decisions can include anchoring (focusing on one factor, such as hourly rates, to the exclusion of all other factors), social pressure (where one or two group members sway the decisions of the rest of the group), and cognitive dissonance (where an individual can talk himself into justifying a costly decision in order to maintain his own good opinion of himself—as in, “It was smart to bring ten people to the hearing today because we’d be able to answer any question the judge might have asked.”).²⁴ Countless cognitive errors might contribute to costly decisions, but we won’t list all (or even most) of them here.²⁵

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.²⁶ Let’s assume that clients always want “good.” Let’s also assume that law firms are afraid to provide

²² *Id.*

²³ See Rapoport & Tiano, *supra* note 5 (discussing the cognitive errors of anchoring, social pressure, and cognitive dissonance); see also Dwayne J. Hermes, Erica R. LaVarnway & Nancy B. Rapoport, *A Solutions-Oriented Approach: Changing How Insurance Litigation Is Handled by Defense Law Firms*, 2017 J. PROF. L. 129; Randy D. Gordon & Nancy B. Rapoport, *Virtuous Billing*, 15 NEV. L. J. 698 (2015) [hereinafter Gordon & Rapoport]; 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 & MALPRACTICE 42 (2014); Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117 (2012); Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. L. 263 (2010).

²⁴ *Id.*

²⁵ We will, however, suggest two great resources, in addition to the articles mentioned in note 23: JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* (A.B.A. 2013); Jean R. Sternlight & Jennifer K. Robbennolt, *Behavioral Legal Ethics*, 45 ARIZ. ST. L. J. 1107 (2013).

²⁶ See Rapoport & Tiano, *supra* note 23, at 1278.

less-than-good work for fear of being accused of malpractice.²⁷ That leaves a choice between the two remaining variables—fast and cheap.²⁸

Let's start with what we're not saying. We're not saying that law firms routinely inflate bills to benefit their bottom line, as we think that there are far fewer examples of law firm greed than simple law firm inadvertence.²⁹ But we do think that there is likely a bias against providing discounted service, especially with client pressure to provide the most responsive and timely work product to clients.³⁰ Therefore, law firms seem inclined to use "fast and good" as their two variables, irrespective of whether a client would choose "cheap and good" while accepting the concomitant delays. "Cheap," though, might not mean "slow." It might mean "staffed with fewer people," or "staffed with those professionals whose seniority matches the tasks that they need to perform," or "discounted rates in exchange for significantly more work from the client."

So, what types of decisions tend to drive up the costs of bills? Here are some categories of costly decisions that we've discovered over the years:

- Overstaffing certain tasks, such as multiple-party attendance at meetings or hearings.³¹
- Rank/task mismatch, where high-rate billers are performing tasks that lower-rate billers could perform.³²
- The arms race toward mid-four-figure hourly rates for the most senior professionals.³³
- Uncovering every possible argument, rather than focusing on the most likely arguments, through over-researching.³⁴
- Re-researching topics that the firm's expertise would normally indicate was part of the firm's prior knowledge base.³⁵

²⁷ *Id.* at 1275.

²⁸ *Id.* at 1278.

²⁹ *Id.* at 1270–72.

³⁰ *Id.* at 1271.

³¹ *Id.* at 1276.

³² *Id.* at 1293.

³³ See Rapoport, *supra* note 23, at 60.

³⁴ Matthew Guarnaccia, *Clients Leaving Firms with the Bill for Research*, LAW360 (Mar. 20, 2017, 4:44 PM), <https://www.law360.com/articles/903628/clients-leaving-firms-with-the-bill-for-research>.

³⁵ Rapoport & Tiano, *supra* note 5, at 1271.

- Not keeping real-time records of billable work. (The longer the delay between doing the work and recording the time entries, the less likely that the time entries will be accurate.)³⁶
- Statistically improbable hours (the 0.1, 0.5, and 1.0 time entries, when they occur more frequently than statistics would tell us is likely) as a way of compensating for not tracking time accurately.³⁷
- Failing to budget appropriately.³⁸

Any of these decisions can drive up the cost of legal services and having more than one of these types of decisions occur in a given matter will drive up the cost exponentially. If law firms are not trying intentionally to increase their bottom line, then why would we see these categories of decisions so frequently?

III. WHY WOULD SMART, WELL-RUN LAW FIRMS MAKE BAD

CHOICES ABOUT BILLING?

Let's assess the categories we have listed above and consider why a law firm might make such costly decisions.

Overstaffing.

There appears to be an issue, at least among the law firms that we observed, with overstaffing meetings and hearings with an array of specialists to address discipline-specific questions. That drives up billing times.³⁹ In an ultra-connected, telecom-enabled world, simple principles of efficiency justify having these specialists on standby, rather than physically present, just in case their knowledge is needed. Although many courts don't allow cell phones in the courtroom,⁴⁰ we doubt that a judge would object to a brief recess if a problem arose and someone in the courtroom didn't know the immediate answer. On the other hand, we recognize that the rationale for having these specialists physically present,

³⁶ *Id.* at 1279.

³⁷ *Id.*

³⁸ See Rapoport, *supra* note 23, at 89.

³⁹ See Rapoport & Tiano, *supra* note 5, at 1276.

⁴⁰ See Jenny Tsay, *What Are the Rules on Cell Phone Use in Court?*, FINDLAW (Apr. 10, 2014), https://blogs.findlaw.com/law_and_life/2014/04/what-are-the-rules-on-cell-phone-use-in-court.html.

rather than on standby, might be along the lines of:⁴¹ “It is more beneficial to ask everyone to attend, rather than to risk not knowing the answers to specialized questions.” Any attorney considering this type of staffing really should do a cost–benefit analysis that weighs the difference between having everyone attend in person and having some people on standby.

Rank/task mismatch.

There is no question that, sometimes, a senior professional is what we call the “lowest efficient biller.”⁴² For example, there are complicated issues that are best researched by someone with years of experience, because that person can find the pertinent information in a hurry, sift through it quickly, and come up with an answer that he or she can use immediately. A first- or second-year lawyer faced with a complicated question of law might take hours—or even days—on the same research project, so the cost to the client is less if the senior person performs the research. Similarly, it’s important that a more senior person reviews document production for privilege issues before producing documents that might waive that privilege. Search algorithms will identify those instances of rank/task mismatch, but we can then ask questions to determine the reasonableness of the choice of professionals.

Other rank/task mismatches, though, are presumptively unreasonable. Each of us has heard numerous excuses for higher-rate professionals performing tasks better suited for lower-rate professionals. The most common explanation tends to be that there were no junior people around when the task needed completion. In one-off, “emergency” situations, it can be appropriate for a legal professional to handle a task below his or her expertise level, but when people are continually assigned tasks below their pay grade, one justifiably wonders whether senior professionals are searching for ways to keep their monthly hours up.

The arms race toward mid-four-figure hourly rates for the most senior professionals.

Much like the arms race for executive compensation, in which everyone wants to come from Lake Wobegone (where the children are all

⁴¹ See Rapoport & Tiano, *supra* note 5, at 1276.

⁴² See Rapoport, *supra* note 23, at 92.

above average),⁴³ the major law firms have raised their top performers' hourly rates steadily, having broken the four-figure barrier⁴⁴ We believe that social pressure (the subconscious desire to conform to what a few people in a group are doing),⁴⁵ coupled with good old-fashioned envy, may be causing this desire to see just how high the market will let hourly rates go.

Research decisions.

Law professors may be at least partially to blame for the tendency to search for every conceivable argument, no matter how likely to prevail. If law schools don't teach the difference between "arguments" and "good arguments," graduates of law schools aren't entirely to blame for leaving no (research) stone unturned. Moreover, the "argument not made" may come up to bite the lawyer later in a malpractice suit.⁴⁶ At some point, a senior legal professional should say "enough is enough" and end the billing frenzy.

In particular, we've seen belt-and-suspenders research on basic issues that the law firm's expertise should already have. For example, in very large bankruptcy cases, those firms chosen to represent the debtor or the creditors' committee should not be re-researching topics that we would classify as "Bankruptcy 101." These law firms won a beauty contest because of their expertise. That expertise, by necessity, should mean that the lawyers in the law firm don't have to re-learn bankruptcy basics.

Time entry failures.

Of all of the billing frustrations that outside counsel have, probably first on the list is keeping track of billable time.⁴⁷ The failure to keep contemporaneous time records, though, results in a cost either to the law firm itself or to the client, because time worked ends up not being recorded or the "estimate" of the time worked exceeds the actual time

⁴³ "Welcome to Lake Wobegon, where all the women are strong, all the men are good-looking, and all the children are above average." Garrison Keillor, *Garrison Keillor Quotes*, BRAINYQUOTE, <https://www.brainyquote.com/quotes/garrisonkeillor137097>.

⁴⁴ See, e.g., Jay Reeves, *Top 10 Lawyer Hourly Rates by City*, LAW.MUTUAL BLOG, (Apr. 6, 2018), <https://www.lawyersmutualnc.com/blog/top-10-lawyer-hourly-rates-by-city>.

⁴⁵ See Rapoport & Tiano, *supra* note 23, at 1278.

⁴⁶ *Id.* at 1275.

⁴⁷ The second most likely is dealing with annoying colleagues or opposing counsel.

worked.⁴⁸ The longer the delay between doing the work and recording the time entries, the less likely that the time entries are accurate.⁴⁹ Not only is misrecording time an ethics violation,⁵⁰ but it also contributes to a suspicion that other corners are being cut.⁵¹ There are several signs of misrecorded time. One such sign is a statistically higher than expected series of time entries ending in .0 or .5 (rounded hours) or many 0.1s.⁵² Certainly, some tasks can take a half-hour or an hour, but significant amounts of such time entries can indicate that the time is being “remembered” rather than billed contemporaneously.⁵³ Other such signs can include incomplete information (e.g., “conversation with” entries that don’t indicate with whom a conversation occurred, or “discuss strategy and tactics with client”) or a supplemental bill to the client with newfound additional time entries.⁵⁴

Missing or incomplete (or unreconciled) budgets.

Law firms seem to hesitate before providing meaningful budgets to their clients for big-ticket matters.⁵⁵ Notwithstanding the deep, widespread experience of the market-leading firms, their lawyers often declare that they can’t possibly guess how much a given matter might cost the client.⁵⁶ Some of that reluctance has real roots—because some of what affects a budget has to do with decisions by those other than the law firm or its client.⁵⁷ Opposing counsel can make choices that result in unpredictable new work. Some of that reluctance, though, also stems from a fear that a budget might underestimate the cost of doing the work and thus cut into profits.⁵⁸ The use of legal analytics easily mitigates unpredictability and underestimates by law firms, which also helps

⁴⁸ See Gordon & Rapoport, *supra* note 23, at 721.

⁴⁹ *Id.*

⁵⁰ See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.5 (reasonableness of fees).

⁵¹ See Gordon & Rapoport, *supra* note 23, at 721.

⁵² *Id.* at 727.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 718.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

establish benchmarks, ensure reasonableness of fees, and prevent billing disputes between law firms and clients.⁵⁹

In a case originally filed in federal district court⁶⁰ and then moved to state court,⁶¹ a client accused a major law firm of, among other things, spending excessive time and performing unnecessary activities. The complaint included the following allegation of work run amok:

After being retained, [the law firm] proceeded to assign what finally became 34 different timekeepers to the file. These timekeepers billed at least 669 hours in a two-month period, at a total cost of \$477,910.00 in that period. This should have been a straight-forward assignment. Experienced lawyers (particularly those who bill at over \$1,000/hour as [the law firm] did) should know that one of the first steps would be to file certificates of dissolution in Delaware. In fact, this was one of the few items that Plaintiffs specifically charged [the law firm] with accomplishing. However, [the law firm] did not accomplish that, nor took any other steps to formally wind the companies down.⁶²

The complaint went on to state:

In late July 2018, Plaintiffs became concerned about the “services” that [the law firm] was providing and was not providing. At that point, [the law firm] had been working for two months but had not sent a bill or an accounting of any of Plaintiffs’ funds held in [the law firm]’s trust accounts. Plaintiffs asked [the law firm] to provide current bills and an accounting. On August 3, 2018, [the law firm] finally provided a billing statement and a summary of the amounts received in the trust account. The billing reflected grossly excessive billing, which totaled 669 hours at \$484,321.39 – for two months of work. The statement also reflected that Plaintiffs had paid \$30,000 in retainer payments, and that [the law firm]

⁵⁹ See Rapoport & Tiano, *supra* note 5, at 1281.

⁶⁰ Synergies Corp. v. Morrison Foerster, LLP, Case 1:19-cv-00110-RP, United States District Court for the Western District of Texas (Feb. 14, 2019).

⁶¹ Synergies Corp. v. Morrison Foerster, LLP, Cause No. D-1-GN-19000956, District Court of Travis County, Texas (Feb. 26, 2019).

⁶² *Id.* at 5.

182 BUSINESS, ENTREPRENEURSHIP & THE LAW VOL. XIII:I

had arranged for \$625,319.00 to be sent into [the law firm]’s trust account, for a total of \$655,319.00.⁶³

The case recently settled⁶⁴ and, therefore, we’re not taking the plaintiff’s allegations as true, but our first thoughts when reading the complaints were: “Did a ‘Tier 1’ law firm, in 2018—the age of ‘Big Data’—work from a gut hunch?,” “Where was the budget?,” and “Was anyone monitoring the budget?”⁶⁵

IV. LEGAL ANALYTICS⁶⁶ AS A WAY TO COUNTERACT BAD GUT

DECISIONS

When law firms and clients use legal analytics intelligently, the resulting data provide a supplemental information source that can hone how legal professionals budget for and monitor the delivery of legal services.⁶⁷ Legal analytics are extremely effective and can be a prophylactic countermeasure to the pitfalls of incorrect gut hunches. The pitfalls from gut hunches almost always materialize in the form of pricing misfires, poor matter-staffing, or related workflow challenges—in other words, runaway legal costs.⁶⁸ The key benefit to legal analytics tools comes from using them to identify mistakes that gut hunches often trigger.

⁶³ *Id.* at 9.

⁶⁴ See Debra Cassens Weiss, *BigLaw Firm Settles Suit Accusing It of ‘Billing Feeding Frenzy’*, A.B.A. J. (May 14, 2019, 10:44 AM), <http://www.abajournal.com/news/article/biglaw-firm-settles-suit-accusing-it-of-billing-feeding-frenzy>.

⁶⁵ *Id.*

⁶⁶ Rapoport & Tiano, *supra* note 23, at 1283 (“[L]egal analytics can be defined as the process of using technology to transform raw data associated with any aspect of the legal industry into actionable information and insights used by legal industry participants to develop, analyze, forecast[,] [and] manage legal risks and opportunit[ies]; legal strategy; matter management; legal process management and improvement; and legal department and law firm financial and business operations.”); see also *Whitepapers and Resources*, LEGAL DECODER (2019), <https://www.legaldecoder.com/whitepapers/>.

⁶⁷ See Rapoport & Tiano, *supra* note 5, at 1281.

⁶⁸ *Id.* at 1284.

A. Avoiding Pricing Misfires

Forward-thinking legal industry leaders need a systematic edge to price legal services accurately.⁶⁹ Legal analytics tools now analyze billing data in a manner that allows for creative, reliable, and predictable pricing.⁷⁰ These tools analyze, on a line-item by line-item basis, “who” (legal professional credentials) did “what” (work elements identified in narrative) and how long the work took to do.⁷¹ The data analytics tools then categorize that data, showing industry-specific pricing trends.⁷² With data properly categorized, a four-dimensional analysis (one that looks retrospectively across matters, tasks, law firms, and time) can inform future pricing decisions.⁷³ For instance, where a client finds himself or herself (or itself) in similar litigation in multiple jurisdictions, it is now possible to determine that Attorney *X* at Firm 1 handled four key witness depositions at a cost of \$12,000 each, Attorney *Y* at Firm 2 handled six key witness depositions at a cost of \$8,000 each, and Attorney *Z* at Firm 3 handled three key witness depositions at a cost of \$10,000 each. One can then correlate the cost of the key witness depositions with the outcome in each case to inform future litigation strategy. Pricing legal services can and should be a data-driven strategic analysis, not a gut hunch.⁷⁴

B. Optimizing Matter Staffing

Both law firms and clients expect their matters to be staffed so that a mix of lawyers delivers high-quality, technically proficient legal services at a cost-effective, industry-benchmarked price.⁷⁵ Efficient staffing runs along a continuum: partners handle complex, high-risk, and high-value legal work; competent associates handle moderately complex, moderate-risk, and high-value legal work; and low-risk and low-value tasks are redeployed elsewhere (such as with contract attorneys) or eliminated altogether (for example, using computers to do the first cut in document

⁶⁹ *Id.* at 1296.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1283.

⁷⁴ *Id.* at 1296.

⁷⁵ See Harrison Barnes, *Meeting And Exceeding Your Legal Clients' Expectations*, LAW CROSSING (accessed Sept. 28, 2019), <https://www.lawcrossing.com/article/900008572/Engaging-the-client/>.

production).⁷⁶ Clients often rely on and defer to outside counsel on staffing decisions based on the natural and reasonable assumption that outside counsel will employ a staffing mix that follows the recipe above.⁷⁷ Such reliance is not an entirely misguided approach, as outside counsel frequently handles the same categories of work and intimately knows the talents, skills, strengths, and weaknesses of its team.⁷⁸ That said, both law firms and clients can leverage legal analytics tools to further improve staffing efficiency.⁷⁹ The practical upshot of evaluating and monitoring staffing efficiency may be as simple as leaving legal work with the same outside law firm but with a reshuffling of staffing resources.⁸⁰ Sometimes, it may mean diverting some tasks to lower cost or alternative legal service providers.⁸¹

C. *Improving the Workflow Process*

Gut decisions usually lead to waste, redundancy, or friction in workflow processes.⁸² Workflow challenges, such as two (or more) legal professionals at the same skill level handling the same task at the same time (or excessive internal office conferences) often stem from uninformed hunches on how to manage a matter from inception until completion.⁸³ Evaluating data that demonstrates how work ideally flows from person to person, establishing standards for who does which tasks, continually monitoring the process, and identifying opportunities for improvement all make for a better product for the client.⁸⁴ When law firms and clients use legal analytics intelligently, the resulting data provide a supplemental information source that augments how legal professionals manage and deliver legal services.⁸⁵

⁷⁶ Cf. Ashley Montgomery, *Lawyers and Light Bulbs: A Guide to Case Staffing*, QUOVANT (May 10, 2017), <https://www.quovant.com/blog/lawyers-and-light-bulbs-a-guide-to-case-staffing/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See generally Becker, *supra* note 21.

⁸⁰ See Montgomery, *supra* note 76.

⁸¹ *Id.*

⁸² See Rapoport & Tiano, *supra* note 5, at 1290.

⁸³ *Id.* at 1303.

⁸⁴ *Id.*

⁸⁵ See generally Rapoport & Tiano, *supra* note 5.

V. PROACTIVE MANAGEMENT OF THE COSTS OF REPRESENTING A
CLIENT

There are certain ways that clients can help law firms control costs. Budgets can be useful, especially budgets that recognize the need for flexibility when the unexpected occurs (but adjustments to budgets need to include advance notice to clients, not *ex post* notice). For law firms with expertise in various subjects, mining their own data to understand the likely components from which to build a budget would not be difficult. Let's assume that a law firm has access to its own historical data in a way that lets it sort and classify different types of engagements. It can take a look at staffing, both in terms of the number of professionals who worked on the matter and the rank of each of those professionals, and be able to tell prospective clients a tighter range of potential costs of representation than it could with just the gut-hunch method.⁸⁶ Moreover, it should be able to monitor its actual engagements more closely by being able to stick to reasonable budgets.⁸⁷ In turn, that ability to monitor should enable the firm to increase its realization rate. As we pointed out in an earlier article:

By using legal analytics, clients can realize greater value and results from their legal spend, and law firms can operate more efficiently (and more profitably) with greater client attraction, retention, and satisfaction. Why do we say, "more profitably"? Because the realization rate (the amount that the client actually pays) is far more important than what the law firm bills to the client. If a client doesn't pay all of the bill, that lost time—and lost income—is gone forever.⁸⁸

Even if law firms aren't yet able to invest full-bore in legal analytics, they could at least mine their data to create frameworks for the staffing and pricing of future engagements. Moreover, they could track each professional's time entries to find those whose descriptions were not particularly useful or those whose entries are always late and find more precise ways to encourage better behavior.⁸⁹

⁸⁶ *Id.* at 1270–71.

⁸⁷ *Id.* at 1293.

⁸⁸ *Id.* at 1282.

CONCLUSION

The era of legal analytics is here, and there will be winners and losers. Self-assessment and self-governance will go a long way towards fending off unplanned obsolescence. In this regard, the successful law firms will leverage legal analytics to give them a competitive edge. Those who do not leverage legal analytics do so at their peril.

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Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry

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LEGAL ANALYTICS, SOCIAL SCIENCE, AND LEGAL FEES: REIMAGINING "LEGAL SPEND" DECISIONS IN AN EVOLVING INDUSTRY⁺

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

For the past decade, the legal industry has been transforming itself. Much of the change has resulted from legal industry disruptors (technological innovations, data analytics tools, and alternative service providers) that have affected the legal service delivery model.¹ The most forward-thinking legal industry leaders are reimagining how the legal industry's historic "rate x hours = price" economic model delivers the optimal value.² What our profession calls "BigLaw"³—and BigLaw's clients—catalyzed a movement to

⁺Although not typical for the Georgia State University Law Review, the use of contractions in this article is purposeful to preserve the authors' established style.

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** Founder and Chief Executive Officer of Legal Decoder, Inc. After practicing law for nearly 20 years in AmLaw 50 firms (most recently as a partner with Pillsbury Winthrop Shaw Pittman, LLP), it was time to start Legal Decoder, tackle new challenges, and solve problems for my legal industry peers and colleagues who are working hard in an industry that is changing its complexion. I'd like to thank Professor Nancy Rapoport, a friend and colleague who epitomizes and exemplifies what it means to be a true legal professional and industry expert. Thank you also to my wife and best friend, Meredith, whose patience, support, and love throughout an exhilarating professional journey have been the most important constant in my life.

1. Mark A. Cohen, *Legal Change: Why Drip, Not Disruption?*, FORBES (Apr. 26, 2018, 6:35 AM), <https://www.forbes.com/sites/markcohen/2018/04/26/legal-change-why-drip-not-disruption/#5aac110c1fbf> [https://perma.cc/AV7R-CPAN].

2. See, e.g., Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 37 n.94 (citation omitted) ("A survey of chief legal officers that law firm consultants Altman Weil conducted in the summer of 2009 found that nearly 40% of client companies are putting some pressure on law firms to change the 'value proposition' in their delivery of legal services.")

3. The term "BigLaw" has no exact definition, but its meaning appears to be generally understood, albeit with some fuzzy boundaries. Some characterize BigLaw as "[law firms] employing more than 500 lawyers" Ashby Jones, *The Third-Year Dilemma: Why Firms Lose Associates*, WALL ST. J. (updated Jan. 4, 2006, 11:59 PM), <https://www.wsj.com/articles/SB113571843977932357> [https://perma.cc/NTR8-RLHC] (citing a NALP Foundation study). Others characterize BigLaw as "the group of historically profitable firms that cater to the country's largest corporations." See Noam

leverage hundreds of billions in “legal spend”⁴ data that in turn, when coupled with legal analytics⁵ software tools, could offer valuable insights into both the pricing and evaluation of the quality of legal services.⁶ Non-BigLaw firms are not to be forgotten as they, too, have the capacity to capitalize on legal analytics data to improve firm performance and client outcomes.

The first decision that any law firm, or its clients, would have to make is that legal analytics data points actually matter—that deciding how to staff an engagement and how to price it is better done with data than with a partner’s gut hunches. Many law firms don’t relish having to pin down budgets or set staffing allocations, in part because they’re uncomfortable committing to restrictions that might prevent them from adapting to changing circumstances. There’s a myth that every complex matter is *sui generis*. In one sense, obviously, that’s right. Every matter has unique aspects. But most matters, even a high-profile, game-changing matter, will bear a substantial relationship to other engagements that preceded it, and every matter

Scheiber, *The Last Days of BigLaw*, NEW REPUBLIC (July 21, 2013), <https://newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries>

[<https://perma.cc/92SL-3RAD>]. BigLaw is also characterized by reference to rankings listed in the *American Lawyer* and the *National Law Journal*. *Id.*; see also *The NLJ 500/National Law Journal*, NAT’L L.J., <https://www.law.com/nationallawjournal/rankings/the-nlj-500/> [<https://perma.cc/CFQ4-VPJ2>] (last visited Feb. 20, 2019). Regardless of whether there’s a universally accepted definition, BigLaw historically has been the trend-setting, incumbent law firms in the legal industry (and the group most susceptible to dethronement).

4. “Legal spend” is the business-speak shorthand for how much of a client’s budget is being spent on outside counsel and other external legal services. See Steven O’Donnell, *What Is Legal Spend Management?*, MITRATECH, <https://www.mitrates.com/blog/what-is-legal-spend-management/> [<https://perma.cc/H4SJ-PNY4>] (last visited Jan. 28, 2019).

5. See *infra* Section III.A for a definition of “legal analytics.”

6. Our friend Bernie Burk has pointed out that the use of big data is still primarily a BigLaw (and BigLaw client base) process. “Analytics is also useful to the other 80% of the practicing bar, but they don’t have the data in place to mine their own[] and will need third-party tools based on industry experience.” Notes from Bernard A. Burk to Nancy Rapoport (Dec. 15, 2018) (on file with authors and the Georgia State University Law Review) [hereinafter Burk Notes]. Also, our friend Randy Gordon has pointed us to one BigLaw firm’s use of data-driven analysis. See Amanda James, *Data-Driven Lawyer: Littler’s Scott Forman*, LAW360 (Dec. 4, 2018, 3:35 PM), <https://www.law360.com/articles/1105930/data-driven-lawyer-littler-s-scott-forman> [<https://perma.cc/L4FS-TKMP>]; see also E-mail from Randy Gordon to Nancy Rapoport (Dec. 5, 2018) (on file with authors and the Georgia State University Law Review).

will have anatomically identical aspects.⁷ The whole point of hiring law firms with significant expertise is that the senior lawyers can use their prior experience to inform their current decisions.⁸

The next decision involves pinpointing the most relevant cost drivers and related data. Hourly rates are only a secondary component of what can drive a bill's cost. Other components can include decisions about how various tasks are staffed,⁹ decisions about which tasks to undertake in the first place, and decisions on which expenses to pass along to the client. When legal spend data are properly analyzed at a task level (in other words, activities like "research X," "draft Y," or "call person Z") and then benchmarked against industry norms, legal professionals can better predict the cost of legal services and whether the cost aligns with legal strategy and the expected outcome of the legal engagement.

Both clients and law firms want the same things: pricing predictability, economic visibility, operating efficiency, and value delivery.¹⁰ Neither side is happy with the uncomfortable feeling of

7. For instance, due diligence at some level of scrutiny occurs in every business combination transaction; nearly all lawsuits involve settlement discussions and discovery, and a patent application precedes the USPTO's issuance of a patent.

8. Bernie Burk explains this point well:

The idea is, simply, that while every case IS different, experienced lawyers get paid a lot of money to use their lifetime of experience to weigh the variables[] and pick the optimum tactics among many possible options[] or predict the likelihood of an uncertain outcome. Everyone knows experienced lawyers are better at this than newbies. Why? Easy[—]because they have a lifetime of experience testing their judgment against reality. Now, suppose you could aggregate the life experience and judgment of MANY, MANY experienced lawyers[] and bring the raw processing power to bear that could figure out what kinds of similarities make similar cases more likely to perform similarly[] and what kinds of differences are more likely to produce different results. Voilà[—]welcome to legal analytics.

Burk Notes, *supra* note 6, at 2.

9. See Sameena Kluck, *Law Firms Must Look at Staffing as Part of Pricing and Profitability Models, Forum Panel Says*, THOMAS REUTERS: LEGAL EXECUTIVE INST. (June 22, 2016), <http://www.legalexecutiveinstitute.com/staffing-as-part-of-pricing/> [https://perma.cc/4L7M-WMHC]. Tasks are staffed both in terms of how many professionals will work on a given task and in terms of the level of experience of each professional. *Id.*

10. See Mark A. Cohen, *Differentiation in the New Legal Marketplace and Why It Matters*, FORBES (Jan. 2, 2018, 6:05 AM), <https://www.forbes.com/sites/markcohen1/2018/01/02/differentiation-in-the-new-legal-marketplace-and-why-it-matters/#7c0ccb2e38ef> [https://perma.cc/T53E-5L2X].

not really knowing what is fair to pay and not really knowing what is fair to charge. Given the changes in the legal market, clients are more aggressive about pushing back on bills; thus, law firms that don't take control of their on-the-ground choices run the risk of having to reduce those bills in order to retain major clients.¹¹ Legal analytics are becoming indispensable in terms of making the legal industry function efficiently and transparently.

To give you a feel for the power of legal analytics, imagine that you are the managing partner of a law firm. With a good set of algorithms and the push of a few buttons, you can make sure that you've delegated each part of an assignment to the professional with the exact combination of experience, talent, and diligence to maximize your firm's client satisfaction and profitability.¹² The client will be pleased both with the work product and its efficiency—and will pay your full bill without any grumbling or request for a reduction of the fees. The client will even tell other potential clients how well-organized and professional your law firm is, and your law firm will then increase its market share. Imagine further that your client is considering hiring you for a new matter and is comparing your firm with a firm whose bills have been murky and expensive. Guess which law firm is likely to get the client's nod for the new matter? Law firms that leverage legal analytics stand to get more engagements and more profitable engagements.

Against this backdrop of the field of legal analytics, this article discusses examples of those types of decisions that tend to drive up the cost of bills, some possible reasons for those decisions, and how data-analytics tools can help price and evaluate the economics of legal services. The article also makes some recommendations for

11. See THOMAS REUTERS, DYNAMIC LAW FIRMS STUDY 6–7 (2017), <http://www.legalexecutiveinstitute.com/wp-content/uploads/2017/10/2017-Dynamic-Law-Firms-Study.pdf> [https://perma.cc/66XG-87WA].

12. Of course, we're assuming that factors like "I want to use this person because he is known to me" won't interfere with the choice of professional for a given task. Our friend Randy Gordon made a similar point in reviewing an earlier draft. See E-mail from Randy Gordon to Nancy Rapoport (Nov. 30, 2018) (on file with authors and the Georgia State University Law Review) [hereinafter E-mail from Randy Gordon].

how both clients and law firms can use legal-analytics tools to benefit from greater control, on the front end, of legal costs.

I. Decision-Making at the Edges: Staffing, Redrafting, and All-Out Zealousness

In what some lawyers may well have termed the good old days, many legal bills were one-line affairs: "For services rendered, \$X." Clients paid those bills, but this is no longer the case. Clients want to know more about what components go into the bottom-line bill: who worked on the matter, on which tasks, and for how many hours.¹³ In many situations, clients (at least large, institutional ones) have more leverage to negotiate those bills, and those clients with leverage have set budgets and drawn lines in the sand, often in formal billing guidelines, regarding what they will, and will not, pay.¹⁴ Often, they

13. Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117, 142–43 (2012).

Lawyers developed hourly billing as a way of reassuring clients that the work that they were doing for the clients was reasonable. In a study of the economics of hourly billing, George Shepherd and Morgan Cloud suggested that the shift to hourly billing from fixed-fee billing stemmed from a change to more liberalized discovery rules. The documentation of time spent on a particular matter—as opposed to the classic one-line bill of "for services rendered, \$x"—gave clients a way to measure the effort that the lawyers had expended. This client-centric development, though, then became a way for a law firm to "measure . . . the utility of the worker and . . . the success of the firm itself." The more billable hours racked up (at least, the more billable hours that resulted in income for the firm), the better off the firm expected its finances to be.

Billable hours can provide some information about how "productive" a lawyer is and how profitable her firm is—but, to paraphrase Jane Austen, it is a truth universally acknowledged that when firms base their reward structures on billable hour totals, they're encouraging billing abuse, which is a particularly virulent form of unethical behavior.

Randy D. Gordon & Nancy B. Rapoport, *Virtuous Billing*, 15 NEV. L.J. 698, 713–14 (2015) (footnotes omitted).

14. Rapoport, *supra* note 13, at 142–43. Chapter 11 bankruptcy cases are often an exception to this general rule that clients push back on bills, in part because the payment of those bills often does not come out of the debtor's budget but from the pockets of unsecured creditors. For other cases, bills get paid out of funds carved out of secured creditors' collateral. Even the unsecured creditors' committee may not be able to provide an in-depth review of the fees of its own professionals, and for the same reason: the funds to pay those bills aren't coming from the budget of a single entity. *See, e.g.*, Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. L. 263, 265 (2010).

won't pay for summer associates or first-year lawyers' work; they won't pay for numerous interoffice conferences; and they won't pay for first-class travel or alcohol with meals.¹⁵ Generally, law firms are agreeing in advance to abide by those terms. But do those agreements "stick"?¹⁶

Think about how large and foreboding the average legal bill looks to a client. (If you've never seen a large legal bill, think back to any hospital bills that you've seen.) They can go on for pages and pages (or screens and screens),¹⁷ and they tend to be organized by date. For each date in a billing cycle on which work was performed, the bill lists who worked on a matter, what each professional did, how long the work took (typically, these days, in six-minute billing increments), and each professional's billing rate. For bills longer than a few pages, the amount of time it would take to go through each element in a bill is enormous. When the time entries are vague ("discuss strategy") or lumped together ("prepare for and attend hearing"; "research, draft, and revise contract"), parsing the bills becomes exponentially more difficult, especially when done manually. Zoning out while reviewing a stack of time entries is understandable. But without some way of analyzing the bills systematically or programmatically, clients must hope that the work

15. See Matthew Guarnaccia, *Clients Leaving Firms with the Bill for Research*, LAW360 (Mar. 20, 2017, 4:44 PM), <https://www.law360.com/articles/903628/clients-leaving-firms-with-the-bill-for-research> [<https://perma.cc/4228-NVFZ>]; Sara Randazzo, *Corporate Clients Push Back After Law Firms Hike Starting Salaries*, WALL ST. J. (updated June 15, 2016, 7:05 PM), <https://www.wsj.com/articles/companies-push-back-at-law-firms-starting-salary-hikes-1466029554> [<https://perma.cc/3VKF-LFTU>].

16. The Association of Corporate Counsel has published outside-counsel billing guidelines that are a good starting point. See *Billing Guidelines—Outside Counsel*, ASS'N CORP. COUNS. (Mar. 4, 2014), https://www.acc.com/cs_upload/v1/membersonly/SampleFormPolicy/1362010_1.pdf [<https://perma.cc/4U2W-DZV9>]. Establishing outside-counsel billing guidelines should be more than a "check-the-box" exercise in which a legal department creates billing guidelines that simply "sit in the bottom drawer" unenforced. Legal analytics tools can be tailored to outside-counsel billing guidelines to allow for an automated and programmatic assessment of legal bills. Even with legal analytics, of course, it's the client's choice, and not the computer's choice, whether to pay or not to pay.

17. For years, clients have been using electronic billing systems (for example, Thompson Reuter's Legal Tracker, Quovant's LegalBill, and Mitratach's TeamConnect) for matter management and payment processing. These electronic billing systems interface with outside counsel's time entry and invoicing systems to allow for automated billing, approval, and payment transactions.

performed fell within the agreed-upon guidelines and must trust that the lawyers preparing the bills were both honest and attentive to the minutiae of who was doing what and when. Hope and trust are nice, but normally they're not enough.¹⁸

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.¹⁹ And, finally, the ethics rules require lawyers to be competent²⁰ and diligent.²¹ 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.²²

18. Compare this statement to Ronald Reagan's famous quote: "Trust, but verify." See Barton Swaim, Opinion, *'Trust, but Verify': An Untrustworthy Political Phrase*, WASH. POST (Mar. 11, 2016), https://www.washingtonpost.com/opinions/trust-but-verify-an-untrustworthy-political-phrase/2016/03/11/da32fb08-db3b-11e5-891a-4ed04f4213e8_story.html?utm_term=.4a336d015089 [https://perma.cc/778P-G3Z6], for a brief history of Reagan's use of the phrase.

19. See Burk Notes, *supra* note 6, at 3.

20. See, e.g., MODEL RULE OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

21. See *id.* at r. 1.3.

22. In his comments on an earlier draft of this article, Bernie Burk suggested four types of inefficiencies:

What happens when these factors—all of which are good things—combine? Expensive bills are the result.²³ Lawyers will justify bringing many people to a hearing or a meeting, instead of a few. After all, a diversity of experience will best serve the client, and having top-notch knowledge on hand will provide better service than having to wait for someone back at the office to provide an answer to a particular question. Lawyers who work their way up the law-firm ladder often have very specialized expertise, so having both Partner A (with expertise in one area of tax law) and Partner B (with a different expertise in tax law) in a meeting will catch any errors and help to come up with a better work product. For lawyers who are still working their way through the associate ranks, someone more senior must supervise their work. Junior Associate X's research will get supervised by mid-level Associate Y, who will do the first draft of a document, only to have senior Associate Z revise the document before handing it to a partner for final revisions. One lawyer in an office will pop into another lawyer's office to get some advice on a matter, and those pop-in meetings can span large blocks of time as the professionals spitball ideas. Even filing a pleading that simply states that one party agrees with some other party's position can result in significant billed time if more than one professional has to set eyes on the draft before it gets filed.²⁴ In a time-pressured

(1) Tending to do more things or take longer to do something simply because hours matter to the lawyer's personal standing and compensation (disseminated and in some cases created by the cognitive biases you describe);

(2) Including too many people (or, to put it more generally, staffing anyone with less than substantial experience on a given task) because one thing the law firm is doing is training more junior lawyers, and there is debate about how much of that expense the client should bear;

(3) Doing beautiful work because the lawyer gets pride (and reputational kudos) out of it rather than the client getting cost-effective service; and

(4) Being excessively risk-averse because the client isn't really committed to the risks inherent in having counsel be cost-effective.

Burk Notes, *supra* note 6, at 4.

23. Outside counsel's preferences on strategy (for example, settle vs. litigate), management (coordinate day-to-day activities), and staffing (using an 8th-year lawyer vs. using a 3d-year lawyer) can control—or strongly influence—an engagement, and those choices often will result in an expensive bill. Legal analytics empower a client to have greater influence and a more proactive role in addressing these matters.

24. Nancy B. Rapoport, *The Client Who Did Too Much*, 47 AKRON L. REV. 121, 125 n.20 (2014)

environment, such as big, bet-the-company litigation or a takeover defense, the amount of work required is extensive. Long days are *de rigueur*, with tens of people amassed to finalize a single project. Many hands may make light work, but they certainly also make expensive work. In some very real sense, pride ("we do good work here") and fear ("what if we've missed something?")²⁵ combine to make legal fees rise exponentially. Pride and fear are the conscious explanations. But there are cognitive biases at work here, too.

II. *Why Add to Legal Costs? Some Social Science Explanations*

Let's take pride and fear as "givens." Good lawyers want to do good work, and they don't want to leave their clients unprotected. But because lawyers are human and are thus subject to countless cognitive biases, there are some subconscious activities going on as well.²⁶ We address just a few of them.

Take "anchoring," which involves focusing on one factor so much that one loses sight of other important factors.²⁷ In the classic experiment on anchoring,²⁸ experimental subjects were asked to count the number of times in a video the members of one basketball team passed the basketball to each other. Subjects frequently counted the number of passes while missing the visual of a person in a gorilla

("Even when [bankruptcy] estate-paid lawyers are dealing with necessary actions, they might do so in wasteful ways. I've certainly seen examples of activity that seemed to exceed what was reasonably necessary. For example, there's nothing wrong with filing a statement that says 'me, too' to someone else's motion. But there's something wrong when a simple, two-page 'me, too' statement takes a full billable hour to draft.")

25. Some law firms may legitimately fear that a client's downward pressure on a bill will create a whiplash effect later: the client may ask the law firm to skip doing one or two things to save costs, those one or two things end up being very important later, and the client then blames the law firm for *not* doing those one or two things in the first place. See Burk Notes, *supra* note 6, at 3.

26. We heartily recommend two great resources for those who want to explore cognitive biases in depth: JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012), and Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013) [hereinafter Robbennolt & Sternlight, *Behavioral Legal Ethics*].

27. Robbennolt & Sternlight, *Behavioral Legal Ethics*, *supra* note 26, at 1132 n.141.

28. See, e.g., Christopher Chabris & Daniel Simons, *Gorilla Experiment*, INVISIBLE GORILLA, http://www.theinvisiblegorilla.com/gorilla_experiment.html [https://perma.cc/Q9KC-62CY] (last visited Jan. 28, 2019).

suit passing among the two basketball teams. They anchored on counting the number of passes, even though most basketball courts don't feature gorillas walking around. Anchoring in terms of legal bills can occur when the client focuses, say, on what the highest billable rate will be for the engagement, rather than focusing on how the matter will be staffed (both in terms of the number of people and their relative experience). Anchoring can also occur when the client focuses on staffing (say, the number of attorneys who are allowed to work on the matter) without regard to whether the matter is an emergency. Although the old saying "there's fast, good, and cheap, but you can only get two of those at once" is true more often than not, anchoring focuses on only one of those three factors at a time.

"Social pressure"²⁹ can also be a factor affecting lawyer billing. How often does a law firm really train new lawyers (new to the firm, or new to the profession) on its culture of billing? Does the firm teach the new lawyer about when the time clock should start and stop? Does it start when a lawyer leaves a message for opposing counsel, even if the message is only thirty seconds long and the minimum billing increment is a tenth of an hour? Does revising a time entry to make it more clear (or less clear, if the bill will become public while the law firm is considering some private strategy on a case) count as billable time? Let's be fair to attorneys in private practice: keeping track of your professional life in one-tenth-of-an-hour increments is a real drag.³⁰ It's not unusual to hear attorneys who have transitioned from outside counsel to inside counsel say that "keeping time" is one aspect of private practice that they don't miss. When billing policies aren't clear—and they often aren't—new professionals in a firm will take their cues from how more senior

29. For a useful discussion of social pressure, see, for example, Saul McLeod, *Solomon Asch—Conformity Experiment*, SIMPLY PSYCHOL. (updated Dec. 28, 2018), <https://www.simplypsychology.org/asch-conformity.html> [<https://perma.cc/D2ZY-BNF3>].

30. Keeping time contemporaneously with undertaking work tasks truly can be an annoyance and imposition upon timekeepers who need to meet strict deadlines for a client's substantive work. We applaud those attorneys in private practice who record and submit time on a daily (as opposed to a weekly or monthly) basis. One can imagine how weekly or monthly timekeeping impairs time recordation accuracy.

people describe their billing practices. If new people hear more senior people saying that they bill even thirty seconds of work because the firm has a minimum billing increment of .1 per hour, they're more likely to round up thirty seconds to six minutes as well. And those six-minute increments can add up quickly if ten, or twenty, or fifty professionals are each billing thirty seconds of time as six-minute increments or if they're billing eight-minute increments as two-tenths of a billable hour.³¹ As everyone who has children knows (or who knows people who have children), peer pressure is a powerful thing (and a potentially costly thing when attorneys' fees are involved).

And our old favorite, cognitive dissonance,³² also plays a role, as people who would never dream of doing something unethical manage to talk themselves into fudging their hours or lying to a court. Here's how cognitive dissonance can play out in legal billing.

One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by

31. We asked Legal Decoder's team to run database queries over billions of legal spend data to find interesting examples of billing patterns in one-tenth-of-an-hour increments. The following interesting pattern surfaced: In one matter spanning several months, a single timekeeper recorded 1,004 line-item entries, 808 of which were billed in a 0.1-hour increment for tasks like reading a one-paragraph court order, reviewing a routine deposition notice, and leaving voicemails. Unquestionably, this timekeeper adhered to all billing guidelines and did nothing wrong per se, but is real "value" being delivered? Perhaps so, or perhaps this is an example of someone playing within the rules of the game but gaming the system.

32. For a good discussion of cognitive dissonance, see, for example, Saul McLeod, *Cognitive Dissonance*, SIMPLY PSYCHOL., <https://www.simplypsychology.org/cognitive-dissonance.html> [<https://perma.cc/Z7KF-RHBL>] (last visited Jan. 28, 2019).

doing thirty minutes of work for the client for “free.” In this way, you will be “borrowing,” not “stealing.”

And then what will happen is that it will become easier and easier to take these little loans against future work. And then, after a while, you will stop paying back these little loans. You will convince yourself that, although you billed for ninety minutes and spent only sixty minutes on the project, you did such good work that your client should pay a bit more for it. After all, your billing rate is awfully low, and your client is awfully rich.

And then you will pad more and more—every two[-]minute telephone conversation will go down on the sheet as ten minutes, every three[-]hour research project will go down with an extra quarter hour or so. You will continue to rationalize your dishonesty to yourself in various ways until one day you stop doing even that. And, before long—it won’t take you much more than three or four years—you will be stealing from your clients almost every day, and you won’t even notice it.³³

Not only is cognitive dissonance happening in this vignette (“you did such good work that your client should pay a bit more for it”), but also the way that the first misstep is framed (not “stealing,” but “borrowing” against future time) contributes to what can undermine a good attorney–client relationship or even eventually devolve into fraud on the client. Much like the hope and trust that a client places in a relationship partner who reviews, approves, and sends a legal bill to a client, so too must the relationship partner place hope and trust in his or her partners, associates, and other professionals that their time

33. Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 107–08 (2008) (footnote omitted) (quoting Patrick J. Schiltz, Symposium, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 917 (1999)).

entries are clear and concise and that they accurately reflect recorded time for work both needed and completed. A relationship partner should know a great deal about all aspects of the matter being billed, but all attorneys, irrespective of title or seniority, have an ethical duty to keep their legal fees reasonable.³⁴

All of these myopic and subconscious behaviors can contribute to whopping legal bills, and when the bills are lengthy and organized by date, ferreting out real and valuable work by hand is well-nigh impossible for both the relationship partner and the client. But don't despair. That's where legal analytics can help to save the day, both for law firms and their clients.

III. Leveraging Legal Analytics Tools to Drive Better Outcomes and Compete Effectively in a Changing Legal Industry

In the legal industry, legal analytics isn't just a trendy phrase. Experts have been touting the merits of legal analytics for several years.³⁵ The movement has now firmly taken root in an effort to improve the cost predictability, efficiency, and effectiveness of legal services through data-driven decision-making.³⁶

For lawyers who are just becoming conversant with legal analytics, rest assured that successful legal analytics efforts will not result in "Robot Law" or a machine lawyer that takes all of our jobs away. When law firms and clients use legal analytics intelligently, the resulting data provide a supplemental information source that augments how legal professionals manage and deliver legal services. Of course, the use of legal analytics requires open-mindedness and some behavioral changes from legal professionals, as well as a deep understanding by data scientists of how lawyers think and work.

34. MODEL RULE OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2016); *id.* at 5.1; *id.* at 5.2.

35. James E. Holloway, D. Tevis Noelting, Aaron Pennington & Vanessa Johnson, *Law and Business as a School of Thought: A Pedagogy to Teach the Theory and Practice of the School*, 18 U.C. DAVIS BUS. L.J. 215, 217–18 (2018).

36. *Id.*

Multitudes of lawyers claim that they attended law school due to a self-diagnosis of being “mathematically challenged.”³⁷ It logically follows that, for many attorneys, the concept of legal analytics is shrouded in mystery because math might be involved. Like most data science offshoots, legal analytics certainly involves some number-crunching. Even so, legal expertise and judgment, process management, and strategic business acumen are at least as important for the proper use of legal analytics.

The good news is that today’s industry leaders are embracing technology, innovation, data, and process change as ways to improve their business results.³⁸ Every expert will agree that adopting legal analytics is not a “flip-the-switch” exercise, where lawyers one day suddenly practice law according to a pre-defined recipe. Legal analytics involves a long-term paradigm shift toward intelligent process change. Simply put, legal analytics makes sense. By using legal analytics, clients can realize greater value and results from their legal spend, and law firms can operate more efficiently (and more profitably) with greater client attraction, retention, and satisfaction. Why do we say more profitably? Because the realization rate (the amount that the client actually pays) is far more important than what the law firm bills to the client. If a client doesn’t pay all of the bill, that lost time—and lost income—is gone forever.

In this Part, we define legal analytics, explore legal analytics in the context of the broader data analytics industry, discuss some valuable legal analytics metrics, and share a case study showing the value of implementing data analytics as a business tool.

37. See, e.g., Eric Fuchs, *The 8 Worst Reasons to Go to Law School*, BUS. INSIDER (Oct. 21, 2012, 8:26 AM), <https://www.businessinsider.com/bad-reasons-to-go-to-law-school-2012-10#i-i-dont-know-what-to-do-with-my-life-8> [<https://perma.cc/L6CR-WSLE>] (quoting U.S. Supreme Court Chief Justice John Roberts: “I think there are a lot of people who go to law school because they’re not good at math and can’t think of anything else to do”); Debra Cassens Weiss, *Posner: Lawyers Bad at Math Are an Increasing Concern; Inmate’s Blood-Pressure Suit Shows Why*, A.B.A. J. (Oct. 29, 2013, 12:51 PM), http://www.abajournal.com/news/article/posner_math_block_lawyers_an_increasing_concern_inmates_blood-pressure_suit [<https://perma.cc/77V2-C4CT>].

38. Holloway, Noeltling, Pennington & Johnson, *supra* note 35, at 217.

A. Getting Familiar with Legal Analytics

The starting point of any meaningful discussion of legal analytics begins with its definition. As a new and rapidly evolving discipline, legal analytics can be defined as the process of using technology to transform raw data associated with any aspect of the legal industry into actionable information and insights used by legal industry participants to develop, analyze, forecast, and/or manage legal risks and opportunity; legal strategy; matter management; legal process management and improvement; and legal department and law firm financial and business operations.³⁹

The raw data fueling legal analytics derive from many sources, including laws and regulations, regulatory filings and other types of public records (e.g., USPTO applications, SEC filings, and land records), judicial records, billing records, law firm and client databases, and legal-industry secondary resources (e.g., surveys and compilations).⁴⁰

In many instances, the raw data are useful only to a particular type of audience. For example, the raw data in a patent application for a single semiconductor device can help the patent holder, its business associates, and potential infringers. Most others probably would find the patent application, by itself, to lack widespread usefulness. If, however, the raw data contained in that patent application are standardized, aggregated with other patent-application information, and intelligently structured,⁴¹ then the patterns and trends can be used to make future decisions.

39. See LEGAL DECODER, POWERING THE SECTION 330 LEGAL FEE ANALYSIS: A RETROSPECTIVE CASE STUDY 1 (2016), <https://static1.squarespace.com/static/586ea31b9f74567913da6257/t/589b3a6d893fc0bb3ba431c7/1486568052591/Legal+Decoder+Bankruptcy+Case+Study.pdf> [<https://perma.cc/8MVC-K7R7>].

40. See, e.g., BRIAN C. HOWARD, TOP LAW FIRM REPORT FOR SELECT FEDERAL LITIGATION 2018, at

iii (Mar. 2018), https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2018_cpr_meetings/2018conf/materials/session1_ethics_issues/session1_all_materials.authcheckdam.pdf [<https://perma.cc/6USQ-AME5>].

41. This process, called "data scrubbing" or "data cleansing," involves modifying or removing data in a database that is incorrect, incomplete, improperly formatted, or duplicated. The goal of data scrubbing is to optimize the statistical accuracy of the data output. *What Is Data Cleansing?*,

Indeed, when raw data are analyzed and transformed into data analytics insights, an end user can uncover important trends, averages, correlations, and patterns. Legal professionals and other decision makers no longer need to rely on guesswork or intuition when evaluating “what happened,” “how or why it happened,” and “what’s likely to happen next.”

For legal industry leaders, the practical application of legal analytics provides invaluable information that can improve the value of legal services. For example, current data analytics tools analyze motions and rulings to predict how likely a judge is to grant or deny a specific motion, how long it takes to get to a permanent injunction, and where to initiate litigation across different venue choices.⁴² Data analytics tools are helping clients and law firms establish appropriate fee arrangements⁴³ and pricing benchmarks to forecast task-based costs and avoid pricing misfires and runaway fees.⁴⁴ Outside counsel’s “win” rates in specific courts and for particular cases are the focus of a legal analytic tool intended to guide attorney engagement decisions.⁴⁵ A professor from Chicago-Kent School of Law has co-founded a company that offers legal analytic tools to predict legal outcomes for such disparate events as Supreme Court cases and congressional bills.⁴⁶ By leveraging one of the largest raw data pools in the legal industry—law-firm billing data—companies are offering law firms and legal departments alike the data analytics tools that analyze mounds of billing data to measure and peer-

WISEGEEK, <https://www.wisegEEK.com/what-is-data-cleansing.htm> [https://perma.cc/TAZ4-F5VX] (last visited Jan. 28, 2019).

42. See *Legal Analytics Platform*, LEX MACHINA, <https://lexmachina.com/legal-analytics/> [https://perma.cc/LQ5G-HWKM] (last visited Jan. 28, 2019).

43. See, e.g., Dwayne J. Hermes, Erica R. LaVarnway & Nancy B. Rapoport, *A Solutions-Oriented Approach: Changing How Insurance Litigation Is Handled by Defense Law Firms*, 2017 J. PROF. LAW. 129, 135.

44. See *Legal Billing Data Analysis at Your Fingertips*, LEGAL DECODER, <https://www.legaldecoder.com/> [https://perma.cc/WKS8-CJP8] (last visited Jan. 28, 2019).

45. See PREMONITION, <http://www.premonition.com> [https://perma.cc/F39K-BK3P] (last visited Feb. 4, 2019).

46. See LEXPREDICT, <https://www.lexpredict.com> [https://perma.cc/Q3A9-DHGW] (last visited Feb. 20, 2019). Professor Daniel Katz’s company, LexPredict, was recently acquired by Elevate Services, a law company that offers products and legal-processing outsourcing services to the legal industry.

benchmark a lawyer's or firm's efficiency level, which is a critical cost driver in all outside-counsel fee arrangements.⁴⁷

The small handful of examples above illustrates that legal analytics is not a one-size-fits-all proposition or solution. As McKinsey & Company noted in its instructive 2016 article on big data analytics, "performance—not pristine data sets, interesting patterns, or killer algorithms—is ultimately the point. Advanced data analytics is a means to an end. It's a discriminating tool to identify, and then implement, a value-driving *answer*."⁴⁸

For the legal industry, legal analytics can improve business decisions and results, but one only gets to the right answers if one asks the right questions. Without a thoughtful and structured approach to legal analytics, the "garbage in, garbage out" (GIGO) mantra undermines the initiative.⁴⁹ Anyone embarking upon a legal analytics initiative should solicit broad input from the management team when identifying key business questions, aligning incentives, fostering cross-disciplinary collaboration across business areas, and insisting that legal analytics insights be used consistently (and periodically re-evaluated for effectiveness). That process becomes a roadmap for success, both for law firms and for their clients.

B. Legal Analytics' Place in the Overall Data Analytics Market (Is Anyone Surprised?)

The global data analytics market is on track to reach \$166 billion in 2018 and projected to grow at a 12% compound annual growth rate to \$275 billion by 2023.⁵⁰ The market is typically segmented by

47. See *infra* Section IV, for a case study of Legal Decoder, Inc.'s Pricing Engine pilot program.

48. See Helen Mayhew et al., *Making Data Analytics Work for You—Instead of the Other Way Around*, MCKINSEY Q., Oct. 2016, <https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/making-data-analytics-work-for-you-instead-of-the-other-way-around> [https://perma.cc/S6J3-M6KQ].

49. *Id.*

50. Market Research Future, *Big Data Analytics Market 2018 Global Size, Share, Growth Opportunities and Industry Forecast by Type, Price, Regions, Key Players, Trends and Demand by 2023*, HERALD KEEPER (Aug. 27, 2018), <http://heraldkeeper.com/market/big-data-analytics-market-2018-global-size-share-growth-opportunities-industry-forecast-type-price-regions-key-players-trends-demands-2023-104850.html> [https://perma.cc/PDZ6-HJYQ].

end-user characteristics. End users in the manufacturing, banking, government, insurance, transportation, utilities, and telecommunications sectors comprise most of the market, with banking and manufacturing alone accounting for nearly 50% of the market.⁵¹ The issues generating the most demand for data analytics involve security and compliance⁵² and customer-experience data that highlight customer engagement, retention, and satisfaction trends. Notably, neither the legal industry nor any tangentially related industry segment has ranked anywhere near the top end users of data analytics, even though the benefits are tangible.

Until recently, legal services have been almost entirely consultative, qualitative, and advisory in nature.⁵³ Statistics have taken a back seat to experience.⁵⁴ Indeed, one of the primary benefits of hiring outside counsel, particularly very seasoned attorneys, has been to leverage outside counsel's depth and breadth of experience, not just their technical legal skills. A client who has hired counsel with thirty or forty years of experience practicing law benefits from a historically guided litigation strategy and time-tested negotiation tactics.⁵⁵ Throughout the golden age of the legal industry, experience operated as a surrogate for a portion of what Big Data can offer.⁵⁶ If clients adopt legal analytics on a widespread basis, though,

51. *Id.*

52. JOSEPH BLANKENSHIP, THE FORRESTER WAVE: SECURITY ANALYTICS PLATFORMS, Q3 2018, at 9 (2018); JAMES RICHARDSON ET AL., CRITICAL CAPABILITIES FOR ANALYTICS AND BUSINESS INTELLIGENCE PLATFORMS 30 (2018).

53. The ABA Rules of Professional Conduct require an attorney "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject." MODEL RULES OF PROF'L CONDUCT r. 1.01 cmt. 8 (AM. BAR ASS'N 2016) (emphasis added). The italicized phrase was recommended by the ABA in 2012 when it approved a change to the Model Rules of Professional Conduct to make clear that lawyers have a duty to be competent in the law and its practice and also in technology integral to the practice of law.

54. *But see* Hermes et al., *supra* note 43, at 135.

55. Law firm billing rates place a premium on this type of lawyer's experience.

56. Mark A. Cohen, *The Golden Age of the Legal Entrepreneur—Why Now and Why It Matters*, FORBES (June 1, 2018, 5:57 AM), <https://www.forbes.com/sites/markcohen/2018/06/01/the-golden-age-of-the-legal-entrepreneur-why-now-and-why-it-matters/#4a4b95477803> [https://perma.cc/E5RZ-99MT].

experience will no longer be the sole distinguishing factor. Client behavior will drive law firm behavior here.

Without question, the unique character traits⁵⁷ of legal professionals have led to the slow adoption rate of legal analytics (or perhaps their outright reluctance to use legal analytics); however, those factors are fading away quickly, and an environment welcoming a new data-driven era is taking shape.

1. Today's Legal Industry Leaders See Technology and Legal Analytics as Imperative for Survival

Change is hard, especially for lawyers who have been doing the same things the same way for the past thirty to forty years. Prior to the Great Recession of 2008, the demand for legal services increased steadily, and competition came only from other firms and attorneys. Consequently, the now-departing generation of legal industry leaders hasn't had much incentive or inclination to change or innovate. Now, we're watching the legal industry getting remade before our eyes. The next generation of legal industry leaders, whether at law firms or in charge of a client's legal department, has now ascended to positions of power and influence.⁵⁸ They understand current market dynamics much better than their predecessors and realize that lawyers are not going to make the same money if they practice law

57. Some consider these "unique character traits" to be flaws. They include "technophobia," "entrenchment/change aversion," and "being mathematically challenged." See Joe Dysart, *Mind Meld: How to Understand Legal Minds to Defeat Tech Fears*, A.B.A. J. (July 2012), http://www.abajournal.com/magazine/article/mind_meld_how_to_understand_legal_minds_to_defeat_tech_fears [<https://perma.cc/AHM4-TWPW>] (explaining "technophobia" in the legal community); James Goodnow, *A Crisis of Confidence in Law Firms*, ABOVE L. (June 1, 2018, 1:27 PM), <https://abovethelaw.com/2018/06/a-crisis-of-confidence-in-law-firms/> [<https://perma.cc/AHM4-TWPW>] (detailing "lawyers doubting their ability to manage change"). See generally Peggy Kubicz Hall, *I've Looked at Fees from Both Sides Now: A Perspective on Market-Valued Pricing for Legal Services*, 39 WM. MITCHELL L. REV. 1 (2012); Robbennolt & Sternlight, *Behavioral Legal Ethics*, *supra* note 26.

58. Julie Friedman, *The Millenials: Meet the New Boss*, AM. LAW., Mar. 2016, <http://legalcommentator.com/pdf/american-lawyer-here-come-the-millennials.pdf>. At age 34, James Goodnow became the President and Managing Partner of Fennemore Craig, P.C. See James Goodnow, FENNEMORE CRAIG, P.C., <https://www.fclaw.com/people/attorneys/e-j/goodnow-james> [<https://perma.cc/9NTH-5GUP>] (last visited Feb. 4, 2019).

the way that it has always been practiced.⁵⁹ They are embracing change and innovation. Technology, data analytics, and legal-process management are the norm for those legal industry leaders who, unlike their innovation-phobic predecessors, now demonstrate a readiness for change.

Although legal analytics has largely been touted as a BigLaw-driven movement that primarily benefits BigLaw firms and their clients, we suspect that legal analytics can also help those legal professionals practicing in a non-BigLaw context. At smaller law firms, legal analytics initiatives could be implemented expeditiously.⁶⁰ Legal professionals practicing in a smaller context may stand to benefit from legal analytics more than their larger counterparts because data insights can operate as a cost-effective surrogate for the experience of throngs of high-priced colleagues. Moreover, data analytics functions as the great equalizer, leveling the playing field for smaller firms that lack their own large data pools but can benefit from the data generated by larger counterparts. Whether at a small or large organization, progressive legal industry leaders are viewing legal analytics as vital to their survival in an increasingly competitive and cost-sensitive market.⁶¹

59. See James Goodnow, *supra* note 58.

60. See, e.g., Hermes et al., *supra* note 43, at 135.

61. Mark A. Cohen, *Law Is a Profession and an Industry—It Should Be Regulated That Way*, FORBES (Mar. 29, 2018, 6:39 AM), <https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/#5438707b6598> [https://perma.cc/6NF9-VBLU]; see Elizabeth Olson, *PwC, the Accounting Giant, Will Open a Law Firm in the U.S.*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/business/dealbook/pwc-law-firm-ilc.html> [https://perma.cc/N57D-4467]; Ben Whewey, *PwC Forms Alliance with US Firm, Furthering Big Four's Ambitions in Law*, AM. LAW. (Sept. 24, 2018, 7:00 AM), <https://www.law.com/americanlawyer/2018/09/24/pwc-forms-alliance-with-us-firm-furthering-big-fours-ambitions-in-law/> [https://perma.cc/HE4G-N2PS]. PwC and Deloitte expanded their core accounting and auditing services into a broad range of data-driven business-consulting services and software-development services and product offerings. Each of those firms is a one-stop shop with the ability to leverage client relationships and business intelligence to cross-sell multiple product offerings. Likewise, law firms must sell more than just legal services to keep competitive. Admittedly, law firms can't develop technologies overnight, but they do have the wherewithal to develop strategic relationships with, or acquire technologies or technology companies that appeal to, their broader client base. Technologies that leverage a law firm's data are the most natural, initial fit for a product offering and pose a formidable challenge to any Big Four competitor. The most progressive law firm leaders are following the path charted by the Big Four to develop product offerings, and they no longer feel

2. *Clients Expect All Attorneys to Embrace Innovation in the Context of their Business*

All attorneys (whether in private practice, in-house, government, or academia) are expected to be technology and data savvy.⁶² Clients are starting to expect law firms to leverage data analytics technology, create new service-delivery models, and expand core competencies to include legal analytics. Quite simply, client value is the driving force behind data analytics adoption because that's where the money is. Legal analytics initiatives must meet a client's goals and expectations for legal-service delivery, budget, and outcome. To meet goals and expectations, legal analytics tools must enhance the client's overall business and operational model, growth strategy, culture, resources, and core strengths. The strength of what legal analytics can provide—predictability, accuracy, and consistency of service delivery—may, under many circumstances, matter more than the speed of delivery of those services. Alternatively, the legal department may sacrifice quality for speed—or stress all of those factors and be willing to pay a premium for excellence in all of them.⁶³ At bottom, successful legal analytics efforts start with understanding how to maximize value for clients.

3. *There Is Plenty of Talent to Assemble a Top-Flight Legal Analytics Team*

Relying on attorneys alone to spearhead a legal analytics initiative is a fool's errand. After all, part of legal analytics involves mathematics.⁶⁴ Other legal professionals must be involved in the effort. Historically, the non-attorney employee roster at BigLaw

constrained by driving revenue only from legal services (other than the ethics rules related to law-related services). See MODEL RULES OF PROF'L CONDUCT r. 5.4, .7 (AM. BAR ASS'N 2016).

62. See D. Casey Flaherty, *Unless You Ask: A Guide for Law Departments to Get More from External Relationships*, ASS'N CORP. COUNS. 11 (2016), <https://uplevelops.com/wp-content/uploads/2017/12/Unless-You-Ask-A-Guide-For-Law-Departments-to-Get-More-From-External-Relationships.pdf> [<https://perma.cc/5ERG-244C>]; Weiss, *supra* note 37.

63. See E-mail from Randy Gordon, *supra* note 12.

64. See Weiss, *supra* note 37.

firms and legal departments has consisted of executive assistants, paralegals, librarians, and support staff, most of whom (though broadly skilled) have become pigeonholed into administrative roles in a traditional organizational structure. In the past eight to ten years, however, larger legal departments and law firms have been hiring a new breed of industry experts to oversee legal-industry-specific business operations,⁶⁵ such as legal analytics, technology sourcing, legal-process management, pricing, client-outside counsel relations, and financial performance.

On the client side, these Legal Department Operations (LegalOps) experts are tasked with creating greater predictability and standardization in the legal department. On the law firm side, experts with titles like Chief Practice Management Officer, Chief Project Management Officer, or Chief Pricing Officer are helping law firms identify where waste, friction, and redundancy hinder efficient workflow processes.⁶⁶ These experts are immensely effective in building legal analytics initiatives and can translate legal analytics principles into a construct that lawyers can understand and embrace.

4. *Legal Technology Has Arrived in Force*

“LegalTech” innovators (e.g., LegalZoom, Fastcase, RocketLawyer, etc.) have revolutionized how legal services are undertaken, delivered, priced, and evaluated. Anyone involved in the legal industry can attest that technology is heavily influencing the practice of law today. The tidal wave of innovation keeps gaining momentum. The emergence of legal analytics is transforming the next generation of legal services into an era marked by mass customization for certain types of practices and a mix of quantitative

65. See LEGAL MKTG. ASS'N & BLOOMBERG LAW, WHERE ARE WE NOW? REVEALING THE LATEST TRENDS IN LEGAL MARKETING AND BUSINESS DEVELOPMENT 14 (Apr. 2018).

66. See Amanda Brady & Amy Mallow, *A Chat with Perkins Practice Management Chief Toby Brown*, LAW360 (May 17, 2018, 4:12 PM), <https://www.law360.com/articles/1044848/a-chat-with-perkins-practice-management-chief-toby-brown> [https://perma.cc/25Q2-AZZ3]; see also Aeberle, *The Rise of Pricing Professionals in BigLaw*, LAW360 (Jan. 8, 2018, 5:11 PM), <https://www.law360.com/articles/999187/the-rise-of-pricing-professionals-in-biglaw> [https://perma.cc/JKJ7-BV5U].

(billable hours) and qualitative (value of those services) for other types of practices. Even though the legal industry has failed to keep pace when it comes to leveraging data analytics, the technological stage is surely set for legal professionals to play catch-up.

C. Legal Analytics Make Pricing and Economically Evaluating Legal Services Easier

"Big data is like teenage sex: everyone talks about it, nobody really knows how to do it, everyone thinks everyone else is doing it, so everyone claims they are doing it."

Dan Ariely

For a few years now, Professor Ariely's quote has been making the rounds.⁶⁷ Elements of it still hold a great deal of truth, and we can update the 2013 teenager metaphor to a 2018 twenty-something metaphor: A few are doing Big Data fairly well now. Many are trying it with mixed outcomes. Some want to try it but haven't determined how and where to start.

Because legal analytics is not a one-size-fits-all solution, it's not surprising that many legal professionals often are overwhelmed by the possibilities. Not every lawsuit turns on how likely a judge is to grant or deny a specific motion; not every organization wants to evaluate litigation venue choices; and not every legal professional needs to predict legal outcomes for U.S. Supreme Court cases.

Almost universally, however, people care deeply about the cost of legal services and whether they are getting optimal value for each dollar spent on those services. Legal billing systems and law-firm invoices contain an ocean of rich data which, when intelligently transformed into legal analytics, can affect the cost and efficiency of legal services. Legal analytics tools empower users to analyze legal spend and efficiency levels. For the legal professional who is new to

67. See Dan Ariely (@danariely), TWITTER (Jan. 6, 2013, 8:02 AM), <https://twitter.com/danariely/status/287952257926971392?lang=en> [<https://perma.cc/3CYS-HB7A>].

legal analytics, analyzing legal spend is the natural starting point. In this regard, the metrics make a difference.

1. Staffing Efficiency

To ensure the greatest value in hourly billing arrangements, one would begin by optimizing the staffing mix of legal professionals. The most competent, lowest-cost legal professional should handle skill-set-appropriate tasks in the right amount of time. With legal analytics tools, each task in a line-item entry that has been handled by outside counsel's team now can be reviewed for skill-set appropriateness. The review of individual line items in a bill, which used to take hours and days (and thus was rarely done thoroughly), can now take seconds. Because enough tasks handled by outside counsel recur with sufficient frequency on an industry-wide basis, legal analytics can provide benchmarks for costs, time, and skill sets required for individual tasks. Therefore, low-risk, low-value work can be easily identified by data analytics tools that surface metrics around time input, seniority levels, tasks, and pricing. Once key metrics are identified, future legal work can be re-deployed in a cost-effective manner. As a clear example, benchmarks can tell a client—and the client's law firm—when legal research is routine enough to be done by a junior associate and when it is tricky enough, or novel enough, for a partner to do a better and more efficient research job.

The practical upshot of evaluating and monitoring staffing efficiency may be as simple as leaving legal work with the same outside law firm with a simple re-shuffling of staffing resources. Sometimes, it may mean re-diverting some tasks to lower cost, alternative service providers, like legal-process outsourcing companies or discovery robots. Either way, forward-thinking legal professionals are now empowered with solutions that help them easily understand, drive, and capitalize on optimal staffing efficiency.

2. *Workflow Efficiency*

Workflow efficiency measures and seeks to eliminate waste, friction, and redundancy in the delivery of legal services. Legal professionals, much like their production and operational-management peers, are now encouraged to optimize the process of working on an engagement for a client by paying attention to the way that the work flows from person to person. Thinking seriously about the work flow, setting standards for who does which tasks, continually evaluating the process, and identifying opportunities for improvement all make for a better product for the client. Intelligently designed legal analytics tools can facilitate this effort. For instance, a well-built legal analytics tool will pinpoint when multiple legal professionals participate on or attend a single phone call, meeting, or closing; identify the frequency with which various types of tasks recur; and analyze whether their recurrence is delivering true client value.

3. *Billing Hygiene*

As long as hourly billing persists in the legal industry, good billing hygiene is essential when it comes to understanding what tasks were handled during each billable hour. Far too often, invoices for legal services rendered contain line-item entries that run the gamut from being vague and cryptic (e.g., “review file,” “attention to tax issue,” “consider negotiation strategy,” and the like) to being so over-descriptive that the line-item entry doesn’t provide easily discernable value. Good billing hygiene means recording clear, concise, informative narrative entries linked to the time to complete an individual task. Neither law firms nor clients benefit from bad billing hygiene. The time entry “Attention to file—2.1 hours” is unhelpful today and even less helpful tomorrow when trying to price legal services with certainty.⁶⁸ One cannot manage toward pricing

68. 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. Nancy B. Rapoport, “*Nudging*” *Better Lawyer*

certainty without a way to measure the likely tasks that would go into a pricing model. Legal invoice data riddled with bad billing hygiene is inherently unmeasurable. But legal analytics tools can highlight where bad billing hygiene has occurred to help attorneys reflect upon the efficiency of their legal work, change their bad habits, and help with the predictability necessary to budget properly for legal services.

4. Pricing

One of the legal industry's biggest challenges is pricing uncertainty.⁶⁹ Every year, \$60 billion is up for grabs between clients and their law firms.⁷⁰ Neither clients nor law firms created this pricing uncertainty. Instead, the uncertainty has been precipitated by disruptive third-party forces that have been pushing the legal industry toward good budgeting as a way to better serve clients.⁷¹ For an industry that uses a "time x hourly rate = price" equation as its core pricing model, it is no wonder that pricing poses a challenge.

In recent industry surveys, pricing predictability and outcome predictability were highlighted as two critical value drivers for litigation counsel who believe that there remains substantial room for

Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 42, 86 (2014).

69. Pricing (in)accuracy has a myriad of knock-on effects that affect business operations and performance. Does the price estimate fall within industry norms and reflect a realistic budget? Will the client balk at the quoted price? Will other corporate strategic initiatives have to be postponed if there are cost overruns? Is the firm's target realization rate attainable?

70. This number results from extrapolating the recently published average net realization rate (83.0%) across the entire industry, both BigLaw and the remaining 70–80% of the industry. Assuming a 17.0% unrealized number, \$60 billion is the delta between the dollar value of the hours recorded in law firm billing systems and dollars actually paid by clients after write-downs, write-offs and uncollected dollars. See generally CTR. FOR THE STUDY OF THE LEGAL PROFESSION AT THE GEORGETOWN UNIV. LAW CTR. ET AL., 2018 REPORT ON THE STATE OF THE LEGAL MARKET (2018), <http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/01/2018-Report-on-the-State-of-the-Legal-Market.pdf> [https://perma.cc/8A29-6QFL].

71. Innovative technologies and data analytics tools have made aspects of practicing law more efficient over the past decade, significantly reducing the time it takes to analyze an issue or handle a discrete, routine task. Alternative service providers have entered the market, shaking up the hourly-rate side of the economic equation by offering competent, lower cost professionals and processes capable of handling high-volume legal work at a steep discount to major law firms. Amidst these innovations, law schools have been graduating law students at a pace that has created a supply/demand mismatch for legal services.

improvement on both counts.⁷² Appropriate fee arrangements (AFAs), particularly fixed fees, and blended rates have been the most commonly used tactics, with mixed results.⁷³ Most AFAs are zero-sum-game propositions and aren't the long-term answer for an industry with competing economic pressures. Survey respondents indicated that *none* of their hundreds of law firms have proposed creative AFA structures despite clients' yearnings for more

72. See BLICKSTEIN GRP., FINDINGS FROM THE 10TH ANNUAL LAW DEPARTMENT OPERATIONS SURVEY 4 (2017), <http://blicksteingroup.com/wp-content/uploads/2017/11/LDO-Survey-Supplement-2017.pdf> [https://perma.cc/8TQH-T89E]; see also ASS'N OF CORP. COUNSEL, ACC CHIEF LEGAL OFFICERS 2017 SURVEY 4-6 (2017), <https://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1449472&page=/legalresources/resource.cfm&qstring=show=1449472&title=ACC%20Chief%20Legal%20Officers%202017%20Survey%20%20Executive%20Summary&recorded=1> [https://perma.cc/S74Z-6QLK] (explaining that compliance and regulatory changes will lead to chief legal officers "focusing on decreasing cost and creating value" and providing statistics suggesting that law departments are increasingly spending more of their budgets on litigation). The Executive Office of the United States Trustee has produced guidelines regarding the use of budgets in large Chapter 11 cases. Appendix B—Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36,248, 36,249 (June 17, 2013). The Director of the Office of the United States Trustee explained the reason for requesting budgets in large Chapter 11 cases:

In recent years, private industry has imposed major cost controls on outside counsel. Budgets, discounts, and other cost saving measures are required under many retention agreements. But in bankruptcy, budgets are rare and charging anything other than the full hourly fee often is considered unfair by the bankruptcy bar.

....

Moving to a slightly more controversial change: budgets should be submitted in cases meeting the \$50 million threshold for both the debtor's attorney and the official committee's legal fees. While the budgets would not be binding and could be changed simply by submitting revisions, they would provide a benchmark and cause the applicant to explain any significant deviations from the budget targets.

In most cases outside of bankruptcy, clients obtain a budget as part of the engagement process. With this Guideline change, budgets would become the norm in bankruptcy and they would be available for all parties to see. We understand that unanticipated litigation may lead to significant deviations, but we hope that budgets will bring greater discipline to the fee application process, help maintain the burden of proof with the applicant, and ensure greater client control and accountability.

Clifford J. White, III, Dir., Exec. Office for U.S. Tr., Notes for Remarks before the National Bankruptcy Conference (Nov. 10, 2011), at 4-6, available at https://www.justice.gov/sites/default/files/ust/legacy/2011/11/30/NBC_Annual_Meeting_111011.pdf [https://perma.cc/MZ9U-X6ZP].

73. See Robin Snasdell, *Maturing to Take on New Challenges*, BLICKSTEIN GRP., *supra* note 72, at 6.

thoughtful pricing arrangements.⁷⁴ Forward-thinking legal industry leaders demand a systematic edge to price legal services accurately. Now, legal analytics tools can analyze billing data in a manner that allows for creative, reliable, and predictable pricing. These tools analyze, on a line-item-by-line-item basis, “who” (legal-professional credentials) did “what” (work elements identified in narrative) and “how long” it took. The data analytics tools then categorize that data in a manner that shows industry-specific pricing trends. Pricing legal services should be a data-driven strategic analysis, not a gut hunch. Why do we suggest that data-driven pricing works? Because one of us ran an experiment that led us to that conclusion.

D. Legal Decoder Inc.’s Pricing Pilot Program

In late 2017, ten law firms and commercial clients partnered with Legal Decoder to use its LSA Pricing Engine legal analytics tool (the “Pricing Engine”) to overcome pricing challenges.⁷⁵ The practical goal of the pilot program was to transform raw data into structured, actionable information for pricing and benchmarking.⁷⁶ In the pilot program, the Pricing Engine processed hundreds of thousands of line items from a vast array of legal matters.⁷⁷ The Pricing Engine analyzed billing data using its “bottom-up” approach, which pinpoints what a legal professional is doing from a narrative billing

74. *See id.*

75. Jason Chi & Joe Tiano, *Pricing Legal Services Accurately with Data Analytics Technology*, HIGH PERFORMANCE COUNS., https://highperformancecounsel.com/whitepaper_legaldecoder_pricing-legal-svcs/ [<https://perma.cc/6D6W-2DFN>] (last visited Feb. 4, 2019). Legal Decoder’s Pricing Pilot Program was a commercial (as opposed to nonprofit/academic) endeavor that sought to explore and satisfy the legal analytics needs of larger players in the legal industry. The greatest need articulated by Pilot-Program participants was to categorize and standardize line-item billing data into a format that allowed for an apple-to-apples comparison of task billing and attorney efficiency. Some pilot participants tested Legal Decoder’s output against their own manual processes and against other comparable technologies; other participants simply relied only on Legal Decoder’s output when evaluating it as a legal analytics tool to address an organizational business needs. The biggest challenge identified was that most data, prior to Legal Decoder’s analysis, was inadequately and inconsistently categorized. Pilot participants intend to use the output for pricing projections, performance evaluations, and talent resource allocation. *Id.*

76. *Id.*

77. *Id.*

entry (a "Work Element")⁷⁸ and then aggregates Work Element data into meaningful phases to build a pricing model (Figure 1 below).⁷⁹ The nature of the legal work and the duration of each task were automatically detected, calculated, and categorized, starting at the Work Element level.⁸⁰

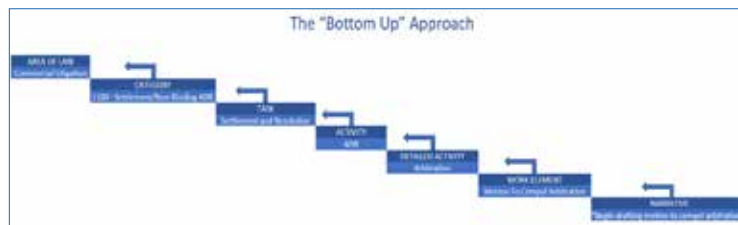


Figure 1

The table below (Figure 2) provides just a few metrics and examples of the Pricing Engine's output, where a legal professional's time correlates to a Work Element.⁸¹

78. Work Elements are very specific "legal" tasks worked on, handled, or produced by a legal professional (e.g., a motion in limine, an asset-purchase agreement, an expert deposition, due diligence reports, a FERC application, owner's affidavits, wills, court hearings, and so on). Some Work Elements may occur just once during a matter and others may recur. Although no cases, transactions, and matters are identical, every matter has hundreds or thousands of recurring Work Elements that make up its anatomy.

79. Once analyzed, the Work Element in a line-item narrative is automatically assigned by the Pricing Engine to one of a series of sub-branches and branches (Tasks, Activities, Detailed Activities) in one of Legal Decoder's proprietary taxonomies that cover many areas of law (e.g., M&A, Patent Litigation, IPOs, Commercial Litigation, Patent Prosecution, Internal Investigations, Employment Litigation and others) and, where applicable, align with Uniform Task Based Management System (UTBMS) codes. The UTBMS codes is a series of codes used to classify legal services performed by a legal vendor in an electronic invoice submission.

80. The LSA Pricing Engine doesn't require a legal professional to assign a code or to change workflow or billing habits. Historic data can be processed whether or not those data have been coded previously. The Pricing Engine also overcomes poor billing hygiene. Block billing, idioms, acronyms, and other billing-hygiene challenges pose no problem for the Pricing Engine. The Pricing Engine parses narratives and learns the lexicon and conventions that legal professionals use repetitively in narrative entries.

81. Chi & Tiano, *supra* note 75.

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

Figure 2

After Work Elements in a matter were identified in the pilot program, the Pricing Engine helped to determine an appropriate division of labor, essentially answering the question of “who should do what?” when it comes to activities required for each Work Element.⁸² Putting aside business activities required to run a law practice, the core activities in the practice of law are straightforward. Attorneys read, write, analyze, investigate, communicate, meet, advocate, negotiate, and manage a matter’s progress.⁸³ Identifying

82. *Id.*

83. Reading was the third most frequently occurring activity and equally spread among partners, associates, and paralegals at around a 15% rate of occurrence. Although reading ranks third in terms of frequency, it was the most time-consuming activity, particularly for associates—an unsurprising statistic because associates are heavily involved in document review and due diligence. Being able to evaluate data both in terms of frequency and hourly volume is critical to pricing precision and is easily handled by the Pricing Engine. Writing was the second most recurring activity overall in timekeeper line items and the most frequently recurring activity among associates. The critical takeaway from the data is that mid-level associates (3rd–6th years) should take the laboring oar when it comes to drafting something from scratch, because the data showed them to be the most efficient at this task. The data indicated that partners should be projected to spend, on average, approximately 17% of their time on drafting and revising documentation. Communication (telecommunications, email, and other written communications) occurred most frequently in all timekeepers’ line items, showing up in nearly one-third

the individuals most suitable for each Work Element's activity is critical to pricing and is a key output of the Pricing Engine.⁸⁴ Based on the most appropriate division of labor, Work Elements were assigned to over 800 sub-branches, which rolled up to 120 branches within Legal Decoder's proprietary taxonomies and which were ultimately tagged with the proper UTBMS code number (or Legal Decoder equivalent). Not only can correctly categorized data help with pricing, but the data can also help with efficiency analysis and performance reviews.

When it comes to pricing, Legal Decoder's output allows a user to evaluate the average time per matter historically spent on specific Work Elements during the Document Production phase. For example, for a given type of case, the data shows that "Evaluation of Produced Materials," "Requests for Production, Objections & Responses," and "Review for Production" should take 22.8 hours, 21.9 hours, and 51.6 hours, respectively.⁸⁵ Machines are surely not the sole determinant of pricing, and legal analytics shouldn't blindly replace judgment and experience in pricing a legal engagement; however, machines can make pricing more precise and reliable. Legal Decoder's experiment provided a proof of concept: with the right benchmarks, it's easier to price an engagement and to make sure that the right professionals are doing the right tasks.⁸⁶

of time entries, with partners accounting for nearly 30% of communications activities. For pricing purposes, this data can be easily translated into actionable information. If, for instance, a fixed-fee billing arrangement is in place, a managing attorney should consider streamlining team communications using process-management techniques, enhanced-communication technologies, and highly structured meeting schedules. Insights of this nature improve cost-effectiveness and realization rates.

84. For instance, the Pricing Engine easily showed a division of labor for "document drafting" versus "document review and revision" versus "document negotiation." Even though countless legal professionals (especially seasoned associates and partners) can handle multiple aspects and activities associated with many Work Elements across several areas of law, the Price Engine pinpoints the ideal professional for the job, not just any capable body. This optimizes efficiency and resource allocation across every aspect of a matter while maximizing realization rates and profitability.

85. Nothing in the process, however, prevents a law firm from explaining to a client why a particular task took more time than the industry average would otherwise suggest.

86. Chi & Tiano, *supra* note 75.

IV. Getting A Handle on Legal Spend

Any essay on topics as rarefied as legal spend, attorney behavior, legal analytics, and controlling legal fees wouldn't be complete without the obligatory list of "practice pointers" on how to get a handle on legal spend. Kidding aside, legal industry leaders will realize the greatest value for each dollar allocated to legal spend, both internally and externally, if the focus is not merely on the academic and theoretical aspects of legal analytics but on principles and actionable steps that can make a real economic and operational difference. Below are a few key takeaways on how to leverage legal analytics to get the best handle possible on legal spend.

Partner proactively with legal-process outsourcing companies (LPOs) for high volume, low risk/low value work. Low risk/low value work that has been handled by junior legal professionals can be easily identified by legal analytics tools that surface metrics around time, tasks, seniority level, and pricing. Does a \$675-per-hour second-year BigLaw associate really need to "roll up the sleeves" on commercial lease review or a discovery "responsiveness" analysis? There are innumerable other examples of low-risk, low-value legal work that quickly increases a client's bill. Once law firms and clients identify the key metrics around low risk/low value legal work, they can redeploy that work to lower cost, highly competent LPOs and other alternative legal-services providers. After all, there's a reason that some work is assigned to contract attorneys and other specialists: they're more experienced at performing that work, and they're usually less expensive than BigLaw junior associates.⁸⁷

Show non-attorney stakeholders how they benefit from a law firm's efficiency. Non-attorneys are often skeptical as to whether matters billed on an hourly basis are managed for optimal efficiency.

87. Of course, the issue of how, then, a law firm can train its junior associates well (and profitably) is a whole other kettle of fish. Assigning repetitive work to junior associates used to be a time-honored way to train them for other, bigger assignments later. If clients don't want to pay for junior associates to get that training—in part because there are lower cost providers who can do at least as good of a job, if not a better job—will law firms find other ways to train their newest lawyers? We're more than a little worried that providing better pricing to clients will result in fewer training opportunities for associates.

Getting *value* from legal services is the proper objective, and the threshold measurement of value on a billable hour basis compares cost, efficiency levels, and outcome. Legal analytics allow legal professionals to self-monitor efficiency levels proactively and to fine-tune staffing and workflow to show stakeholders that, based on legal analytics, the law firm has delivered the optimal efficiency and *value*. Post-mortem matter analyses and annual outside counsel performance reviews are ideal opportunities for a legal analytics evaluation.

Educate colleagues that legal analytics is an investment, not a cost. Leveraging legal analytics will require an *investment* of time and resources for which both a client's legal department and a law firm will recognize a return on investment. For a client's legal department, the return on investment will manifest with improved quality and efficiency, strategic management of resources, and enhanced value from its legal spend. For law firms, efficiency levels will drive greater client attraction, retention, and satisfaction. Over time, legal analytics will translate to more business at higher profitability levels. Educating and building consensus around a legal analytics investment thesis is critical.

Consider carefully the issue of change management when introducing legal analytics. Although there is some truth to the adage that lawyers are averse to change, labeling the leaders of today's legal industry as entirely resistant to change and innovation or technophobic is unfair. Most people dislike change because it normally comes with by-products such as risk, uncertainty, a loss of control, more work, and more cost. Today's legal industry leaders are embracing change because the unwanted by-products of change are far less catastrophic than being change averse in a transforming, ultra-competitive legal industry. Overlaying legal analytics onto the practice of law certainly marks a change from the way law has been practiced for the past fifty years, but the shift need not be seismic. Steps toward adopting legal analytics can be incremental, and the careful messaging of how legal analytics improve results makes change more digestible.

Remind lawyers (and data analytics experts) that legal analytics will require a cross-disciplinary team and approach. In Part III, we noted that there is plenty of talent to assemble a top-flight legal analytics team, comprised of both lawyers and non-lawyers. The job of a lawyer seems to involve imagining every possible risk and then finding solutions to mitigate against every risk, however improbable. Lawyers have been trained with this mindset,⁸⁸ and it is partly what makes them so valuable. That said, from a legal analytics perspective, endless risk analysis promises to drive a data analytics expert over the edge. Although both lawyers and data analytics experts are analytical and process oriented, it is important for each side to understand the ethos of the other. Clear communication is key.

Pick the right practice areas to start with legal analytics. The practice of law can't be jammed into a formulaic process or managed solely with technology and statistics. Unexpected twists always pop up during deals; courts hand down unpredictable rulings; and regulators change policy views as new administrations take office. There are always variables. But certain areas of law are anatomically well-suited for legal analytics because they follow a normal, repeatable pattern of activities. Business-combination transactions, Chapter 11 bankruptcy cases, and patent litigation are areas in which the path can meander, but it usually continues to point in the same direction. If legal analytics are leveraged in the right practice areas, the chances of success increase exponentially.

Use the right data pool(s). Because of external forces that we've already highlighted, the practice of law has changed dramatically since the 2008 financial crisis. Leveraging \$120 billion in legal spend data sounds powerful—almost irrefutably so; however, if 80% of the legal spend data is from the 1990s and early 2000s, insights from outdated data for 2018 and beyond are limited.⁸⁹ The dollar volume of data does not, by itself, translate to accurate insights when it

88. You can blame law professors for this by-product of a legal education.

89. Chi & Tiano, *supra* note 75.

comes to driving pricing certainty. In fact, a greater volume of inapposite data skews results and often translates to the wrong answer. Selecting the right pool of current data is key to successful legal analytics.

Select legal analytics tools that align with how legal work should be performed. Legal analytics is a discipline that should not fall prey to Maslow's hammer.⁹⁰ The practice of law is complicated, and anyone that is embarking upon a legal analytics initiative should not view it as a cookie-cutter exercise. It's critical to employ a team and technologies that truly understand how lawyers should practice law. The value of a team of legal professionals is optimized when the lowest cost, *competent* legal professional handles a skill-set-appropriate task in the right amount of time (according to current industry benchmarks) without waste, redundancy, or friction in the workflow process. When law firms and clients use legal analytics tools surfacing the most important metrics, legal professionals should be able to understand and embrace the data and make fine-tuning adjustments that drive maximum value. If the use of legal analytics and the real-time fine-tuning help a law firm to attract or retain a big client, the investment of time and money will have been worth the effort.

Commit to take action. When analyzed thoughtfully, legal analytics data will inform both overall strategy and day-to-day tactics. There is nothing wrong with making strategic, data-driven changes that do not initially yield the desired result because tactical adjustments can be made later. There is everything wrong with seeing a data-driven path toward accomplishing a mission and taking no action to adapt to that path. An upfront commitment to take action is a prerequisite to success.

Monitor results. Almost invariably, the same legal analytics tools that surfaced mission-critical legal trends, insights, and key performance indicators will assess seamlessly whether the mission

90. "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." ABRAHAM H. MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* 15 (1966).

(the client's objective) is being accomplished, but it is equally critical to monitor whether the actions taken based on legal analytics-informed decisions are driving the desired results. Skeptical lawyers must be shown results from the legal analytics effort that are driving better results for both the client and its law firm.

CONCLUSION

Technology and data have leveled the playing field and demystified the practice of law in many respects. But Robot Law (the rise of the machine lawyer) is a myth. Technology just can't reproduce some aspects of what lawyers do, but it *will* augment how they practice. For example, software can't account for precedential value, from a *business* perspective,⁹¹ of choosing one course of legal action as opposed to another. There are many areas in which legal services and advice should be delivered by lawyers alone, and not by technology, consultants, or alternative service providers. Technology has its limitations, and artificial intelligence won't replace lawyers. But it will improve their service, cost, and results. Lawyers who embrace technology and data analytics to augment their practice and inform their legal advice will have a competitive advantage.

91. Software can find precedents but can't replace a good lawyer's judgment in how best to use those precedents.

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USING DATA ANALYTICS TO PREDICT AN INDIVIDUAL LAWYER'S LEGAL MALPRACTICE RISK PROFILE: BECOMING AN LPL "PRECOG"

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John Anderton: Why'd you catch that?

Danny Witwer: Because it was going to fall.

John Anderton: You're certain?

Danny Witwer: Yeah.

John Anderton: But it didn't fall. You caught it. The fact that you prevented it from happening doesn't change the fact that it was *going* to happen.

— MINORITY REPORT (20th Century Fox 2002)¹

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† Founder and Chief Executive Officer of Legal Decoder, Inc. After practicing law for nearly twenty years in Am Law 50 firms (most recently as a partner with Pillsbury Winthrop Shaw Pittman, LLP), Joe decided that it was time to start Legal Decoder, tackle new challenges, and solve problems for his legal industry peers and colleagues who are working hard in an industry that is changing its complexion. Joe wants to thank Nancy Rapoport for being a great friend and mentor. Joe also would like to thank his wife, Meredith, for her love and constant support throughout his entrepreneurial journey. He'd also like to thank his team at Legal Decoder, all of whom have been integral to the data-centric aspects of this article.

¹ MINORITY REPORT (20th Century Fox 2002) (emphasis added).

INTRODUCTION.....	268
I. UNDERPINNINGS OF MALPRACTICE ACTIONS	273
A. <i>Legal Malpractice Errors</i>	273
B. <i>Malpractice Theories of Liability</i>	273
1. Civil liability for professional negligence	274
2. Breach of fiduciary duty	275
3. Breach of contract	276
II. BIG DATA AND STATISTICAL SCIENCE IN THE INSURANCE INDUSTRY	277
A. <i>Overview</i>	277
B. <i>Amplifying Demographic Data with Behavioral Data</i>	279
C. <i>The Auto Insurance Paradigm – Behavioral Data Comes to the Forefront</i>	280
D. <i>Data Usage in the LPL Segment</i>	282
1. Practice area	283
2. Firm size	285
3. Geography	287
4. Claims history/step rating	288
5. Client roster	290
6. Miscellaneous considerations	290
III. WHY LEGAL MALPRACTICE METRICS NEED TO EVOLVE.....	291
IV. A NEW DATA-DRIVEN SCHEMA.....	294
A. <i>The Raw Data</i>	295
B. <i>Using Legal Analytics to Calculate Risk: The Six Malpractice Markers</i>	297
1. Staffing efficiency	297
2. Workflow efficiency	299
3. Billing hygiene.....	300
4. Institutional governance.....	301
5. Matter oversight.....	302
6. Fiduciary risk	304
C. <i>Creating the LPL Malpractice Risk Score</i>	304
CONCLUSION.....	306

INTRODUCTION

In the movie *Minority Report*, Tom Cruise’s character, Chief John Anderton, runs a “Pre-Crime” unit operating out of Washington, D.C. in the year 2054. Relying on three “Pre-Cogs” who can sense that a crime will be committed, Chief Anderton is convinced that the Pre-Cogs are making the nation safer—right up until the moment when the Pre-Cogs predict that Anderton himself will be committing murder in the next thirty-six hours. Anderton must find out why he’s been identified as a future murderer. The

“minority report” referenced in the movie’s title is from the female Pre-Cog, who occasionally dissents from the other two Pre-Cogs’ crime predictions. The movie’s premise—what if we can predict the future risk of legal malpractice using data generated by an unlikely source to fuel our predictions?—provides us with a nice legal ethics question: What if we could pinpoint specific legal malpractice markers before they mature into actual malpractice?²

The practice of law is evolving at a breathtaking pace—true even before COVID-19, but especially true since the pandemic began. Big data, advanced technologies, and alternative legal service providers are revolutionizing how legal services are undertaken, delivered, priced, and evaluated.³ Until recently, legal services have been almost entirely

² We use the terms “malpractice,” “legal malpractice,” “legal professional liability,” and “LPL” interchangeably as the same concept. We also use the terms “insurance company,” “insurer,” and “carrier” interchangeably as the same concept.

³ See, e.g., Debra Cassens Weiss, *‘Fundamental Shift’ is Transforming the Delivery of Legal Services, New Report Concludes*, ABA J. (Jan. 6, 2020, 2:10 PM), <http://www.abajournal.com/news/article/fundamental-shift-is-transforming-the-delivery-of-legal-services-report-concludes> [<https://perma.cc/3378-XYC9>] (discussing the effect of technology on legal practice); Michele Gorman, *Despite Hype, AI Still Hasn’t Caught on with Most Attorneys*, LAW360 (Oct. 23, 2019, 7:38 PM), www.law360.com/articles/1212702/despite-hype-ai-still-hasn-t-caught-on-with-most-attorneys (noting that attorneys say that artificial intelligence and other tools are “creating a generational shift” in legal service delivery); Aebra Coe, *Data Science No Longer a Luxury for Modern Law Practices*, LAW360 (Jan. 4, 2019, 4:07 PM), <http://www.law360.com/articles/1105413/data-science-no-longer-a-luxury-for-modern-law-practices> (arguing that “lawyers will need to know the basics of data analytics and statistics” to be competitive); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Leveraging Legal Analytics and Spend Data as a Law Firm Self-Governance Tool*, 13 J. BUS., ENTREPRENEURSHIP & L. 171, 172–75 (2019) (discussing how firms are leveraging data to create a business development advantage); 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, 1269 (2019) [hereinafter Rapoport & Tiano, Jr., *Legal Analytics*] (discussing how data analytics tools are affecting legal service delivery); Aebra Coe, *Why More Law Firms Are Moving to the Cloud*, LAW360 (Mar. 20, 2017, 3:33 PM), <https://www.law360.com/articles/903164/why-more-law-firms-are-moving-to-the-cloud> (describing increased cloud usage at law firms); Julie Sobowale, *How Artificial Intelligence Is Transforming the Legal Profession*, ABA J. (Apr. 1, 2016, 12:10 AM), https://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession [<https://perma.cc/GPG7-QXER>] (reporting that lawyers say artificial intelligence is changing how they think, work, and interact with clients); John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 2995–96, 3017 (2014) (discussing the effect of innovative legal services models); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3041, 3056 (2014) (arguing that information technology has begun to disrupt lawyers’ market power in providing legal services); Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909, 910–11, 949 (2013) (positing that legal

consultative, qualitative, and tailored in nature. Statistics and automation used to take a back seat to experience and human effort. In today's legal industry, there are two distinct offerings of "legal solutions": (1) the practice of law itself, and (2) the *business* of delivering legal services.⁴ Clients now receive a hybrid qualitative/quantitative service mix where many aspects of law can be "mass customized,"⁵ using innovative artificial intelligence tools to automate tasks formerly assigned to junior associates and paraprofessionals and providing "bespoke" services on complex issues to those clients who can afford them.⁶ Moreover, the increasing use of legal analytics provided by third-party industry innovators can give both law firms and clients new perspectives on efficiency and value.⁷

These innovations affect how, when, and where attorneys practice (e.g., in BigLaw or elsewhere), thus contributing to heightened client expectations regarding speed and accuracy in the delivery of legal

information technology will help define the future of the legal services industry). Most of these changes are occurring in BigLaw or highly specialized boutiques, but many of the advances in artificial intelligence are likely used by lawyers in the other sectors of legal practice as well, from solos and small firms to mid-sized firms.

⁴ In other words, the pricing of those legal services, which also includes reductions in client bills based on negotiations with clients and the overall budgeting process in which law firms engage.

⁵ "Mass customization" is defined as "the mass production of individually customized products, goods, and services." Mass Customization, *MERRIAM-WEBSTER* <https://www.merriam-webster.com/dictionary/mass%20customization> [<https://perma.cc/55YT-RNT6>] (last visited July 11, 2020). For one of the seminal articles on the application of mass customization, see James H. Gilmore & B. Joseph Pine II, *The Four Faces of Mass Customization*, 75 HARV. BUS. REV. 91 (1997).

⁶ For a wonderful article discussing the array of legal services options available to a Chief Legal Counsel, see Omari Scott Simmons, *Chief Legal Officer 5.0*, 88 FORDHAM L. REV. 1741, 1747–49 (2020). Other great articles include Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, 67 HASTINGS L.J. 1 (2015); McGinnis & Pearce, *supra* note 3; Dzienkowski, *supra* note 3.

⁷ Among the top disruptors, of course, is Legal Decoder. LEGAL DECODER <https://www.legaldecoder.com/> [<https://perma.cc/6566-H2QZ>] (last visited Nov. 21, 2020). (Yes, we're both biased in favor of Legal Decoder.) Legal Decoder's mission is to revolutionize the way that legal services are priced and economically evaluated. Legal Decoder's software is capable of programmatically running the entire analysis of the Malpractice Markers. See discussion *infra* Section IV.B. Other companies that provide data about "legal spend" include LUMEN LEGAL, <http://www.lumenlegal.com/legal-spend-analytics> [<https://perma.cc/VX7Q-KQ8B>] (last visited Nov. 21, 2020); *LegalVIEW Analytics*, WOLTERS KLUWER, <https://www.wolterskluwer.com/en/solutions/enterprise-legal-management/legalview-analytics> [<https://perma.cc/BS5L-HSYF>] (last visited Nov. 21, 2020); and BODHALA, (<http://www.bodhala.com/legal-spend-analytics>) [<https://perma.cc/Q9RW-JKJK>] (last visited Nov. 21, 2020).

services.⁸ Today, law is unabashedly a business in which clients expect lawyers to deliver legal services better, faster, and cheaper, all without sacrificing quality. The old days of having only two degrees of service delivery freedom—fast and good, fast and cheap, slow and good—are gone. In addition, clients have become ultra cost-conscious, often characterizing much of the work performed by lawyers as routine, commoditized, and undeserving of ever-increasing hourly rates. The practice of law is no longer a genteel profession in which attorneys are viewed as skilled artisans, trusted advisors, and deep thinkers, who can take all the time needed to deliver a (near-)perfect work product. Feeling client pressure to be more efficient, legal professionals regularly use innovative technologies in order to meet client expectations.⁹

When those expectations aren't met, clients don't hesitate to sue their former attorneys for legal malpractice. For attorneys and malpractice insurers, legal malpractice claims can result in massive economic damages, resource drains, and reputational harm. Despite significant transformations in nearly every other aspect of the legal industry, the approach to preventing, predicting, assessing, and resolving malpractice claims hasn't really changed. Malpractice insurers and their law firm clients continue to take an old-fashioned approach when it comes to legal professional liability (LPL). LPL industry experts have confirmed that most legal malpractice insurers aren't yet leveraging advancements in technology and legal analytics to predict risk areas.¹⁰ Instead, LPL carriers primarily react to actual events or use the broad brush of simple demographics to set rates. Consequently, the "all-in" malpractice costs for insurers and law firms continue to escalate, even though

⁸ For a discussion of how chief legal officers can leverage new developments to keep legal fees reasonable, see generally 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).

⁹ These innovative technologies include contract generation and review software; legal analytics tools; practice management platforms; document management systems; timekeeping and billing software; and eDiscovery tools, among others. For over two decades, Robert Ambrogi, an attorney and journalist, has been writing about the LegalTech industry on his website. *LAWSITES*, <https://www.lawsitesblog.com/> [<https://perma.cc/XD86-7LXD>] (last visited Nov. 6, 2020). That website is an excellent resource to keep abreast of innovations in the LegalTech industry.

¹⁰ As part of our research for this article, we conducted hour-long interviews with over a dozen executives directly involved in the LPL industry as LPL carrier executives, underwriting experts, claims executives, LPL brokers and consultants, and risk management partners at law firms. Special thanks go to David Bell, Steve Couch, Henry Dinger, Joe McCarthy, Douglas Richmond, Todd C. Scott, and Sharon Stuart, along with a few other interviewees who wished to remain anonymous.

risk and costs should be decreasing.¹¹ This is the wrong result for everyone directly or peripherally involved in the legal industry and, more specifically, the wrong result for the LPL industry as a whole.¹²

This paper posits that a data-driven approach to legal professional liability will reduce the overall cost of malpractice claims, thus helping law firms to recognize potential pressure points before those intimations of problems become full-blown blisters. Part I analyzes the underpinnings of malpractice claims. Part II discusses how malpractice insurers and their law firm clients have historically assessed, underwritten, and resolved malpractice claims. Part III explains why historical malpractice metrics fall short. And Part IV proposes a new data-driven analytic schema by which malpractice claims might be predicted, managed, assessed, and resolved.

¹¹ To make matters worse for LPL carriers, many LPL industry experts indicated that the underwriting profit margin for LPL carriers is razor-thin, often as low as five percent (5.0%), leaving them with the challenge of having to rely predominantly on investment income to generate their desired economic results. *See supra* note 10.

¹² *See, e.g., Lawyers Professional Liability Insurance Claims Grow in Severity, Complexity, Cost*, INS. J. (May 31, 2019), <https://www.insurancejournal.com/news/national/2019/05/31/527978.htm> [<https://perma.cc/8K5V-VUDB>] (discussing the growing complexity and higher costs associated with defending legal malpractice claims); HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS 71 (2018) (showing, in Figure 4.1, that the annual claim rate for large firms is approximately 7.5 out of every 1,000 lawyers); *id.* at 121–22 (estimating that large firms spend \$570 million per year to pay and defend malpractice claims). As Kritzer and Vidmar note,

ALAS [Attorneys Liability Assurance Society] offers its members policies with per-claim limits starting at \$10 million and going as high as \$75 million. Premiums are not experienced based. Rather, all members of ALAS pay the same rate per lawyer for a policy with a specific limit and a specific “self-insured retention” (SIR). A[] SIR operates similarly to a deductible with one key difference. The insured must expend the SIR before the insurer steps in and starts to pay; in a contract with a deductible, the norm in the solo/small firm market, the insurer usually will recoup the deductible from the insured after paying the claim and the defense costs. The per-claim SIR with ALAS ranges from a minimum of \$175,000 up to a maximum of \$5 million. In 2015, a policy with the lowest claim limit had a premium of \$5,075 per lawyer if the SIR was \$175,000; the premium declined to \$3,128 with a \$1 million SIR and to \$1,450 with a \$5 million SIR. The comparable figures for a policy with a claim limit of \$50 million were \$9,398, \$6,444, and \$4,128, respectively; for a policy with the maximum claim limit of \$75 million, the figures were \$10,664, \$7,594, and \$5,225, respectively.

Id. at 45. *See generally* Attorneys Liability Assurance Society, <https://alas.com> [<https://perma.cc/EYZ5-FDMK>] (last visited Nov. 27, 2020).

I. UNDERPINNINGS OF MALPRACTICE ACTIONS

As with virtually every other aspect of the law, the basis for a legal malpractice claim requires the application of law to a set of facts. We will first discuss the types of errors and fact patterns giving rise to a legal malpractice claim and then address how several theories of law determine malpractice liability.

A. Legal Malpractice Errors

An infinite number of fact patterns could form the factual underpinnings of a legal malpractice claim. We've distilled all of these fact patterns into three types of errors indicating breaches of duties owed to clients by their lawyers. First, there are substantive legal errors, such as giving incorrect legal advice, doing exceptionally sloppy work (like missing a statute of limitations or other important deadline), and engaging in other actions that fall below the standard of care. Most substantive legal errors will reflect on an attorney's competence and diligence. Next, there are administrative legal errors, which include failing to identify and resolve conflicts of interest, faulty withdrawal from representation, failure to transfer client files, and improper commingling of funds. Administrative errors usually relate to poor workflow processes at law firms, insufficient client communications, and ineffective internal controls and governance measures. Worst of all are intentional wrongdoings, such as billing fraud, misappropriation of client funds, frivolous litigation, and outright dishonesty, all of which will trigger malpractice claims or worse.

B. Malpractice Theories of Liability

In countless cases and treatises, courts and legal experts have explained the complicated principles of professional ethics and legal professional liability, and we're not going to rehash them here.¹³ For purposes of this article, we'll offer a highly simplified and abbreviated version of the elements of a legal malpractice action under several different legal theories. Whether a claim is grounded in professional negligence, the law of fiduciaries, or contract law, there are four fundamental elements required to establish a *prima facie* malpractice action:¹⁴

¹³ For an in-depth discussion of the law of legal professional liability, see RONALD E. MALLIN, *LEGAL MALPRACTICE* (2020 ed.), a five-volume, 9088-page treatise viewed as the leading authority on the topic.

¹⁴ See, e.g., *In re 35th & Morgan Dev. Corp.*, 510 B.R. 832, 848 (Bankr. N.D. Ill. 2014) ("In an action for legal malpractice the plaintiff must plead and prove that: the defendant attorney

- **Duty Owed.** A lawyer-client relationship has been established, giving rise to a legal duty owed by the lawyer to the client.¹⁵ In nearly every jurisdiction, the lawyer-client relationship triggering a lawyer's duty arises when a client seeks legal representation and advice or has formally engaged counsel.¹⁶
- **Violation.** Not every error made by a lawyer equates to malpractice. There must be a violation of a standard of professional conduct that is the baseline for acceptable professional behavior.
- **Causation.** For a legal malpractice claim to be valid, an aggrieved client must prove that the lawyer's violation or error caused the damages.¹⁷
- **Damages.** An aggrieved client must prove actual damages.¹⁸

1. Civil liability for professional negligence

Against this backdrop, it's important to understand what does and doesn't "count" to establish a standard of care associated with civil liability for professional negligence or legal malpractice. A state's ethics rules provide standards for professional discipline by the entity regulating lawyer conduct.¹⁹ The violation of a state's ethics rules can't form the basis of a

owed the plaintiff a duty of due care arising from the attorney-client relationship; that the defendant breached that duty; and that as a proximate result, the plaintiff suffered injury in the form of actual damages. Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client.") (quoting *Governmental Interinsurance Exch. v. Judge*, 850 N.E.2d 183, 187 (Ill. 2006)).

¹⁵ 1 MALLIN, *supra* note 13, § 8:12.

¹⁶ *Id.* Note that there are some ethical duties owed to potential clients. See MODEL RULES OF PRO. CONDUCT r. 1.18 (AM. BAR ASS'N 2020) ("Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information . . ."). Other duties flow to former clients. See, e.g., *id.* r. 1.9 (discussing how lawyers and their present or former firms are constrained in using information about former clients).

¹⁷ See 1 MALLIN, *supra* note 13, § 8:20 ("A basic tenet of any cause of action, no matter the legal theory, is that the alleged wrongful conduct of the attorney must be a cause of the plaintiff's injury.").

¹⁸ See 3 *id.* § 21:1 ("Although damages are an essential element of a cause of action for legal malpractice, there are jurisdictional differences about whether nominal damages will suffice. If actual damages are required, the courts agree that the fact of damage cannot be left to speculation.").

¹⁹ See, e.g., NEV. RULES OF PRO. CONDUCT r. 1.0A(c) (2019) ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."); *id.* r. 1.0A(d) ("Violation of a Rule should not itself give rise to a cause of action

client's malpractice action: State ethics rules only relate to the state's own ability to discipline those licensed to practice in the jurisdiction. A state's licensing authority can reprimand, suspend, or even disbar a lawyer who has violated the ethics rules.²⁰ Even though a violation of the state's ethics rules doesn't give a plaintiff a free pass for winning a malpractice suit, a violation of the ethics rules "may be evidence of breach of the applicable standard of conduct" as they provide industry accepted evidence of the standard of care.²¹

2. Breach of fiduciary duty²²

Not only may a lawyer be disciplined for a violation of the ethics rules or sued for negligence, but she may also be sued for a breach of her fiduciary duty to her client. As CJS explains:

The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with the client and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity. The nature of the relationship between attorney and client is highly fiduciary as it consists of a very delicate,

against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.") For a more general version of the ethics rules, see the guidance of the MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

²⁰ See, e.g., *Ethics FAQs*, ST. BAR OF NEV., <https://www.nvbar.org/member-services-3895/ethics-discipline/ethics-faqs/> [<https://perma.cc/9NHP-KMNU>] (last visited Nov. 22, 2020) (listing forms of discipline that Nevada lawyers face for violating state ethics rules).

²¹ NEV. RULES OF PRO. CONDUCT r. 1.0A(d) (2019); MODEL RULES OF PRO. CONDUCT pmbl. [20] (AM. BAR ASS'N 2020).

²² Claims for breach of fiduciary duty closely resemble professional negligence claims, but they differ when it comes to procedural requirements (e.g., statutes of limitations) as well as available remedies. For instance, "[a] lawyer who has acted with reasonable care is not liable in damages for breach of fiduciary duty, but *other remedies* such as disqualification, restitution, and injunctive or declaratory relief may be available." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (AM. L. INST. 1998) (emphasis added). As a result of the legal distinction between breach of fiduciary duty and professional negligence, our proposed "Malpractice Markers," *infra* Section IV.C., likewise acknowledges the distinction, separating out a unique "Fiduciary Risk" marker.

exacting, and confidential character and requires the highest degree of fidelity and good faith. The fiduciary duty of an attorney extends both to current clients and former clients and is broader in scope than a cause of action for legal malpractice. Fiduciary duties created by an attorney-client relationship may be breached even though the formal representation has ended.²³

In fulfilling a fiduciary duty to her client, an attorney “must serve the client’s interests with the utmost loyalty and devotion.”²⁴

As with malpractice cases, plaintiffs can’t link the violations of the ethics rules directly to the violation of the lawyer’s fiduciary duties, but again, the ethics rules “may evidence standards of care, and thus, the court may look to the rules to determine whether an attorney failed to adhere to a particular standard of care and thus breached . . . her fiduciary duty to a client.”²⁵

3. Breach of contract

Add to all of these potential repercussions the garden-variety breach of contract claim, which seeks a remedy for a failure to perform in accordance with the client-lawyer engagement letter. For example, if the engagement letter promises to let the client know of impending budget overruns and the lawyer doesn’t do so, that’s a breach of contract.²⁶ If the engagement letter promises “best efforts,”²⁷ then attorney sloppiness is a breach as well. Our brief survey of the potential consequences for bad lawyer behavior gives you a feel for how that misbehavior can lead to devastating consequences, not just for the lawyer, but also for her law firm.²⁸

²³ 7A C.J.S. *Attorney & Client* § 344 (2020) (footnotes omitted).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, e.g., *Sample Engagement Letters*, S.C. B., www.scbbar.org/media/filer_public/d6/08/d6083090-d65d-4f6a-b64a-8b08ef359836/sample_engagement_letters_sample_1.pdf [<https://perma.cc/GG6C-K2X9>] (last visited Nov. 7, 2020) (“We will advise you if fees will be significantly higher than this estimate. At such time, you may decide to restrict the scope of our efforts or we may make other adjustments.”).

²⁷ See *id.* (“You will appreciate we can make no guarantee of a successful conclusion in any case. However, the attorneys of this firm will use their best efforts on your behalf.”).

²⁸ For the quintessential tale of the consequences flowing to a major law firm for the failure of one of its partners, see generally Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98 (2007) (reviewing MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004)). Law firms must supervise their attorneys (and their non-attorney staff); see, for example, MODEL RULES OF PRO. CONDUCT r. 5.1, 5.3 (AM. BAR ASS’N 2020). For an example of a lawsuit encompassing, among other things, malpractice, breach of contract, and breach of fiduciary duty, see Debra Cassens Weiss, *Lawsuit Accuses Morrison & Foerster of a ‘Billing Feeding*

II. BIG DATA AND STATISTICAL SCIENCE IN THE INSURANCE INDUSTRY

A. Overview

For decades, the insurance industry has run on internal data generated from customer application forms, claims data, emails, and internal notes.²⁹ Insurers are now mining externally commissioned data from third-party research organizations and are finding a treasure trove of information from the public record (bankruptcies, judgments, foreclosures, and criminal records) and even from social media sources in order to generate new underwriting metrics.³⁰ Without question, unstructured raw data abounds. A daily challenge for insurers is transforming raw data into structured data and, ultimately, into viable business intelligence.

One can add to the volume and variety of primary data that are actively sought by insurers even *more* data that are being passively captured via telematics,³¹ monitoring equipment, and other technological applications; indeed, the possibilities for data usage in the insurance industry seem endless. In most lines of coverage, insurers have been leveraging data to better understand consumer behavior, to anticipate preferences and risks, to expedite the application process, to improve claims management and

Frenzy, A.B.A. J. (Feb. 20, 2019, 12:05 PM), www.abajournal.com/news/article/suit-accuses-morrison-foerster-of-a-billing-feeding-frenzy [<https://perma.cc/24M4-59VL>].

²⁹ Ins. Nexus, *External Data in Insurance – Part I*, REUTERS EVENTS: INS., <https://www.reutersevents.com/insurance/analytics/external-data-insurance-part-1> [<https://perma.cc/VP2R-5Z9S>] (last visited Nov. 22, 2020).

³⁰ See, e.g., Herb Weisbaum, *Data Mining Is Now Used to Set Insurance Rates; Critics Cry Foul*, CNBC (Apr. 16, 2014, 11:29 AM), <https://www.cnbc.com/2014/04/16/data-mining-is-now-used-to-set-insurance-rates-critics-cry-fowl.html> [<https://perma.cc/26QC-WNG4>] (describing “price optimization,” which is the insurance industry’s practice of using customer data to raise rates for individuals likely to accept a rate increase but not for those who are more likely to shop around than to pay a higher rate).

³¹ The term

[t]elematics refers to the use of wireless devices and “black box” technologies to transmit data in real time back to an organization. Typically, it’s used in the context of automobiles, whereby installed or after-factory boxes collect and transmit data on vehicle use, maintenance requirements or automotive servicing. Telematics can also provide real-time information on air bag deployments or car crashes and locate stolen vehicles by using GPS technology. In addition, telematics can serve as the platform for usage-based insurance, pay-per-use insurance, pay as you drive (PAYD) insurance, pay how you drive (PHYD) programs for fleet insurance, or teen driving programs for retail business.

Telematics, GARTNER: INFORMATION TECHNOLOGY GLOSSARY, <https://www.gartner.com/en/information-technology/glossary/telematics> [<https://perma.cc/6APQ-VJPH>] (last visited Nov. 7, 2020).

“market[] effectiveness by tailoring products to individual preferences,”³² and to reduce claims leakage, which is the difference between what a carrier should have spent on a claim if that claim had been managed efficiently and what the carrier actually spent resolving the claim.³³

“Big data” provides insurers with invaluable insights into all facets of their business operations. From an operational perspective, data are helping insurers identify trends, anomalies, competitive edges, and business challenges so that insurance executives can craft strategic plans and implement cutting-edge operational tactics for their organizations.³⁴ In many coverage lines, insurers have leveraged big data in their underwriting operations to more accurately price and incentivize risk-reducing behaviors. For example, insurers calculate smoker vs. non-smoker rates for health and life insurance, offer “safe driver” discounts for auto insurance premiums, and reduce homeowner’s insurance premiums for residences with a connected home security system.³⁵ As a result of its commitment to data, the insurance industry benefits from improved profitability via more accurately assessed risk.³⁶

The big data trend shows no signs of slowing in the insurance industry. The insurance industry spent roughly \$2.4 billion annually on gathering and using big data in 2018, and that amount is expected to

³² *Big Data*, NAT’L ASS’N INS. COMM’RS: CTR. FOR INS. POL’Y & RSCH. (Mar. 27, 2020), https://content.naic.org/cipr_topics/topic_big_data.htm [<https://perma.cc/N7KW-9WYX>].

³³ VIJAI GANESH, INFOSYS, *BIG DATA ANALYTICS: IT’S TRANSFORMATIONAL IMPACT ON THE INSURANCE INDUSTRY 2* (2018), www.infosys.com/industries/insurance/white-papers/documents/big-data-analytics.pdf [<https://perma.cc/M38E-FWZ5>].

³⁴ Christopher Henry, *How Big Data Is Changing the Insurance Industry*, MEDIUM (Mar. 12, 2020), https://medium.com/@chrishtopher.henry_38679/how-big-data-is-changing-the-insurance-industry-293bb243a820 [<https://perma.cc/UT4M-3V9Z>].

³⁵ Barbara Marquand, *Life Insurance for Smokers vs. Quitters: When Are You a Nonsmoker?*, NERDWALLET (Apr. 30, 2015), <https://www.nerdwallet.com/blog/insurance/life-insurance-nonsmoker/> [<https://perma.cc/92U3-NPTF>]; Paul Stenquist, *Letting Your Insurer Ride Shotgun, for a Discounted Rate*, N.Y. TIMES, (July 16, 2020), <https://www.nytimes.com/2020/07/16/business/car-insurance-app-discounts.html> [<https://perma.cc/T9R6-NT3K>]; *Insurance Discounts for Using Alarm Systems to Protect Your Home*, SAFETY.COM (Jan. 13, 2020), <https://www.safety.com/insurance-discounts-for-using-alarm-systems-to-protect-your-home/> [<https://perma.cc/9DFU-KR6A>].

³⁶ As our friend Bernie Burk put it,

In the ordinary course of competition . . . that ought to translate to a very significant degree to lower rates for lower-risk insureds. And . . . better understanding in the legal industry can lead to better risk management, in the sense of policies and practices that should tend to reduce the number, severity, and cost of claims. How much of those savings end up in the insurers’ pockets vs. the insureds’ pockets is one of those things [that] economists debate long after everyone else has dozed off.

Comment from Bernard A. Burk, Consultant, to authors on an earlier draft of this article (Sept. 28, 2020) (on file with authors).

skyrocket to \$3.6 billion by next year.³⁷ For anyone doubting the effect of big data on the insurance industry, the emergence of an entire vertical segment in the information technology industry called “InsurTech” affirms that innovative technologies, particularly data analytics tools, will be a cornerstone of the insurance industry for years to come.³⁸ The appetite for data in the insurance industry is insatiable.

B. Amplifying Demographic Data with Behavioral Data

Policy holder segmentation is one of the most fundamental practices in the insurance underwriting world. It enables insurers to accurately and cost-effectively gauge an insured’s risk profile.³⁹ Until just recently, segmentation methodologies used by insurance underwriters have focused on demographic factors (age, gender, marital status, income, geography, and so forth) as the stalwart metrics guiding the evaluation of underwriting risk.⁴⁰ Demographic data was the best (and only) way for insurers to establish a risk profile. But as most insurers will attest, it is not uncommon for insureds who have identical demographic criteria to behave in a radically different manner. Such behavioral differences do not invalidate the use of demographics for underwriting purposes. Demographics are an excellent starting point. But the limitations, variables, and unpredictability inherently associated with relying solely on demographics have underscored the need for insurers to find a more sophisticated solution, using underwriting factors tailored to specific current and potential policyholders. Today, underwriting experts understand the limitations of demographic segmentation and seek best-in-class solutions.

Enter behavioral data.⁴¹ Behavioral data are data generated by, or in response to, an individual’s activities, reactions, preferences, and habits.⁴² By uncovering how individuals act and why, behavioral data enables insurers to predict more accurately how their policyholders are likely to act in the future and to assess the risks posed by those behaviors. Sources of behavioral data

³⁷ *Big Data*, *supra* note 32.

³⁸ *This is InsurTech’s Moment. Will Insurers Seize the Opportunity?*, PwC, <https://www.pwc.com/us/en/industries/financial-services/library/insurtech-innovation.html> [<https://perma.cc/85XT-LAQS>] (last visited Nov. 7, 2020).

³⁹ DELOITTE, ADVANCED ANALYTICS AND THE ART OF UNDERWRITING: TRANSFORMING THE INSURANCE INDUSTRY 4 (2007), www.the-digital-insurer.com/wp-content/uploads/2014/09/326-Deloitte_FSI_AdvancedAnalytics.pdf [<https://perma.cc/9984-BVS2>].

⁴⁰ MARK CARR, SOUTH STREET STRATEGY GROUP & AMY MODINI, CHADWICK MARTIN BAILEY, A NEW APPROACH TO SEGMENTATION FOR THE CHANGING INSURANCE INDUSTRY 2 (2012), https://www.cmbinfo.com/cmb-cms/wp-content/uploads/2012/03/HealthDoc_FINAL.pdf [<https://perma.cc/GEE6-CGVW>].

⁴¹ ERIC BENJAMIN SEUFERT, FREEMIUM ECONOMICS: LEVERAGING ANALYTICS AND USER SEGMENTATION TO DRIVE REVENUE 47–82 (Andrea Dierna ed., 2014).

⁴² Shane Greenstein, *Behind the Buzz of Behavioral Data*, 35 IEEE MICRO 88, 88 (2015).

include websites, mobile devices, software systems, marketing automation systems, medical equipment, call centers, help desks, and billing systems. Behavioral data can be generated from individuals, businesses, or individuals within a business, but behavioral data can always be tied back to a single end-user and is typically captured as an “event.” For underwriting purposes, insurers now supplement historical, internal demographic data with behavioral data from external, technologically enabled data sources. Behavioral data can be used to generate better coverage solutions because insurers have better predictive insights into the relative risk of underwriting an individual policy in the future policy term. Many lines of coverage already are capturing and leveraging behavior data in ways never before imagined.

C. The Auto Insurance Paradigm – Behavioral Data Comes to the Forefront

To acquaint readers with a close analog for how behavioral data, fueled by innovative technology, could be used in the legal malpractice context, let’s examine the underwriting process for automobile insurance and how it’s evolved. It used to be that automobile insurance and the related premiums were largely based on simple factors.⁴³ Historically, the information used by auto insurers to gauge underwriting risk included only the application information, driver demographics, driver history, and vehicle history.⁴⁴ This information was fed into the insurer’s rating system to produce an underwriting rating or score, and then the insurance company would use those variables to determine insurability and the size of the premium.⁴⁵

Even as we have moved into the big data era, the information embodying “legacy” auto insurance underwriting factors surely remains relevant; however, innovative technologies, like telematics,⁴⁶ that surface behavioral trends have revolutionized the underwriting criteria for auto

⁴³ Cf. Josh Anish, *11 Things Car Insurance Companies Don’t Want You to Know*, MARKETWATCH (Nov. 2, 2019, 1:42 PM), www.marketwatch.com/story/11-things-car-insurance-companies-dont-want-you-to-know-2019-10-29 [<https://perma.cc/4DXZ-GB3M>] (demonstrating that legacy driver-based criteria have expanded to include prior claims, credit score, marital status, job status, and education level).

⁴⁴ *Insurance Experts Explain the Main Demographic Factors That Influence Car Insurance Rates*, BUS. INSIDER: MKTS. INSIDER (Nov. 19, 2018, 8:00 AM), <https://markets.businessinsider.com/news/stocks/insurance-experts-explain-the-main-demographic-factors-that-influence-car-insurance-rates-1027738423> [<https://perma.cc/PH48-YQW3>]; *Insider Information: How Insurance Companies Measure Risk*, INSURANCECOMPANIES.COM, <https://www.insurancecompanies.com/insider-information-how-insurance-companies-measure-risk/> [<https://perma.cc/L8KU-6TZP>] (last visited Nov. 22, 2020).

⁴⁵ *Insurance Experts Explain*, *supra* note 44.

⁴⁶ See *Big Data*, *supra* note 32 (discussing the use of telematics).

insurance.⁴⁷ For the past decade or so, our vehicles have been running on a plethora of advanced sensors and other data-collecting and data-transmitting technologies that allow for real-time communications and data sharing. Advanced technologies have transformed what used to be a moving bucket of bolts into a data sponge. These new telematic technologies monitor and report on an automobile's mechanical performance, augmenting significantly the "vehicle history" part of the underwriting equation.⁴⁸ More important for purposes of auto insurance underwriting, premiums, and claims, these technologies also monitor driver behavior, driving patterns, and automobile usage trends.⁴⁹ Sensors capture a car's speed, brake application, airbag deployment, seatbelt use, steering angles, A/V usage, and similar factors.⁵⁰ The captured data is not just limited to vehicle performance but includes personal information, too, such as driver weight, music tastes, and places visited, including fast-food drive-throughs.⁵¹ Rather than relying solely on demographic data (application forms and driving history), insurers can leverage behavioral data by "watching" a driver operate a vehicle for a little bit and determining an underwriting score based upon the driver's actual driving history.⁵² Then, in a more fulsome underwriting exercise, insurers can take a single driver's metrics and compare an individual's driving behavior with a larger pool of data to correlate behavior and risk. Newfangled underwriting

⁴⁷ See, e.g., Stenquist, *supra* note 35 (describing telematics as "like the Elf on the Shelf, but for car insurance. Call it the mole on the console.").

⁴⁸ *How Telematics May Help You Save Money on Car Insurance*, ALLSTATE (last updated Aug. 2020), <https://www.allstate.com/tr/car-insurance/telematics-device.aspx> [<https://perma.cc/KSA8-U3BZ>]; *How Does Telematics Work?*, VERIZON CONNECT (last updated Oct. 29, 2019), <https://www.verizonconnect.com/resources/article/what-is-telematics/> [<https://perma.cc/P9NV-HRJU>].

⁴⁹ *How Telematics May Help You*, *supra* note 48.

⁵⁰ Stenquist, *supra* note 35; *How Does Telematics Work?*, *supra* note 48.

⁵¹ Geoffrey A. Fowler, *What Does Your Car Know About You? We Hacked a Chevy to Find Out*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/technology/2019/12/17/what-does-your-car-know-about-you-we-hacked-chevy-find-out/> [<https://perma.cc/J3AA-56D3>]; Stephanie Voelker, *Debunking the Top 10 Vehicle Tracking Myths*, GEOTAB (Nov. 9, 2017), <https://www.geotab.com/blog/top-myths-misconceptions-related-to-telematics/> [<https://perma-cc/M8MT-LH84>]. A car can generate 20 to 200 gigabytes a day, according to some estimates. The data trove in the hands of car makers could be worth as much as \$750 billion by 2030, the consulting firm McKinsey has estimated. But consumer groups, aftermarket repair shops and privacy advocates say the data belongs to the car's owners and the information should be subject to data privacy laws. Stephen Gossett, *IoT in Vehicles: A Brief Overview*, BUILT IN (Dec. 13, 2019), builtin.com/internet-things/iot-in-vehicles [<https://perma.cc/H7TQ-R3FJ>].

⁵² *Snapshot Privacy Statement*, PROGRESSIVE (last updated July 21, 2020), www.progressive.com/support/legal/snapshot-privacy-statement/ [<https://perma.cc/7UPF-8EEF>]; *Privacy Policy*, ROOT INS. (last updated Apr. 1, 2020), www.joinroot.com/privacy-policy [<https://perma.cc/QZ24-7ZQZ>].

scores emanating out of driving behavior, mileage, and other metrics are realities in this highly innovative arena.⁵³

In the context of auto insurance, insurers have augmented and improved the “old school” approach with new technologies that unearth behavioral trends. It stands to reason that it is only a matter of time before the insurance industry implements the “connected car” paradigm across all lines of business. Like the auto insurance line of coverage, underwriting metrics are becoming significantly more individualized, sophisticated, and data-driven in property and casualty insurance, health insurance, and life insurance, among others. We think that LPL coverage is a prime area for mimicking the approach seen in auto insurance underwriting, but the LPL area is sorely lagging behind underwriting advances in other insurance lines. We don’t just think that it’s a good business idea to bring LPL into the modern era; we think that it’s vital to the survival of the LPL industry and its lawyer-customers. In the next sections, we trace the current state of play in the legal malpractice underwriting scene and explain how smart data analytics tools can drive better LPL underwriting metrics by individualizing an attorney’s malpractice risk profile.

D. Data Usage in the LPL Segment

Iris: Sometimes in order to see the light, you have to risk the dark.

— MINORITY REPORT (20th Century Fox 2002)⁵⁴

Given that the insurance industry uses ultra-sophisticated data analytics to inform most of its business lines, it boggles our minds that industry hasn’t brought a sophisticated level of behavioral data analysis into the mix to illuminate the legal malpractice line of business. We’re not willing to go so far as to say that legal malpractice underwriting metrics are stuck entirely in the

⁵³ In the vehicle insurance context, driving-related data captured via telematics is far from perfect but far better than nothing. For instance, a driver with a lead foot may not excessively exceed the speed limit during the week because she may live in a congested metropolitan area with a ton of traffic and never has a chance to drive fast during weekday rush hour like she does on weekends. A smoothing effect may blur her weekend speeding habit. Likewise, telematics cannot meaningfully account for the senior partner who stops at the club for a drink or two after work before heading home but, miraculously, never had his inexcusable behavior behind the wheel of a car detected (yet . . .) by telematic means. Without question, the partner’s behavior, in addition to being illegal, surely results in greater risk of motor vehicle collisions but could remain largely undetected. So, data analytics in the insurance realm is not a 100% accurate silver bullet, but it surely goes a long way to point insurers in the right direction when it comes to gauging underwriting risk posed by its insured.

⁵⁴ MINORITY REPORT (20th Century Fox 2002).

dark ages or that the legacy demographic metrics can't shed some light on legal malpractice risk, but the approach that LPL underwriters are using today is akin to the underwriting approach in auto insurance lines from the late 1900s. Much like in the auto insurance context, the “*real*” underwriting risk is mostly derived from behavioral data, not demographic data.

Indeed, the metrics used to calculate legal malpractice underwriting risk, assess claims exposure, and settle LPL claims seem shockingly unsophisticated. Fewer than a dozen factors are considered, and that paucity of data affords legal malpractice insurance little more than a perfunctory evaluation of risk.⁵⁵ For insurers, the baseline for evaluating a law firm's underwriting risk starts with an application that captures primarily, if not exclusively, demographic data.⁵⁶ The LPL application⁵⁷ captures little to no meaningful behavioral data, and in the big-data age, that gap strikes us as woefully inadequate.

None of the factors used to evaluate legal malpractice risk is *per se* wrong, and all of them should continue to be used. But as we discuss below, these factors have inherent predictive limitations, allowing for only broad conjecture. Indeed, this demographic data is a poor proxy for behavioral data, borne of guesswork and presumptions about behavioral patterns. We discuss below the demographic data being used by LPL insurers and why we think that such data have limited predictive value.

1. Practice area

As we studied how LPL insurers envisage risk factors, we discovered that they maintain a fairly consistent categorization of areas of practice that tend to produce the most claims. The riskiest practice areas are mergers and acquisitions, trusts and estates, tax opinions, patent law, securities, plaintiff-side medical malpractice, environmental law, and real estate.⁵⁸ The industry

⁵⁵ Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PRO. 41, 58–59 (2004).

⁵⁶ NANCY R. KORNEGAY & DAVID H. BROWN, PURCHASING LEGAL MALPRACTICE INSURANCE 3 (2011), http://www.texasbarcle.com/Materials/Events/10357/137641_01.pdf [<https://perma.cc/J2UA-DF9F>].

⁵⁷ Per our interviews, LPL industry experts have said that the typical application can be as little as five pages or as much as forty pages long. Several of them also indicated that LPL carriers struggle with striking a balance between wanting to know everything in the LPL application and causing applicants to want to walk away because of too many questions.

⁵⁸ Based on interviews; *see supra* note 10. *See also* MAGGIE WELK, KIMBERLE WILLIAMS & CRAIG GREUEL, ARGONAUT INS. CO., ARGO PRO PROFESSIONAL LIABILITY SERFF FILING 3 (2017) (SERFF Tracking Number ARGN-130932892) (explaining that Argo's insurance rates for attorneys are based in part on an “Area of Practice Factor” that can increase rates based on the frequency and severity of claims generally arising out of that practice area);

clearly views the type of practice area as relevant to legal malpractice risk, particularly when claims are predicated on substantive errors.⁵⁹ At first blush, one might be inclined to conclude that the “riskiest” areas of law are the most sophisticated, most complicated, and most prone to misapprehension of the law. This conclusion, though aspirational, simply is not true.

A lawyer’s natural hope is that LPL insurers look, in proper context, to the competence and behavior of an insured attorney when evaluating her legal malpractice risk profile.⁶⁰ They want legal malpractice risks and premiums to be based on actual competence and specifically observed behaviors, not on behavioral risk that is inferred from generalized information with no inherent predictive value. In reality, the degree of LPL risk ascribed to “high-risk” practice areas has little to do with legal complexity or professional competence required by a discipline of law. Indeed, risk ascribed to a practice area is based upon the industry-wide number of claims made in that area of law and the severity of those claims. There are certain fields of law where clients have proven to be more inclined to make a malpractice claim and seek comparatively higher damages than in other practice areas.⁶¹

News Release, Ames & Gough, Rising U.S. Legal Malpractice Claims Continue to Plague Law Firms (May 20, 2020), <https://www.amesgough.com/sites/default/files/A%26G%20News%20Release%20-%202020%20LPLI%20Claims%20Survey%20-%205-20-20.pdf> [<https://perma-cc/AQ2U-SDBQ>] (describing that, based on a survey of lawyers’ professional liability claims, business transactions and corporate and securities were the two practice areas experiencing the largest number of legal malpractice claims in 2019).

⁵⁹ According to several LPL industry experts, the risk profile of “boutique” law firms that specialize in a single area of practice is considerably lower than the risk profile for general practice law firms. When different attorneys in a single law firm practice in multiple areas of law, LPL carriers typically evaluate each “pocket” of practice area practitioners during the underwriting process. They are asking whether those practice groups represent a high combined level of expertise or are comprised of “dabblers” who are new entrants into the particular practice area. Similarly, a lawyer with a broad breadth of practice areas might be a prototypical “small town lawyer” or a dabbler looking for a more remunerative practice area. LPL carriers are now also grappling with the complicated issue of how to assign risk to attorneys who engage in a multi-jurisdictional practice.

⁶⁰ Almost universally, the LPL industry experts shared the view that their lawyer-insureds have only a superficial understanding of the LPL evaluation process.

⁶¹ *Top Practice Areas for Lawyers’ Malpractice Claims*, INS. J. (June 28, 2018) <https://www.insurancejournal.com/news/national/2018/06/28/493458.htm> [<https://perma.cc/V3DJ-YG67>]. As an example of severity of claims in a “high risk” area of law, consider the purchase and sale of a warehouse. Recording a deed of transfer or mortgage on the land records is far from complex. However, if a mistake is made during recording, that mistake more often than not jeopardizes the entire value sought by a client buying or selling the property and it’s not a mistake easily overlooked by the client given the magnitude of the harm. The substantive error did not materialize because of legal complexity. However, it did trigger a claim mainly because the error completely subverted a client’s objective and the resultant harm was catastrophic.

Additionally, the “area of law” factor assumes that attorneys always stay in their lane, practicing only within their area of expertise. That assumption is flat-out wrong. Dabbling in an area of law that falls outside of an attorney’s core competence gives rise to a significant number of claims and can run afoul of a lawyer’s professional duties.⁶² According to the American Bar Association’s “Profile of Legal Malpractice Claims: 2012–2015,” over 60% of all malpractice claims pertain to a practice area in which the accused attorney works for less than 20% of his or her time.⁶³ To put a finer point on matters, only about 7% of all legal malpractice claims are made against attorneys who practice in a single area of the law.⁶⁴ When attorneys dabble in non-core areas of law, the behavioral tendencies of those dabblers will skew underwriting data—to the detriment of attorneys who *do* stay in their lane as a specialized practitioner and to the detriment of those LPL insurers who insure them. Moreover, using the area of law as a factor is less meaningful when the legal malpractice results not from substantive errors but from administrative errors or intentionally wrongful behavior.⁶⁵ Those two categories account for one third of all malpractice claims.⁶⁶

2. Firm size

Unlike other professions, whose annual malpractice premiums are determined based on the firm’s annual revenue, malpractice premiums for law firms are calculated on a per-lawyer basis and depend on the number of attorneys in the firm.⁶⁷ There is some variation among insurers, but typically law firms are segmented into anywhere between five and nine size categories.⁶⁸ Some LPL carriers even evaluate the lawyer-to-support staff

⁶² American Bar Association Rules and every state impose a duty that “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PRO. CONDUCT r 1.1 (AM. BAR ASS’N 2020).

⁶³ William F. McDevitt, *Dabbling: A Dangerous Practice Even for Accomplished Attorneys*, LAW.COM (June 9, 2016, 12:00 AM), <https://www.law.com/thelegalintelligencer/almID/1202759657347/?slreturn=2020101113526> [<https://perma.cc/BR6R-Z7Y7>].

⁶⁴ *Id.*

⁶⁵ ABA STANDING COMM’N ON LAWYERS’ PRO. LIAB., PROFILE OF LEGAL PRACTICE CLAIMS 2012–2015, at 18 (2016) [hereinafter ABA STANDING COMM’N].

⁶⁶ *Id.*

⁶⁷ See, e.g., WELK ET AL., *supra* note 58, at 1 (making the point that Argo’s insurance rates for attorneys are based in part on the “Size of Firm Factor”).

⁶⁸ See, e.g., ARCH INS. CO., LAWYERS PROFESSIONAL LIABILITY PROGRAM: GENERAL RATING RULES 4, 6 (2014) (segmenting firms into one of nine size categories); LAWGOLD, RATING GUIDELINES LAWGOLD LPL (ARIZONA) 4 (2010) (segmenting firms into one of six size categories).

ratio in an attempt to gain further insights into a firm's risk profile.⁶⁹ Solo practitioners and small firms (up to ten attorneys) account for over 75% of malpractice claims and thus pay the highest premiums per capita.⁷⁰ LPL insurers infer certain law firm and attorney behaviors based on law firm size. For instance, the LPL carrier metrics assume that larger law firms with more resources have better internal risk management controls⁷¹ and more reliable administrative procedures than do smaller firms.⁷² LPL insurers also assume that larger law firms will have attorneys whose expertise covers a sweeping range of practice areas, thereby reducing the instances of lawyers dabbling outside their core practice areas.⁷³ LPL insurers further assume that the behaviors of the overwhelming majority of lawyers in an Am Law 400 law firm risk mimic each other or, at least, do not vary significantly. Moreover, LPL insurers assume that larger firms are less risky because fewer claims are made against them than are made against smaller firms. In the eyes of the actuaries at LPL insurers, these size-based assumptions and the concomitant inferences about lawyer behavior are "true enough" to rely on firm size as an underwriting metric.⁷⁴

The assumptions may be correct or mostly correct, but they also have their limitations because the assumption that larger organizations pose a lower risk profile is far from unassailable. Certainly, larger law firms have the resources to implement greater risk controls, but firm politics and economics—and organizational bureaucracy—can undermine even the best risk mitigation initiatives. The "competence of large numbers" assumption also seems to be misguided. With throngs of people working on a high volume of matters and lots of task handoffs from professional to professional, mistakes inevitably happen. Indeed, it is just as possible that having more

⁶⁹ Per our interviews, the LPL experts indicated that a well-trained support staff is viewed positively in the LPL underwriting process (presumably because of their ability to curtail administrative risk) until the attorney-to-support staff ratio crosses a certain threshold, at which point LPL carriers presume that excessive support staff personnel are poorly trained and/or inadequately supervised.

⁷⁰ ABA STANDING COMM'N, *supra* note 65, at 14.

⁷¹ In reading an earlier draft, Nancy's friend Randy Gordon pointed out that risk management can, itself, create risk. As Randy explains, "every risk management form that is supposed to get filled out and/or signed by the client is evidence of malpractice when it doesn't get filled out or returned." E-mail from Randy Gordon, Partner, Barnes & Thornburg, to Nancy B. Rapoport, (Sept. 7, 2020, 6:52 PM) (on file with authors).

⁷² Randy Gordon also observed that the compensation systems in large law firms can cause "sometimes perverse incentives." *Id.* We agree wholeheartedly, and one of our future studies will compare the behavior in firms that use lockstep partner compensation with the behavior in firms that use an "eat what you kill" compensation system.

⁷³ As Bernie Burk reminded us, even BigLaw lawyers can dabble. They just have more people at the firm to help them think through issues that "dabblers" might face. Comment from Bernie Burk, *supra* note 36.

⁷⁴ Information gathered from author interviews. *See supra* note 10.

people in the equation creates a greater risk of malpractice errors rather than acting as a check and balance against malpractice.⁷⁵ The resources of larger law firms allow them to tamp down or mute problems so that they don't register on the radar screens of LPL insurers (or, more specifically, the insurers' actuaries). Finally, many solo practitioners are uninsured, which could mean that those solo practitioners who pose no malpractice risk are not counted in the actuarial analysis.⁷⁶ Simply put, the assumptions underlying the "size of firm" factor as an underwriting metric may not be as determinative as LPL insurers have assumed.

3. Geography

The state in which a law firm practices, as well as different locations within the state, contributes to a firm's malpractice risk profile.⁷⁷ Geography *per se* is a red herring because the real factor measured is the hourly rate that a firm charges for services rendered. Statistics show that firms that charge higher rates (usually in metro areas) typically see claims with a higher dollar value, but this correlation doesn't pertain to the frequency of claims made or the underlying basis for the claim.⁷⁸ In other words, LPL insurers are not focusing on the error/violation or causation elements of a malpractice claim but instead are focusing on the damages element.⁷⁹ We sympathize, because damages affect the magnitude of the payouts, but preventing the malpractice in the first place will also affect the magnitude of the payout. We see little, if

⁷⁵ It makes logical sense that more professionals in a law firm handling more matters increases the risk of something going wrong. With ethical rules imposing a duty of supervision and vicarious liability on law firm partners for the misdeeds and professional malpractice of colleagues, legal malpractice underwriters for larger law firms are keen to know how throngs of associates are supervised and whether a management committee or peer-review system exist. These types of management control measures are a baby step in the right direction towards the use of behavioral, not just demographic, data.

⁷⁶ See Scott R. Schaffer & Kyle P. Barrett, *Bare Naked Lawyers: Practicing Without LPL Insurance May Leave Attorneys Overexposed*, AON ATTORNEYS ADVANTAGE, <https://www.attorneys-advantage.com/Risk-Management/Bare-Naked-Lawyers> [https://perma.cc/R6FJ-E9TS] (last visited Nov. 7, 2020) (stating that, for example, "a 2005 Texas survey found that . . . 63% of solo practitioners were uninsured"); Susan Humiston, *Practicing Law Without Liability Insurance*, MINN. ST. B. ASS'N: BENCH & B. MINN. <https://www.mnbar.org/resources/publications/bench-bar/columns/2019/10/02/practicing-law-without-liability-insurance> [https://perma.cc/95B6-T6DJ] (last visited Nov. 7, 2020) ("Illinois estimates that as many as 40 percent of solo lawyers are uninsured. In a 2017 survey in Washington, 28 percent of solo practitioners reported being uninsured.").

⁷⁷ See, e.g., WELK ET AL., *supra* note 58 (stating that professional liability insurance rates will vary based on state).

⁷⁸ Information gathered from author interviews. See *supra* note 10.

⁷⁹ An attorney practicing in Dallas, Texas is going to pay more than an attorney practicing in rural Nebraska. Some states, like New York, have multiple underwriting territories, with law firms in New York City paying more than attorneys in upstate New York.

any, correlation between geography and those behaviors that are likely to trigger a legal malpractice claim.

4. Claims history/step rating

“Claims made”⁸⁰ history is widely viewed as the most accurate predictor of future claims.⁸¹ Although claims history has undertones of behavioral data, it is almost entirely a quantitative criterion using, in most instances, a multivariate analysis. Typically, a “claim” will include any event reported to any insurance company with an incurred loss amount of \$5,001 or more.⁸² Claims history is segmented primarily by firm size,⁸³ number of claims over the past five years,⁸⁴ and total dollar amounts of all claims over the past five years.⁸⁵ Each of these claims history factors is ascribed a value

⁸⁰ An “occurrence” policy provides coverage for alleged incidents that occurred during the policy year irrespective of when the claim is reported to the carrier. A “claims-made” policy provides coverage for an incident that occurred during the policy period and was reported as a claim when the policy was in effect. When a claims-made policy becomes effective, the effective date, also known as the retroactive date, becomes a permanent part of the claims-made policy and remains the same each year the policy is renewed. A claims-made policy, when renewed, covers claims that come in during the policy year for incidents that occurred on or after the retroactive date. This is how an attorney can be covered for prior acts or incidents that are several years old.

⁸¹ Past and pending claims can affect not only the cost of a firm’s policy, but also eligibility for coverage.

⁸² “Incurred amount” includes reserve and payment for indemnity and expenses. When a claim has been reported but the claims reserve is unknown, five-twenty five percent of the demand amount may be used as the best estimate for the claim value. *See, e.g.,* ARCH INS. CO., *supra* note 68, at 4 (“For purposes of the additional charge, a ‘claim(s)’ [sic] means: any claim reported to any insurance company with an incurred loss amount of \$5,001 or more. Incurred amount includes reserve and payment for indemnity and expenses.”); LAWGOLD, *supra* note 68, at 4 (“For the purposes of the adjustment, losses will only be considered ‘claims’ if: i) loss and/or expense payments have been made in excess of \$5,000; or ii) an insurer has established a claim file and carries an open reserve in excess of \$5,000.”).

⁸³ *See* discussion *supra* note 68 and accompanying text.

⁸⁴ *See* ARCH INS. CO., *supra* note 68, at 4; LAWGOLD, *supra* note 68, at 4. Certain LPL insurers flatly deny coverage to firms with over five prior claims in the past five years.

⁸⁵ *See* ARCH INS. CO. *supra* note 68, at 5; LAWGOLD, *supra* note 68, at 4. One insurer has categorized claims liability into the following categories:

Severe Account has already experienced at least one loss with total case reported losses (including defense expenses) exceeding deductible by more than \$100,000.

Significant There is a possibility of payout exceeding the deductible by \$10,000 but not by more than \$100,000.

Material While there are established reserves for this account and payout may exceed the deductible, it is not anticipated to exceed the deductible by more than \$10,000.

that may increase or decrease an LPL carrier's so-called base rate. For example, a law firm that has had no claims made against it may receive a "claim-free" credit that decreases the base rate. Conversely, a law firm that has been the subject of many legal malpractice claims will see its base rate increased by a multiple based on "claims made."⁸⁶ A final quantitative wrinkle that arises in the context of the claim history is the "step rating" attributed to a lawyer.⁸⁷ A lawyer's step rating recognizes that newly minted attorneys generally have fewer clients and fewer prior acts, as compared to more seasoned attorneys. This makes the "prior acts" risk concomitantly lower.⁸⁸ Typically, an insurance carrier that uses the "step rating" methodology offers a reduced rate in the first five or six years of an LPL policy, after which time the attorney malpractice profile has reached maturity, ripening into the "typical" risk profile.⁸⁹

A considerable amount of quantitative analysis goes into "claims history," but we think that "claims" are misrepresented when the insurer relies solely on demographic data. First, there are unmade claims that could have or should have been made based on actual attorney (mis)behavior, but that were never counted because clients were unaware of the potential claim.⁹⁰ Second, in circumstances in which a client has become aware of a potential claim, many clients may choose not to pursue their claim against the law firm. Third, in circumstances in which a client has become aware of a potential claim and has opted to pursue it, the law firm and client may have agreed to resolve

Minimal There have either been no claims reported or claims reported have had no payout or a low possibility of ultimate payout.

VIRGINIA PUTZU & TONIA BURLEIGH, QBA INSURANCE CORP., LAWYERGUARD SERFF FILING Flex-8 (2018) (SERFF Tracking Number QBEC-131630592.)

⁸⁶ Even a high number of claims might not mean a high risk of large payouts. One LPL industry expert estimated that 75–80% of claims reported by lawyers to LPL carriers ended up with no action by the aggrieved party.

⁸⁷ In determining how to price the first year of coverage and succeeding renewals, the claims-made insurers' actuaries closely monitor statistical data reflecting the lag time between occurrences which create liability and the reporting of claims arising out of those occurrences. In addition, they study the impact of various economic factors on the value of claims during this lag time. From this data, they draw conclusions about the number of years likely to elapse before all of the claims arising out of any one "occurrence year" are reported and settled and the ultimate cost of defending and settling those claims. Then, they use these conclusions to establish rating factors to determine the cost of a claims-made policy as it renews each year. These rating factors are commonly referred to as "step rates" because they evolve in a stair-step pattern. See, e.g., *How Legal Malpractice Insurance is Priced*, OKLA. ATT'YS MUTUAL INS. CO., <https://oamic.com/step-ratings/> [<https://perma.cc/NCQ9-LCGN>] (last visited June 17, 2020) (discussing what step ratings are and how they work).

⁸⁸ On the other hand, the risk of a newer lawyer actually committing malpractice is likely to be higher. We both made many mistakes at the beginning of our careers.

⁸⁹ Information gathered from author interviews. See *supra* note 10.

⁹⁰ See *supra* note 82 (noting that it might not be immediately apparent that there is enough value to make a claim due to the concept of "incurred amount").

the claim without putting the LPL carrier on notice. Underreporting of claims strikes us as a meaningful limitation on the factor's accuracy.

Besides underreporting, claims history does not look to the underlying behavior giving rise to the claim. Except for the damages calculation ascribed to a claim, the actuarial methodology seems to treat all claims more or less identically. That can't be correct. By ignoring lawyer behavior, the merits of a claim, and its factual underpinnings as part of claims history, LPL insurers are using a blunt instrument to assess a complex problem when a surgical tool that considers behavior in the context of claims history would yield better risk assessments.

5. Client roster

A law firm's client roster can create additional malpractice risk. Clients that have unreasonable expectations for an attorney or for the outcome of their matter are more likely to make a malpractice claim. Client size and sophistication, as well as a client's proclivity to challenge its law firm's bill, alters the risk profile. Similarly, the number of law firms that have been previously employed by the client on the same matter is viewed as a high indicator of risk. *That* factor, we believe, is reasonably accurate, though sometimes the frequent switching of firms stems not from client dissatisfaction at all, but rather from a client's desire to keep her lawyer even after her lawyer has changed firms. Lateral movement of attorneys from firm to firm is commonplace today. It is not clear to us whether the firm turnover calculus accounts for a client who follows the same lateral lawyer from firm to firm.

6. Miscellaneous considerations

Malpractice risk is viewed as being higher (or lower) as a result of the absence (or presence) of loss-prevention programs, use of risk management practices, docket control measures, conflict of interest avoidance policies, and law-firm-imposed continuing legal education requirements.⁹¹ We agree that a systems approach to managing risk is a necessary underpinning, but having a good system in place is not the same thing as using that system.⁹²

Without question, LPL underwriters should continue to use the quantitative/demographic factors discussed above as indicia of risk. These factors are time-tested, and insurers will affirm that they have meaningful

⁹¹ Other factors not related to the risk posed by a lawyer or law firm that affect the cost of a policy include policy limits, deductibles, self-retention obligations, and additional claim defense expenses paid *outside* the policy limits.

⁹² One of us can't resist pointing to the "gate fails" of FAIL Blog: CHEEZBURGER: FAIL BLOG, <https://cheezburger.com/4882611968/security-fail> [<https://perma.cc/BW7X-SGQ2>] (last visited Nov. 22, 2020). The other one of us is indulging her here.

correlations to risk. That said, we're in the age of big data and must therefore ask: Are there other big-data-driven behavioral metrics that can better pinpoint LPL risk and that can be used to augment or even outweigh the legacy metrics? We think so.

III. WHY LEGAL MALPRACTICE METRICS NEED TO EVOLVE

Iris: It's funny how all living organisms are alike . . . when the chips are down, when the pressure is on, every creature on the face of the Earth is interested in one thing and one thing only. Its own survival.

— MINORITY REPORT (20th Century Fox 2002)⁹³

The prior two Parts paint a starkly contrasting picture between the sophisticated risk assessment data and metrics used in auto insurance underwriting and the rudimentary data and metrics used in LPL underwriting. At the risk of stating the obvious,⁹⁴ overlaying qualitative, behavioral data into the underwriting mix has brought auto insurance underwriting into the twenty-first century of big data. LPL insurance underwriting, on the other hand, seems to be stuck in the twentieth century, with antiquated risk assessments using only large-scale quantitative, demographic data.⁹⁵ For both the LPL segment of the insurance industry and for the legal industry as a whole, the use of unsophisticated underwriting metrics is a suboptimal approach. There are significant business imperatives and competitive drivers for both LPL insurers and law firms that should prompt legal malpractice insurers to begin to incorporate behavioral data into underwriting guidelines. Each segment has been given the mandate by clients to innovate and deliver greater client value.⁹⁶

In the insurance industry today, customers are the most disruptive force.⁹⁷ The leading insurers have found that their paramount mission must

⁹³ MINORITY REPORT (20th Century Fox 2002).

⁹⁴ Which has never stopped us.

⁹⁵ The specifics as to the operational and financial effect of using a combination of demographic data and behavioral data across the entire industry as a whole extends well beyond the scope of this article.

⁹⁶ See e.g., *Collaborative Defense for Your Legal Malpractice Claims*, ATT'Y PROTECTIVE, <https://www.attorneyprotective.com/legal-malpractice-claims> [<https://perma.cc/8KG9-NUCH>] (last visited Nov. 22, 2020) (providing an example of innovative products in the legal malpractice insurance sector).

⁹⁷ See JORDI MONTALBO & DAVID RUSH, DELOITTE LLP, A DEMANDING FUTURE: THE FOUR TRENDS THAT DEFINE INSURANCE IN 2020, at 3–4 (2019), www2.deloitte.com/content/dam/

be to emphasize policyholders' needs, preferences, and perceptions in nearly all aspects of their business and at every touchpoint throughout the customer's journey. The customer experience must be hyper-personalized because buyers of insurance—especially sophisticated, commercial buyers such as law firms—have never been more informed, more adept at comparative shopping, and more exacting. As we discuss below, hyper-personalization is now a customer prerequisite to be achieved through detailed data analysis, innovation, and modern digital capabilities.

As ironic as it may seem, the legal industry, which itself has been slow to change, is likely to drive the change in LPL underwriting metrics. The same pressure that law firms are feeling from their clients will undoubtedly funnel down to LPL insurers, who will feel change pressures from their own law firm clients. Clients are strongly pushing back on law firms with respect to their legal fees. Those legal fees have, in turn, been embedded within LPL coverage and rate cost structure. With the clients of law firms monitoring fees more closely, it is reasonable to expect law firms also to be more cost-conscious when it comes to the fixed cost associated with LPL premiums. If a law firm can urge an LPL carrier to use a more accurate and hyper-personalized set of underwriting metrics to lessen the malpractice risk profile and thus reduce premiums, it does not take a severe strain of logic to conclude that law firms will eventually do just that.⁹⁸

Financial transparency and clarity have been the rallying cry in the legal industry for several decades now. Its value holds true in the LPL industry as well. LPL underwriting guidelines and the weighting of the factors varies widely from carrier to carrier. Often, the underwriting guidelines are not published, and law firms have no way of truly understanding those guidelines.⁹⁹ Understandably, LPL insurers must set the price of premiums at a level that compensates them for the risk taken, but also at a level that fits within the budget of their law firm customer. Otherwise, the law firm will go elsewhere for coverage. Law firms surely deserve better guidance and information on how their risk profile is calculated, how they can reduce their malpractice risk profile, and how they can use enhanced self-governance to improve their LPL risk profile. When malpractice underwriting guidelines are a black box, risky law firms get lumped in with

Deloitte/uk/Documents/financial-services/deloitte-uk-insurance-trends-2019.pdf [https://perma.cc/55JH-YM9X] (describing why customers are the most disruptive force in the insurance business).

⁹⁸ Especially if the result is more money in partners' pockets because of the savings on LPL insurance premiums, because of fewer claim payouts, and because of improving the risk factors overall.

⁹⁹ See *supra* note 60 ("Almost universally, the LPL industry experts shared the view that their lawyer-insureds have only a superficial understanding of the LPL evaluation process.").

less-risky law firms, creating a tremendous amount of premium disparity. The less risky law firms are subsidizing the behavior of their riskier counterparts.

But how much data will law firms be willing to give their insurers? After all, bad drivers probably don't want the "mole on the console"¹⁰⁰ exposing their lead feet, their tailgating, or their other bad habits to insurers because their rates will go up. Law firms probably don't want their bad habits laid bare to LPL insurers, either. But the risks don't go away just because LPL insurers don't know about them. And those risks are expensive. Reducing the risk of malpractice can save law firms big bucks in the ordinary course of business, but especially when a law firm is in a transformative mode where, for instance, it is looking to grow attorney headcount, expand into new practice areas or geographies, or pursue the next "tier" of clients.¹⁰¹ In this regard, consider a law firm with a strategic growth initiative through lateral partner acquisitions. For that firm, it would be highly beneficial to know in advance how risky the addition of lateral lawyers will be for the firm.¹⁰² The epic bankruptcy case of Dewey & LeBeouf demonstrated the risk of adding laterals whose promises were mere fantasies.¹⁰³ And then, of course, there are the advantages to the clients.

As law firms are being pressured by clients to use technology and data to make the delivery of legal service better, faster, and cheaper, the firms are responding by leveraging their knowledge management repositories, document management systems, and billing data warehouses to deliver service offerings (and even product offerings) that involve mass customization and incorporate their clients' demands for efficiency and innovation.¹⁰⁴ So, too, will law firms demand this heightened standard from providers of LPL coverage. The trickle-down effect will come into play. When a law firm is uninsured, underinsured, or overcharged because premiums are not based on hyper-personalized malpractice risk factors, then

¹⁰⁰ Stenquist, *supra* note 35.

¹⁰¹ In just those cases that the two of us have reviewed, we've seen exposure in the hundreds of thousands of dollars *per firm*. That's not chump change.

¹⁰² Some firms are making data-driven choices in terms of adding laterals. In particular, Duane Morris has a process for gathering information about a lateral partner's book of business and has a deliberate onboarding plan to integrate lateral partners into the culture of the firm. HEIDI K. GARDNER & ANNELENA LOBB, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARV. BUS. SCH. CASE STUD. 9-414-022, at 12–13 (July 26, 2013).

¹⁰³ For a great read on the Dewey & LeBeouf debacle, see James B. Stewart, *The Collapse*, NEW YORKER (Oct. 7, 2013).

¹⁰⁴ See Caryn Devens, Teppo Felin, Stuart Kauffman & Roger Koppl, *The Law and Big Data*, 27 CORNELL J.L. & PUB. POL'Y, 357, 366 (2017) (describing new client services and tools enabled by the use of big data, including tools that "predict legal costs and case outcomes, manage data for regulatory compliance, and reduce document review costs").

the law firm's clients suffer.¹⁰⁵ Legal malpractice simply doesn't stop at the law firm level. Real money and the real lives of clients and other third parties are at stake when legitimate malpractice claims arise. LPL insurers and law firms must acknowledge the reality that their financial interests depend on clients who buy legal services. Thus, it is imperative to bring LPL underwriting into the twenty-first century. The next Part discusses the new data-driven, behavior-driven playbook on how to modernize LPL underwriting metrics.

IV. A NEW DATA-DRIVEN SCHEMA

Iris: The Pre-Cogs are never wrong. But, occasionally . . . they do disagree.

— MINORITY REPORT (20th Century Fox 2002)¹⁰⁶

The auto insurance paradigm affirms that powerful new data analytics technologies and novel uses of existing technologies enable insurers to leverage raw data in ways never before imaginable. Auto insurers use a driver's media system not just as road trip entertainment and the driver's GPS system not just as a map but also as a means to capture and extrapolate driver behavior, revolutionizing underwriting risk for every driver seeking auto insurance. Auto insurers have realized that raw data captured from disparate information sources and a multitude of technologies can be synthesized and transformed into meaningful behavioral data, which in turn can highlight predictive trends upon which new underwriting metrics can be built. For the auto insurance industry, the keys to success have involved recognizing the existence of the raw data and having the creative vision to repurpose technologies to surface behavioral trends and supplement demographic data. Every LPL industry expert that we interviewed craved additional data, particularly behavioral data, that could amplify the current criteria used in the LPL underwriting process.¹⁰⁷ For the LPL insurance industry, the keys to success likewise involve leveraging next-generation technology to transform raw data into hyper-personalized, behavioral underwriting metrics. This section discusses the raw data sources and how that raw data can transform the LPL underwriting process.

¹⁰⁵ For a cash-based business like a law firm, an inflated premium or an underinsured claim can have serious ramifications for the financial performance of the law firm. With more accurate underwriting metrics come greater fiscal predictability and better operational results for law firms.

¹⁰⁶ MINORITY REPORT (20th Century Fox 2002).

¹⁰⁷ Information gathered from author interviews. *See supra* note 10.

A. The Raw Data

In order to form a good foundation for a next-generation legal malpractice underwriting metric, raw data must have three vital qualities: (i) raw data should have independent usefulness and validity,¹⁰⁸ (ii) raw data should be accessible at scale,¹⁰⁹ and (iii) raw data should be capable of personalization or individualization. Legal billing data fit all of these qualities and form much of the foundation for our proposed LPL underwriting schema.

Each year in the United States alone, lawyers bill clients over \$300 billion.¹¹⁰ Until the early 1990s, when timekeeping and billing software became commonplace, law firms sent invoices to clients in paper format.¹¹¹ Whether in paper form or submitted through a digital platform, legal invoices are rich with raw, semi-structured data. In each invoice, a lawyer reflects, in a narrative entry, every task that he or she completes, typically in segments of one-tenth of an hour. For anyone who hasn't had the misfortune of reading a legal invoice, here's a sample time entry:

Date	Timekeeper	Hours	Rate	Description	Total
6/9/2020	E. Afferton	2.3	\$520	Analyze US 9,949,302 re: patent eligibility (0.4); Draft "Legal Analysis" part of Section 101 Alice Motion (1.6); Review curriculum vitae re: plaintiff's expert (0.3)	\$1,196.00

This is an example of a "good" invoice line item entry. It is clear, concise, (presumably) reflects accurately recorded time, and amply informs the client as to what tasks were undertaken and by whom, along with the associated cost. Sometimes, line-item narrative descriptions contain much more detail, which can be good until they become so wordy that they obfuscate what work has actually been performed.¹¹² 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

¹⁰⁸ We think that independent usefulness and validity is important because these factors negate the possibility of bias in the data and further helps to ensure accuracy.

¹⁰⁹ We believe that there is a tipping point where raw data is sufficiently voluminous to provide statistical relevance and scientific value. In an industry that generates at least \$300 billion in annual invoice data, volume and accessibility at scale pose no issue.

¹¹⁰ *Industry Revenue of Legal Services in the U.S. from 2011 to 2023*, STATISTA, <https://www.statista.com/forecasts/311177/legal-services-revenue-in-the-us> [<https://perma.cc/ZF4U-YD4B>] (last visited June 17, 2020).

¹¹¹ Stephen J. Sturgill, *New System Offers Easier and More Exact Billing*, NATIONAL L.J., October 17, 1994, at 13. Currently, we estimate that over \$300 billion in legal billing data is processed by law firm time and billing platforms and/or clients' e-billing platforms.

¹¹² See *infra* Section IV.B.2 and Section IV.B.3.

performed. Regardless of the clarity and quality of the narrative, every invoice line item offers data points that shine a light on what the lawyers and other billing professionals are doing. Those data also form the foundation of a legal professional's behavioral patterns.¹¹³

The sample invoice line item entry reflects a total charge of \$1,196 for three items of work performed by E. Afferton, all of which total 2.3 hours. This is just a *single* invoiced time entry for a single client by a single law firm timekeeper for, possibly, one-fourth of one timekeeper's workday.¹¹⁴ These data points scale quickly. Right now, there are probably more than 950,000 attorneys in private practice in the United States¹¹⁵ who are recording and billing time in a similar manner in approximately 1,300,000,000 to 1,500,000,000 line-item entries that can be analyzed every year.¹¹⁶ Most of these data can be easily accessed, because timesheets "live" in digital format on billing and e-billing platforms.

This invoice line-item data, which is inherently timekeeper-specific, is capable of even further individualization with the assistance of "legal spend" data analytics tools. When an individual timekeeper's professional biographical data, such as title, seniority, specialty, educational background, prior employers, and so forth are incorporated into an invoice line-item analysis, the results are hyper-personalized and powerful.

In essence, invoice line-item data, coupled with a timekeeper's professional biographical data, is transformed into something akin to the DNA of a matter or a legal professional. Out of this invoice-level DNA, hyper-personalized behavioral data can become a next-generation LPL

¹¹³ As we discuss below in Section IV.B.3, a vague, cryptically written narrative entry, such as "Analyze outstanding issues," "Attention to case strategy and client communications," or "Review file," informs our proposed LPL underwriting schema because while it sheds no light on what a legal professional did, it evidences a potential tendency for sloppy billing hygiene practices or even possible Rule 1.5 violations.

¹¹⁴ At some law firms, 2.3 hours is perhaps 1/6 of a person's workday.

¹¹⁵ See Sally Kane, *Working in a Private Practice Law Firm*, BALANCE CAREERS (Jan. 12, 2019) <https://www.thebalancecareers.com/law-firm-life-2164667> [<https://perma.cc/N3PD-P73P>] ("About 75 percent of the 1.3 million-plus licensed attorneys in the U.S. work in private practice. Lawyers are considered to work in private practice when they're part of a firm with two or more attorneys, or they have a solo practice.").

¹¹⁶ Let's extrapolate upon this type of invoice line item to understand the potential and power of raw billing data, even before it gets programmatically transformed into LPL malpractice risk factors. There are several ways to extrapolate. First, let's calculate based on an "hours worked" basis. Based on our industry statistics, the average hours worked per line-item entry is 1.1 hours. Assuming an annual 1,800 billable target, each of the 950,000 attorneys in private practice will record 1,636 time entries for a total of over 1,500,000,000 narrative entries just for the year 2020. If we assume that \$300 billion was billed by law firms on an hourly basis using line-item invoices where the average value per line item is \$225, then there are over 1,300,000,000 narrative entries that can be analyzed every year. Calculations on industry averages were made using Legal Decoder's data pool.

underwriting metric that examines risk not just by firm size or practice area but also by the type of lawsuit or specific transaction, calculates risk with respect to an individual or to groups of individuals within a law firm, and ties the risk to behavioral patterns.

B. Using Legal Analytics to Calculate Risk: The Six Malpractice Markers

Just as automobile insurers are using behavioral data to supplement demographic data, LPL underwriting will benefit by using, as part of its underwriting evaluation, our proposed analytic framework, which generates behavioral data from legal spend data. We're basing our proposed framework on our own experience, having reviewed millions of line-item entries in legal invoices from thousands of law firms and hundreds of thousands of legal professionals.

Although we know that every client matter is different, as are the invoices attached to each matter, we can mine a law firm's billing records for patterns of good or bad practices. Our analytic framework is meant to augment and amplify existing LPL underwriting standards, not to displace them. Indeed, there's no need for a wholesale change in business process or methods. The new behavioral metrics, which we'll call "malpractice markers," are simply an evolutionary step forward. We understand that this step is a giant step, not a baby step, but it's a necessary step. So, in a "pre-cog" world, what does our proposed analytic framework look like? How can insurers mine and categorize timesheet entries for predictive risk analysis, to help both the malpractice insurers and their insureds identify serious malpractice concerns before those concerns mature into full-blown problems?

We've identified the six major malpractice markers, in addition to some minor ones, that could help catch potential malpractice before it happens. Our proposed analytics framework employs a weighting methodology similar to that used by LPL insurers in their existing demographic risk factors.

1. Staffing efficiency

Malpractice risk increases when the wrong staffing is used on a project. In an optimally functioning legal environment, a legal professional handles tasks appropriate for his or her skill set in an industry-benchmarked amount of time. There are many dimensions to the concept of staffing efficiency.¹¹⁷

¹¹⁷ As a strategic priority, clients are identifying those tasks that are "commoditizable" in order to divert low-value, high-volume work from law firms to lower-cost alternative legal services providers.

One dimension relates to the seniority of a legal professional. We've encountered many situations in which the wrong level of professional performed a task: for example, senior partners performing tasks below their paygrade such as basic legal research¹¹⁸ or the converse, where very junior lawyers, without ample supervision, are handling tasks for which they are underqualified, such as taking a key 30(b)(6) deposition or negotiating the contract language on a complicated tax indemnity provision.¹¹⁹ In the case of the senior partner's research, it raises valid questions: What senior-level work has been cast aside in favor of the basic research? If a senior partner handles basic research below her paygrade, does that work comport with the Rule 1.5 ethical obligation regarding reasonable fees?¹²⁰ For the junior associate, the lack of experience on a sophisticated task clearly implicates the junior lawyer's (and her law firm's) duty to provide competent representation.¹²¹

We suspect that one of the problems with staffing inefficiency is that the partner in charge of a particular representation isn't monitoring, in real time, the cost of who's doing which tasks. That partner is aware of the assignments of various professionals to tasks that must be completed, but likely isn't aware—at least not until the time comes to review the bill—of how much time each professional spent on each task. Another dimension of staffing efficiency relates to a lawyer dabbling outside of her primary area of practice. In almost every imaginable instance, an intellectual property attorney should not be handling a living trust document for a high net-worth client, and a trusts and estates attorney should not be handling a trademark for a start-up technology client. Invoice data, when evaluated with sophisticated legal data analytics tools, very quickly surfaces trends where attorneys are practicing at the wrong skill set level or in the wrong area of law. Both are red flags for LPL risk purposes

¹¹⁸ And the explanations tend to range from “I needed it immediately, and there was no one else around” to “I can do it faster.” We absolutely believe that senior partners can do *complicated* legal research faster, but simple research belongs in a junior professional's wheelhouse.

¹¹⁹ The failure to assign the right level of work to the right level of lawyer implicates various ethics rules, and law firms should have systems for ensuring that the right work goes to the right people. See MODEL RULES OF PRO. RESPONSIBILITY r. 5.1 (AM. BAR ASS'N 2020) (describing the obligations that lawyers who supervise or give orders to other lawyers have to ensure that they are conforming to ethical rules, including rules of competence and diligence in legal work); see also *id.* r. 5.2 (stating that lawyers are bound even if they are acting at the direction of another, but that they may rely on supervisory lawyers' reasonable interpretations of professional responsibility); *id.* r. 5.3 (outlining lawyers' duties to ensure that “nonlawyer[s]” are acting ethically and not impeding on lawyers' ethical obligations).

¹²⁰ See *id.* r. 1.5 (requiring that fees be reasonable with respect to “the experience, reputation, and ability of the lawyer or lawyers performing the services” and “the skill requisite to perform the legal service properly,” among other factors).

¹²¹ See *id.* r. 1.1 cmt. 2, cmt. 4 (detailing the basic obligations of competence and noting that “[a] newly admitted lawyer can be as competent as a practitioner with long experience” but that lawyers should only take matters where competence is obtainable “by reasonable preparation”).

2. Workflow efficiency

When clients pay their lawyers by the hour, they expect their lawyers to work efficiently without wasted effort, unneeded redundancy in personnel, or duplication of work. Inefficiencies in a lawyer's workflow process quickly drive up the cost of legal services. Few things can sour the attorney-client relationship as deeply as when a client opens an invoice and sees a legal professional doing the same work over and over again (without increased efficiency), or multiple lawyers at the same level handling the same task at the same time, or throngs of legal professionals attending meetings or hearings. Invoices containing these types of inefficiencies leave the client questioning outside counsel's competence and her fiduciary duty of candor, and the client starts worrying about whether the professional provided real value for each hour billed.

Although one might think that having multiple tiers of professionals working on a task would increase the odds for competent,¹²² diligent¹²³ representation, that's not necessarily true. Having that many bodies requires massive coordination in order to avoid problems with client communication¹²⁴ and unreasonably high fees.¹²⁵ More is not always better, and too many professionals assigned to a single workflow matter can create confusion and duplication of effort, as different layers of lawyers change documents to their preferred individual styles as a draft moves through the process.¹²⁶ As we have said before, in order to dissipate the fear of accidental malpractice, lawyers will justify bringing many people to a hearing or a meeting, instead of a few. After all, a diversity of experience will best serve the client, and having top-notch knowledge on hand will provide better service than having to wait for someone back at the office to provide an answer to a particular question. Lawyers who work their way up the law firm ladder often have very specialized expertise, so having both Partner A (with expertise in one area of tax law) and Partner B (with a different expertise in tax law) in a meeting will catch any errors and help to come up with a better work product. For lawyers who are still working their way through the associate ranks, someone more senior must supervise their work. Junior Associate X's research will get supervised by mid-level Associate Y, who will do the first draft of a document, only to have senior Associate Z revise

¹²² *Id.* r. 1.1.

¹²³ *Id.* r. 1.3.

¹²⁴ *See id.* r. 1.4 (describing obligations to keep clients apprised of the status of their legal matters, including information necessary to facilitate informed consent and decision-making).

¹²⁵ *See id.* r. 1.5 (noting that reasonable fees consider "the time and labor required" as well as "[t]he scope of representation" previously communicated to the client).

¹²⁶ As an example, one of us worked with a partner who eschewed middle initials on pleadings and spent time editing out those offending initials.

the document before handing it to a partner for final revisions. One lawyer in an office will pop into another lawyer's office to get some advice on a matter, and those pop-in meetings can span large blocks of time as the professionals spitball ideas. "Even filing a pleading that simply states that one party agrees with some other party's position can result in significant billed time if more than one professional has to set eyes on the draft before it gets filed."¹²⁷

Ironically, those multiple layers of review ultimately can raise the specter of malpractice. After all, it is more efficient to put all of the main professionals in a room for a half hour, at the beginning of a representation, to communicate what's going on and who will handle which issues than it is to have separate conversations with each professional, and it is more efficient to update a workgroup by quick emails (and be allowed to bill for the time drafting and reading those emails) than it is to have a series of cascading meetings or phone calls. But it is not particularly efficient to schedule all-hands weekly meetings in which people who don't need to be at the meeting show up because it was too much trouble to cull the invite list. As these workflow inefficiencies snowball and intensify, a client's initial dismay becomes frustration; frustration then becomes anger; and anger can quickly transform into a malpractice claim.

All of the activities suggesting workflow inefficiencies (internal office conferences, multi-attorney meetings, repeated tasks, and so on) have been memorialized in invoice line-item data. When we analyze tens (or hundreds) of thousands of line items recorded by a timekeeper or massive volumes of line items from innumerable timekeepers, we can surface behavioral patterns of workflow inefficiencies. Once surfaced, workflow inefficiency trends can be correlated to malpractice risk.

3. Billing hygiene

We define exemplary billing hygiene as "recording clear, concise, informative narrative entries linked to the time to complete an individual task."¹²⁸ The goal of billing hygiene is to explain who did what and for how long, so that those paying hourly-rate bills understand the components of the legal fees.¹²⁹ Billing hygiene problems come in a wide variety of flavors,

¹²⁷ Rapoport & Tiano, Jr., *Legal Analytics*, *supra* note 3, at 1276.

¹²⁸ *Id.* at 1293. And, as we said in that article, "[t]he time entry 'Attention to file—2.1 hours' is unhelpful today and even less helpful tomorrow when trying to price legal services with certainty." *Id.*; see also Nancy B. Rapoport, "Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY'S J. ON LEGAL MAL. & ETHICS 42, 86 (2014) ("[A]ttention to file' has never told a single client what the biller actually did . . .").

¹²⁹ We're actually fans of alternative billing methods, and legal analytics can help lawyers price fees that are based on metrics other than time multiplied by hourly rate.

ranging from vague, cryptically written narrative entries to overly verbose narrative entries that obfuscate any inkling of the work performed. “Block-billing” is the practice of lumping together many tasks spanning several hours into a single narrative description. “Round-hour” billing is where a statistically improbable number of time entries end in a zero (1.0, 2.0, 3.0, etc.). Both block-billing and round-hour billing can eventually trigger a client’s ire, which may lead to full-blown malpractice lawsuits. Admittedly, there are many reasons that lawyers might not write clear time entries. For the types of work for which bills are part of the public record,¹³⁰ lawyers might not want to signal their strategy.¹³¹ Moreover, lawyers who don’t record their time contemporaneously might not remember in detail what they did.¹³² Those lawyers who are on our side of the bifocal divide might not have been trained to provide clear time entries.¹³³

When billing hygiene is poor, malpractice risk is high. First, poor billing hygiene is an indication that a firm’s lawyer and paraprofessional training program and its administrative controls are weak. Second, poor billing hygiene, even when it results from sloppiness or laziness rather than from maliciousness, runs afoul of a lawyer’s Rule 1.5 obligation regarding reasonableness of fees and the Rule 8.4(c) obligation not to lie.¹³⁴ Finally, poor billing hygiene will irritate even the most patient and cooperative client, and if the lawyer-client relationship deteriorates, poor billing hygiene can form the basis for allegations of billing fraud.

4. Institutional governance

Having gotten into the habit of chronicling their workdays in one-tenth of an hour segments of billable time, most legal professionals also account for their non-billable time in a similar manner. Typical categories of non-billable activities include *pro bono* work, business development, firm management committees, attorney mentorship, client billing, and continuing

¹³⁰ Such as fee applications in chapter 11 cases.

¹³¹ See, e.g., Rapoport, *supra* note 8, at 47, n.33 (2020) (providing sources that describe what happened when two law firms—Kirkland & Ellis and Jones Day—scrutinized each other’s timesheets as part of a larger skirmish).

¹³² We think that making up the entries later violates MODEL RULES OF PRO. CONDUCT r. 1.5 (Am. Bar Ass’n 2020) (regarding fees), r. 1.4 (regarding communications), r. 5.1 (regarding supervisory lawyer responsibilities), and r. 8.4(c) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation”), not to mention the overarching fiduciary duty to the client.

¹³³ Being on our side of the bifocal divide may explain that behavior, but it doesn’t excuse it.

¹³⁴ See MODEL RULES OF PRO. CONDUCT. r. 1.5 (Am. Bar Ass’n 2020) (providing that a lawyer “shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount”); r. 8.4 (noting that dishonesty and deceit constitute professional misconduct).

legal education.¹³⁵ Insofar as legal professionals capture their tasks and activities within these categories of non-billable work, we think that such organizational governance/non-billable data can have a major effect on malpractice risk.

If a partner with a \$1,500,000 book of business spends fewer than 30 minutes per month on billing activities, it calls into question whether the partner is adequately reviewing the invoices that he or she is sending to clients, again bucking up against the ethics rule on the reasonableness of fees.¹³⁶ If an inconsequential amount of non-billable time is recorded to firm management committees, which are established to streamline processes and mitigate risks, that signals inattention to risk mitigation procedures that can reduce malpractice risk. Conversely, where attorneys' timekeeping records indicate that they've taught or attended more than the required amount of continuing legal education programs, that might bode well for lowering malpractice risk.¹³⁷ Just as with the other malpractice markers, even non-billable activities can be relevant to LPL underwriting risk.¹³⁸

5. Matter oversight

Any lawyer charged with overseeing a matter should meet the standard of care requiring her to use and manage "people, processes, and technology" effectively and efficiently. When an attorney who is the "lead"

¹³⁵ Most larger law firms set up a "dummy" client/matter account where the client is reflected as "non-billable time" and a matter is reflected as "pro bono," or "management committee work" or "CLE." Contrary to popular opinion, law firms do care what their legal professionals are doing when they are not handling billable work.

¹³⁶ MODEL RULES OF PRO. CONDUCT, r. 1.5 (Am. Bar Ass'n 2020) (discussing reasonableness of fees).

¹³⁷ This assumes the attorneys actually pay attention during the CLEs, rather than just multitasking. Sitting in a room playing on one's smart phone isn't the same thing as listening to the presentation.

¹³⁸ Staffing efficiency, workflow efficiency, billing hygiene, and organizational governance are certainly our four candidates for the most likely predictors of potential malpractice problems, but presumably there are several others as well. For example, we might be able to catch those types of behaviors that are typically associated with competency and diligence risks by paying attention to how upcoming deadlines get docketed on a lawyer's calendar. If a paralegal docketed an upcoming filing deadline for, say, a summary judgment motion, then there should be concomitant calendar entries for starting the drafting process and assembling all of the necessary components. If a paralegal docketed an upcoming motion with a filing deadline of December 1, and nothing happens on the drafting side until perhaps a few days before December 1, then the odds of a well-written, well-argued motion go way down. We can conceive of an internal system that nags lawyers to start the drafting process earlier. Perhaps a poorly drafted motion won't rise to the level of malpractice, but why not reduce the risk by advance (and automated) planning?

attorney on a matter falls short of the mark on her matter-oversight responsibilities, that failure poses a malpractice risk.

In terms of the people component, a properly managed matter should be staffed with an appropriate number of legal professionals with the right mix of seniority and skill sets, as dictated by the scope and complexity of a matter. Understaffing a matter with too few legal professionals can be as problematic as overstaffing it. Likewise, staffing a matter with too few senior attorneys and too many junior legal professionals can pose a competence issue. Using too many “drive-by” billers who breeze in and out of the matter and who are not fully committed to it can foster ineffective communication, failed accountability, and a shallow understanding of the legal and factual issues of the matter. Managing people, particularly legal professionals, is tricky for the attorney leading the matter. She must deftly use different people’s skills at the right time and in the right manner and scope, all while ensuring effective team communications with minimal waste and redundancy. At bottom, poor personnel management increases malpractice risk.

Designing and managing a well-thought-through process is equally important when it comes to matter oversight. Without a good process, things simply can fall through the cracks. For example, a faulty process will cause professionals to miss deadlines or do sloppy, rushed work.

In the current tech-enabled world, the effective use of technology in a matter is critical to good matter oversight. In fact, 38 state bar associations have indicated that part of a lawyer’s duty of competence includes a duty of technological competence.¹³⁹ Lead attorneys on a matter need know to how and when to use case management technologies, virtual data rooms, eDiscovery tools, and legal research platforms. No longer is technological competence a role solely for the information technology (IT) department, knowledge management experts, or librarians. These tech skills must be arrows in the lead attorney’s quiver. If a lead attorney can’t draw back the bow, or the arrows consistently fly wide of the mark, these shortcomings can materialize into a significant malpractice risk.

When invoice data for a particular matter is reconstructed using advanced legal spend data analytics tools, it is tantamount to the genetic roadmap for that matter: people, process and technology can be examined in a multi-dimensional analysis. It is possible to identify appropriate partner/associate leverage ratios, transient timekeepers, matter advancement,

¹³⁹ See *id.* r. 1.1 cmt. 8 (emphasis added) (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”); see also *Tech Competence*, LAWSITES <https://www.lawsitesblog.com/tech-competence> [<https://perma.cc/TW99-QUQE>] (last visited Nov. 23, 2020) (depicting the states that recognize a lawyer’s duty to maintain technological competence).

task allocations and flow, communications patterns, and technology usage. It's then easy to compare those metrics on a single matter against comparable matters on an industry-wide basis to establish the relevant standard of care and related matter oversight markers.

6. Fiduciary risk

Every lawyer owes a fiduciary duty to her client.¹⁴⁰ At all times, a lawyer must use her professional skills and energy to act in her client's best interest and to disclose any interest—economic or otherwise—that could conflict with her client's interest. Lawyers must adhere to the duty of loyalty, the duty of confidentiality, the duty of competence, and the duty to communicate. A proven breach of any of these duties will likely trigger malpractice liability.

As we've studied invoice data across multiple cases, we've discovered that the "fiduciary risk" malpractice marker requires an evaluation of not just what happened based on invoice data, but also what *didn't* happen. An analysis of a lawyer's non-billable time entry data could surface times when she engages in activities that are harbingers of malpractice, such as interactions with her law firm's risk management partner(s) or state bar officials; legal research on ethics issues; or communications putting a carrier on notice. In theory, some of these activities will evidence a fiduciary duty breach. The absence of certain categories of activities in invoice data, such as a paucity of attorney/client communications, will also raise legitimate questions on whether a lawyer is discharging her fiduciary duties properly.

C. Creating the LPL Malpractice Risk Score

Rufus Riley: [to Agatha] Are you reading my mind right now?

John Anderton: Get up.

¹⁴⁰ Some lines of jurisprudence surrounding a lawyer's fiduciary duty include only the duty of loyalty and the duty of confidentiality as comprising a lawyer's fiduciary duty whereas other lines also include the duty of competence and duty to communicate. *See, e.g., Bank of Hartford, Inc. v. Bultron*, NO. SP-H-9296-65684, 1992 Conn. Super. LEXIS 3551, at *20–21 (Conn. Super. Ct. Dec. 21, 1992) (describing the duties of an attorney as "competence, loyalty, confidentiality and communication"). We acknowledge that aspects of our Fiduciary Risk marker could be viewed as overlapping with aspects of the other five markers, much like a breach of fiduciary duty action can overlap with actions under other theories of liability. The duty of competence and duty to communicate are subsumed by another malpractice marker. Accordingly, the "Fiduciary Risk" marker centers on the duty of loyalty and duty of confidentiality.

Rufus Riley: [to Agatha] I'm sorry for whatever I'm going to do and I swear I didn't do any of that stuff that I did.

— MINORITY REPORT (20th Century Fox 2002)¹⁴¹

We know that there is a sufficient quantum of valuable data that can be analyzed to show legal professional behavioral patterns. We also know that there are legal data analytics tools that can analyze and categorize the legal spend data in a manner that surfaces behavioral trends. No longer are LPL actuaries relegated to generalizations, inferences, and conjecture when it comes to behavioral data. Behavioral data can allow lawyers and their LPL insurers to forecast, in a pre-cog-like manner, malpractice.

Out of the complex stew of LPL application data, LPL claims data, invoice data, biographical data, and LPL actuarial analyses, we think that there should emerge an LPL malpractice behavioral scoring metric. Today's technology easily can analyze and synthesize terabytes (or even petabytes or exabytes) of complex data and transform the data into a lawyer-by-lawyer, simple, individualized/hyper-personalized LPL Malpractice Risk Score, akin to an A.M. Best rating, FICO score, Moody's rating, or similar industry-accepted standard.

With advanced data analytics tools, legal invoice data can be analyzed on a line-item-by-line-item basis. When a line item contains one or more data points that tie to one or more of the six malpractice markers, that line item can be flagged and assigned to a malpractice marker category. When this flagging and assignment exercise is done at scale, evidence of LPL behavioral risk naturally follows. The law firm, or the attorney herself, or both could monitor the Malpractice Risk Score over time, with the hope of improvement, in the same way that people now monitor their credit scores. Moreover, the Malpractice Risk Score could be combined with the existing demographic data to amplify existing LPL underwriting guidelines: The Malpractice Risk Score could be compared against peers; the score could even be rolled up with data from other professionals in the same firm to provide an overall firm score. Simply put, the Malpractice Risk Score, which transforms an attorney's own time entries into *behavioral* data, brings twenty-first century big-data insights to legacy LPL underwriting metrics that came from the late 1900s.¹⁴²

¹⁴¹ MINORITY REPORT (20th Century Fox 2002).

¹⁴² Our intrepid research assistant, Joshua Nelson, asked us an important question while he was helping us with this article: Wouldn't law firms, knowing what comprised the Malpractice Risk Score, game the system to keep their perceived risk down? That's absolutely a possibility: After all, law schools game the U.S. NEWS rankings all the time. See, e.g., Darren Bush & Jessica Peterson, *Jukin' the Stats: The Gaming of Law School*

CONCLUSION

The legal industry and the insurance industry, particularly the LPL Insurance segment, can experience a renaissance by using behavioral data and our Malpractice Risk Score. Real malpractice risk can be individualized so that the less risky insureds don't wind up subsidizing their higher-risk counterparts. LPL insurers can develop new coverage options that protect more lawyers (and more risks) at a more affordable price, and those insurers could predict malpractice risk with greater accuracy. Most important, catching potential risk early allows a professional to find ways to reduce that risk, thereby reducing the likelihood and severity of actual malpractice claims. Risk prevention measures can be tailored to the risky behaviors of individual legal professionals. Underwriting costs and claim exposure and severity should decrease, in part because aggrieved clients will be able to point to concrete metrics to support their legitimate claims and in part because professionals with good systems and habits in place should be able to leverage the metrics to avoid or refute frivolous malpractice claims. Much

Rankings and How to Stop It, 45 CONN. L. REV. 1235, 1238 (2013) (discussing pressure on law schools to “juke the stats” to gain a competitive advantage); Nancy B. Rapoport, *Managing U.S. News & World Report—The Enron Way*, 48 GONZ. L. REV. 423, 423 n.1 (2013) (providing examples of data misrepresentation and manipulation at Illinois Law, Villanova, and the University of St. Thomas); Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES (July 31, 2005), <https://www.nytimes.com/2005/07/31/us/education/the-878-million-maneuver.html> [<https://perma.cc/8CUG-ZC9N>] (describing the odd incentives and choices posed to law schools as a result of the importance of *U.S. News & World Report* rankings). We're of two minds about Josh's question: We think that some of the gaming that goes on is wasteful (for example, the glossy brochures that law schools mail—or used to mail, at least—touting how great they are in time for the voting for *U.S. News's* reputational scores). These brochures are known colloquially as “law porn.” See, e.g., Doug Litowitz, *Law Porn and its Discontents*, 6 CRIT. CRITICAL LEGAL STUD. J. 14, 15 (2012) (“‘Law porn’ is an epithet that refers to professional-looking, glossy publications commissioned by law schools . . . often attributed to attempts by law school administrators to influence the U.S. News & World Report annual ranking of law schools.”). We can also point to the almost fanatical scrutiny of LSATs and undergraduate GPAs that law schools use to manipulate the 25th and 75th percentiles of those two factors. But we also think that the reason that many law schools game the rankings relates to how little the rankings reflect actual differences among law schools. See Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News & World Report Shouldn't Want to Be Compared to Time and Newsweek—or The New Yorker*, 60 OHIO ST. L.J. 1097, 1099 (1999) (describing portions of the *U.S. News* ranking system as a “dartboard” approach or as a “glorified coin toss at best”); see also *id.* at 1101 & 1101 n.17 (suggesting that *U.S. News* could also rank law schools by faculty height—or inverse height—but that ranking wouldn't reflect quality, either). If we're right that the Malpractice Risk Score reflects actual risk, then the gaming actually lowers risk, which is a good thing. If we're wrong, though, then we'd need to titrate the score until it more accurately reflects risk.

like their counterparts in the auto insurance lines, behavioral data promises to be the next-generation differentiator for LPL insurers. LPL insurers that leverage behavioral data will flourish; those that fail to leverage behavior data will do so at their peril.



AI Summit

The State Bar of Arizona, Arizona Supreme Court, and ASU are co-organizing a one-day summit on AI, the courts and the legal profession on Monday, December 11, 2023. Information and registration: <https://www.azcourts.gov/aisummit>

AI has quickly become ubiquitous in our lives. It dominates news headlines, conversations with colleagues, and our daily discourse. Perspectives on its implications vary widely, from optimistic, to pragmatic, to skeptical. But regardless of opinions on AI, it is now disrupting every sector of our economy. Law is no exception.

In March 2023, Goldman Sachs released a report detailing the rapid pace at which AI is replacing tasks across a wide range of industries.⁴ The report found that 44 percent of legal work could be automated through AI—a staggering figure. However, Gold-

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TECH AND INNOVATION

man argues that this trend may not be entirely negative, as the increased efficiency and innovation spurred by automation could ultimately create new jobs.

It is therefore not surprising that the legal industry is abuzz with interest in AI, particularly with the emergence of ChatGPT. Attorneys are already using these technologies in a variety of ways, from drafting pleadings to navigating court proceedings.⁵

AI's disruption of the legal industry has begun. It's crucial for everyone to be prepared for the changes ahead. Are you ready?

What is AI?

*"Artificial intelligence
is the new electricity."*

—Andrew Ng (former Baidu
Chief Scientist and Coursera co-founder)

The development of AI has been a long process, starting in the mid-20th century. The surge in AI importance and applications over the past decade was mostly stimulated by the development of deep learning—an advanced form of machine learning that used neural nets, which are complex computer networks modeled on the human brain. Machine learning represents an epochal leap forward in AI, because unlike previous generations of AI where a human programmer provided instructions for the AI system to operate, in machine learning the machine “learns” itself from massive quantities of data and then makes decisions based on this learning. This is the first time in human history that a machine has gained the capacity to make its own judgments. The power provided by machine learning has been enhanced by another important advance, natural language processing, which enables a machine to communicate with humans in verbal or written form.

Until recently, machine learning AI systems analyze large data sets to categorize the data, identify trends, or make predictions. While these applications of machine learning continue to expand, AI is experiencing another major leap forward with the advent of Generative AI (“GAI”). GAI is a type of deep learning capable of not simply analyzing existing data, but generating new content such as text, images,

video and code in response to prompts. GAI uses massive databases to generate content that it predicts is responsive to the human user's request.

When the dataset used to generate content contains text, the GAI program is known as a Large Language Model (“LLM”). These models can consist of billions of data inputs. The database also can consist of images, videos or code to generate content in those formats. One of the newest capabilities is to use data in one format, say text, to generate new content in another format, such as images.

While GAI has been in development for many years, it reached widespread public awareness, and potential legal application, with the release of ChatGPT3.5 in late 2022 and ChatGPT4 in March 2023. ChatGPT, developed by OpenAI, proved an immediate sensation, reaching 1 million users in five days and 100 million users within two months.⁶

The current GAI landscape is quickly evolving, with multiple players racing past each other to release bigger, better, faster versions of their model. Recently Google released Bard, Meta (Facebook) released Llama-2, and Anthropic released Claude2, all competing with ChatGPT for text-based GAI. Several companies also have created GAI products for generating images, including DALL-E2 (Open AI), Midjourney and Firefly (Adobe). And we are quickly seeing many legal technologies, like Casetext's CoCounsel, Allen & Overy's Harvey, and Ironclad, incorporating these GAI tools.

Current Legal Industry Tech Capabilities

*"We will see more change in
the [legal profession] in the
next two decades than in the past two
centuries."*

—Richard Susskind, legal futurist

The legal landscape is becoming more

**Machine
learning represents
an epochal leap
forward in AI.**

complex, but the demand for legal services continues to grow. Concurrently, the cost of lawyers is increasing at an alarming rate; many businesses are reducing reliance on outside law firms, instead insourcing attorneys for legal service delivery.⁷ At the same time, millions of individuals face legal issues but in many cases do not have access to lawyers, creating an “access to justice” crisis.

AI has been discussed for several years as a possible remedy for this growing demand for legal services, and it has been making some modest progress. But the potential role and excitement about AI kicked into overdrive with the release of ChatGPT. GPT-4, in contrast to its earlier iterations, is a state-of-the-art system capable of creating words or images in response to simple written commands or “prompts.” As it relates to legal, this new iteration passed a simulated version of the bar exam ... something that 3.5 was unable to do.

The impact of this technological evolution is impressive. GAI can read, summarize, annotate, analyze, translate, categorize, synthesize and interpret text. And it is rapidly evolving every day. With these skills, the impact on legal professionals is massive; the use cases are endless.

AI has a wide range of potential legal applications. Skills such as searching databases, summarizing information, and generating correspondence can be automated through AI. In addition, AI can assist with transactional tasks such as contract drafting, policy compliance, data extraction and due diligence. Finally, AI can be used to facili-

TECH AND INNOVATION

tate litigation by helping with tasks such as ediscovery, legal research, deposition preparation, and drafting motions and pleadings. It's also transforming the business of law: The automation of routine tasks can reduce the need for billable hours, which has long been the foundation of law firm profitability.

Limitations of Current LLMs

LLMs have no conscious thought or understanding

An important risk of LLMs is that users might start taking its synthetic text as meaningful, despite it being ultimately devoid of any conscious thought or true understanding. LLMs have been likened to "stochastic parrots,"⁸ because they just repeat back information they have been exposed to without understanding its true meaning. This raises concerns about the reliability of information produced by these models, which can provide valuable insights based on their massive training data but require human supervision.

Hallucinations

LLMs can sometimes "hallucinate" or generate text that is not grounded in reality. This can happen because the models are designed to generate new combinations of words, rather than to understand the content they are producing.

There has already been at least one legal case of attorneys getting into trouble from LLM hallucinations. In that case, according to the judge, the attorneys "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question." While there is nothing "inherently improper" about an attorney using artificial intelligence, wrote U.S. District Judge P. Kevin Castel, "existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings."⁹

While the frequency of hallucinations should decrease over time as the LLM models improve, it is critical that attorneys using

such tools always check to ensure the validity of specific facts or citations produced by an LLM. Trust. But always verify.

Unauthorized practice of law

The capability of LLMs to generate novel content is raising concerns under state unauthorized-practice-of-law rules. Already, one state has threatened enforcement action against an entrepreneur who planned to use an LLM model to provide oral argument in a court case.¹⁰ It is unclear whether attorneys cross the line into unauthorized practice of law when they rely on LLMs for activities such as generating legal briefs or pleadings, analyzing contracts, or drafting client communications.

Duty of technological competence

It is no longer feasible for lawyers to simply ignore the implications of AI. ABA Model Rule 1.1, which addresses the duty of competence, includes a comment that specifically references the need for lawyers to stay abreast of changes in technology.¹¹ Attorneys are ethically obligated to use technolo-

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gy in a way that improves efficiency, reduces costs, and enhances the quality of legal services provided to clients.

Legal Issues With LLMs

In addition to issues relating to the practice of law, LLMs also raise several substantive legal issues.

Section 230 immunity

Section 230 of the Communications Decency Act provides immunity to online platforms for content posted by third parties. This raises legal questions when it comes to LLMs, because it is ambiguous who is responsible for generating the content: the user or the platform.

Defamation

LLMs can raise defamation concerns if they generate content that is false and damaging to someone's reputation. Such examples have already occurred.¹² It is not clear how liability would be assigned in such a case, as the model is not a conscious entity and the platform hosting the model may be shielded

from liability under Section 230.

Bias/discrimination

LLMs can exhibit bias or discrimination if trained on biased data sets. This raises legal concerns, as the output of these models could be used to make decisions that disproportionately impact certain groups of people.

Data ownership/ intellectual property

LLMs raise intellectual property and data ownership concerns. For example, if an LLM is trained on copyrighted material, there may be questions about whether the model is infringing on the copyright. Several lawsuits are currently pending on this issue.¹³ In addition, if an LLM generates new content, it is not clear who owns the intellectual property rights to that content.

Large language models can exhibit bias or discrimination if trained on biased data sets.

Privacy

LLMs can raise privacy concerns if they are trained on or generate content that contains personally identifiable information. In addition, if an LLM is used to analyze large quantities of text, it may be able to infer sensitive information about individuals even if that information is not explicitly stated.

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Deep fakes

LLMs can potentially be used to create “deep fakes” or synthetic media that is designed to look or sound like real people. This raises several legal concerns, such as the potential for defamation, fraud, and intellectual property infringement. Deep fakes are also a risk for courts and lawyers, as the first examples of deep fake evidence submitted to courts have already been reported.¹⁴

The Future of Generative AI in the Legal Industry

“Those who fail to consider how they will adapt to the use of these technologies may ultimately risk becoming dispensable. So some expedited hard thinking is an imperative.”

—Sir Geoffrey Vos,
Master of the Rolls, UK
McNair Lecture, April 19, 2023

As AI continues to disrupt a wide range

of industries, many people are understandably apprehensive. However, it is crucial that we do not simply adopt a “wait and see” approach—we must be proactive to stay ahead of the curve.

AI already has significantly altered the entire legal profession: law firms, law schools, bar associations and courts are actively grappling with these powerful new tools. These technologies will continue to automate tasks and processes, disrupt the way we currently perform legal services, and fundamentally change the skills attorneys need to effectively represent their clients.

In addition to improving efficiency for existing legal services, AI holds great promise to address the access to justice problem in which many people do not have the resources or information needed to assert their legal rights. AI can assist individuals to pursue dispute-resolution inside or outside the existing court and legal system.¹⁵

It is important to recognize that while AI already has started to disrupt law, this is just the beginning. AI will continue to ad-

vance, at an accelerating pace. Legal futurist Richard Susskind predicts that “ChatGPT and generative AI are significant not for what they are today (mightily impressive but sometimes defective) but for what later generations of these systems are likely to become. We are still at the foothills.”

These changes are happening quickly, but the impacts on the legal profession will be evolutionary rather, not revolutionary. Embrace these advancements:

1. Educate yourself and test these tools early and often.
2. Adopt the “trust, but verify,” methodology with output from these technologies. There are safe and unsafe ways to use these platforms, and it is crucial to be thoughtful about how to incorporate them into our workflows.
3. Align with industry partners to share information, create opportunities for growth, evaluate risk and rewards, and structure change management for your practice. **AI**

endnotes

1. Jenna Greene, *Will ChatGPT make lawyers obsolete? (Hint: be afraid)*, REUTERS, Dec. 9, 2022, www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/.
2. Adam David Long, *Why ChatGPT-3 is just the beginning—and lawyers risk getting left behind*, LAWNSAP, March 8, 2023, <https://lawsnap.substack.com/p/why-chatgpt-3-is-just-the-beginning>.
3. Chris Stokel-Walker, *Generative AI is coming for the lawyers*, WIRED, Feb. 21, 2023, www.wired.com/story/chatgpt-generative-ai-is-coming-for-the-lawyers/.
4. Jan Hatzius et al., *The potentially large effects of artificial intelligence of economic growth*, GOLDMAN SACHS, March 26, 2023, www.gspublic.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html.
5. Sara Merken, *New York lawyers sanctioned for using fake ChatGPT cases in legal brief*, REUTERS, June 26, 2023, www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/.
6. Bergur Thormundson, *ChatGPT statistics and facts*, STATISTA, April 25, 2023, www.statista.com/topics/10446/chatgpt/#topicOverview.
7. Rob Chesnut, *When law firms hike rates, sharp general counsel ‘learn to bake’*, BLOOMBERG LAW, Dec. 19, 2022, <https://news.bloomberglaw.com/business-and-practice/when-law-firms-hike-rates-sharp-general-counsel-learn-to-bake>.
8. Emily Bender et al., *On the dangers of stochastic parrots: Can large language models be too big?* FACCT ‘21: PROCEEDINGS OF THE 2021 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY, March 2021 at 610–623, <https://doi.org/10.1145/3442188.3445922>.
9. *Roberto Mata v. Avianca Inc.*, 22-cv-1461 (PKC) (U.S. District Court for S.D.N.Y.) Order to Show Cause Ruling, Hon. P. Kevin Castel, May 4, 2023, <https://s3.documentcloud.org/documents/23826753/judgeaskingtheotherlawyerwhyhesubmittedafilingwithfakecases.pdf>.
10. Megan Cerullo, *AI-powered “robot” lawyer won’t argue in court after jail threats*, CBS NEWS, Jan. 26, 2023, www.cbsnews.com/news/robot-lawyer-wont-argue-court-jail-threats-do-not-pay/.
11. American Bar Association, Rule 1.1: Competence, Comment [8] Maintaining Competence (2023), www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.
12. Isaiah Portiz, *First ChatGPT defamation lawsuit to test AI’s legal liability*, BLOOMBERG LAW, June 12, 2023, <https://news.bloomberglaw.com/ip-law/first-chatgpt-defamation-law-suit-to-test-ais-legal-liability>.
13. Matt Southern, *ChatGPT creator faces multiple lawsuits over copyright and privacy violations*, SEARCHENGINE J., July 3, 2023, <https://www.searchenginejournal.com/chatgpt-creator-faces-multiple-lawsuits-over-copyright-privacy-violations/490686/#close>.
14. Isha Marathe, *Deepfakes are coming to courts. Are judges, juries and lawyers ready?* ALM LAW.COM, May 26, 2023, www.alm.com/legaltechnews/2023/05/26/deepfakes-are-coming-to-courts-are-judges-juries-and-lawyers-ready/.
15. Margaret Hagan, *Opportunities and risks for AI, legal help, and access to justice*, MEDIUM, June 29, 2023, <https://medium.com/legal-design-and-innovation/opportunities-risks-for-ai-legal-help-and-access-to-justice-9c2faf8be393>.

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Billing Judgment

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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.

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311

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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

¹WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 99 (1996).

²Although 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 Watch*, http://en.wikipedia.org/wiki/Law_firm_watch, nrl31 (last visited April 28, 2022).

³For 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.

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 Machine⁶ 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.

⁴Even fellow lawyers recognize this problem. See, e.g., Rachel Barnett, *Down With the Billable Hour*, 3 Mo. Bn. J. 62, 62 (June 2021) ("Let's face it, the billable hour is archaic. It creates the wrong incentives, drives inefficiency, and no one likes it, no one"); Jarrod F. Reich, *Capitalism on Healthy Lawyers: The Business Case for Law Firms to Promote and Prevent Lawyer Well-Being*, 65 VILL. L. REV. 361, 384 (2020) ("[T]he billable hour system rewards unproductivity and inefficiency"); David K. Higgins, *Hourly Rate Billing: An Unnecessary Evil*, 31 W. VA. LAW. 26, 27 (July/Aug. 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."); David D. Snyder, *Incentive Legal Billing in Litigant Cases*, 31 BREVIER: HILLAS Bn. Ass'n 1, 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.")

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

⁶Yes, we're showing our age. Learn more in KERRY SCOTT, *THE MONSTER TRAIL ROBBER: THE STORY OF JAY WARD, BILL SCOTT, A FLEASO SQUARE, AND A TALENTED MONSTER* (2001). And yes, you should go back and watch *The Adventures of Rocky and Bullwinkle and Friends*.

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

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

⁹Just ask some of the former partners in law firms like Brobeck, Phleger & 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

¹⁰For 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).

¹¹The 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.

¹²Lawyers 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

¹³MODEL RULES OF PRO. CONDUCT r. 1.5 (Am. Bar Ass’n 2020).

¹⁴MODEL 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).

¹⁵There’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-

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.").

¹⁶Consider 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.

¹⁷Of 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.

¹⁸The 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 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

¹⁹Industry 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.

²⁰See, 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).

²¹The 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 professionals²⁵ typically take their marching orders from peo-

²²The 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).

²³Steve 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).

²⁴Email 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).

²⁵We (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 trustee²⁶ to employ professionals with court approval.²⁷ Retained professionals must meet certain tests—non-adversity and disinterestedness²⁸—before a court may authorize their employment. The bankruptcy court must find the professionals' fees and expenses reasonable and necessary²⁹ before it will approve them, and before those administrative priority fees³⁰ 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

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).

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

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

²⁸See 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).

²⁹11 U.S.C. § 330(a); see also FED. R. BANKR. P. 2016 (setting forth what the professional seeking payment must establish).

³⁰See 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").

³¹See 11 U.S.C. § 330.

³²See 11 U.S.C. § 331.

statutory 120-day interim application period,³³ often in conjunction with monthly fee statements and conditioned on a 20 percent³⁴ 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 eyeshade³⁸ 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

³³See 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).

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

³⁵Such 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.

³⁶Once 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.

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

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

³⁹See 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.

⁴⁰In 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 table⁴² 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.

⁴¹We 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.

⁴²As 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

professionals 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 disinterestedness⁴³ 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).

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

⁴⁴Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. LAW 117, 151 (2012) (footnotes omitted).

⁴⁵See *supra* note 43.

⁴⁶Or 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 professionals⁴⁷ 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

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

⁴⁸Bankruptcy 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.

⁴⁹Some 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.

⁵⁰Family 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).

⁵¹One 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).

⁵²Most 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-Quest chief Nacchio says lawyers billed him for underwear*, DENVER POST (Mar. 23, 2011, 4:57 AM), <https://www.denverpost.com/2011/03/23/ex-quest-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

⁵³Nancy 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.").

⁵⁴For 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

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).

⁵⁵Our 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).

⁵⁶Given 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).

⁵⁷We 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.

⁵⁸Instead 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

⁵⁹See, 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).

⁶⁰Moreover, 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.

⁶¹Fee 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,

⁶²Legal 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.

⁶³And 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).

⁶⁴The 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 cases⁷⁰ 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.

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

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

⁶⁷The 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.

⁶⁸The 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.

⁶⁹The 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.

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

⁷¹See *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 million⁷⁵ in potentially problematic line items. After considering Legal Decoder's analysis⁷⁶ 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

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

⁷³The 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.

⁷⁴Managing 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.

⁷⁵We 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.

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

⁷⁷We 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.

⁷⁸In 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).

⁷⁹16-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 it⁸⁴

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

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).

332 AMERICAN BANKRUPTCY LAW JOURNAL (Vol. 96)

04/15/2016	VAN	Phone conference with Ira Kharasch, Sharon Nickerson and Denise Royce regarding cash collateral matters	0.40	795.00	~~\$918.00~~	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	~~\$998.30~~	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	~~\$66.00~~	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	~~\$367.50~~	C
04/18/2016	BDD	Review service list re Lumpy's -FL and service of Motion, Dec and App Shortening Time; emails to M. Kulick 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 Royce 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 email 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	

2023 WINTER LEADERSHIP CONFERENCE

2022)

BILLING JUDGMENT

333

			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	~~\$954.00~~	D
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~~	D 1500
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

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

⁸⁷With 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-

⁸⁸Michelle 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 economics⁹⁶ might incentivize behavioral changes to accomplish the same objective.

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.

⁹²The 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.

⁹³We 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.”).

⁹⁶Minus 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

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

⁹⁸We heartily recommend this classic book: JENNIFER K. ROBBENOLT & 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.

⁹⁹Cf. 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).

¹⁰⁰RICHARD 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.

¹⁰²On 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.

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

¹⁰⁴For 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).

¹⁰⁵For 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).

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

¹⁰⁷But 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.

¹⁰⁸See 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.”).

¹⁰⁹Apparently, 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

¹¹⁰In 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.

¹¹¹But 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).

¹¹³We 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

¹¹⁴During 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).

¹¹⁵Nancy 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.*

¹¹⁸Randy 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).

¹¹⁹We 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

¹²⁰When 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).

¹²¹After 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.

¹²²In 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 program-matically, 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.

¹²³Work 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.

¹²⁴We 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).

¹²⁵See 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 nudge¹²⁷ 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

¹²⁶And 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.

¹²⁷Consider:

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 . . .").

¹²⁸After 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 titrate¹³¹ their billing judgment by using data that they already have or can get.

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

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

¹³⁰Gretchen 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.

¹³¹For 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).

¹³²They 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

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.").

¹³⁶Even 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 trove¹³⁸ 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).

¹³⁸That “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.

¹³⁹Remember, 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

¹⁴⁰This "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 carry-over 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

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).

¹⁴²For 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 costs¹⁴⁵ but provides useful comparisons.¹⁴⁶ Those comparisons let the requesting firm

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

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

¹⁴⁵A 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.

¹⁴⁶Our 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.

¹⁴⁷We 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.

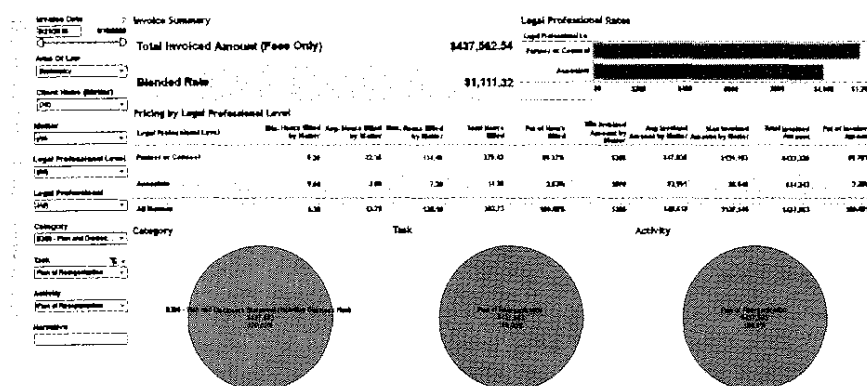
¹⁴⁸NOISE, *supra* note 97, at 35-36 (2021). We know that bankruptcy professionals like to think of themselves as going to war, but they're wrong, at least usually.

¹⁴⁹Because 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

¹⁵⁰We 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.

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

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

¹⁵³For 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," passively-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

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).

¹⁵⁵But stated more politely.

¹⁵⁶One 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

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).

¹⁵⁷And 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.

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).

¹⁶¹WILLIAM 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

¹⁶³Legal 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>.

¹⁶⁴Here'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’ fees¹⁶⁸ 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

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

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

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

¹⁶⁸We 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 work¹⁶⁹ 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.

¹⁶⁹Not 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).

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The Specter of Malpractice: When Law Firm General Counsel and Risk Management Professionals are Confronted with Potential Malpractice Claims and Ethics Violations

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**THE SPECTER OF MALPRACTICE: WHEN LAW FIRM
GENERAL COUNSEL AND RISK MANAGEMENT
PROFESSIONALS ARE CONFRONTED WITH POTENTIAL
MALPRACTICE CLAIMS AND ETHICS VIOLATIONS**

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Legal malpractice law and ethics rules are some of the scariest bodies of law for attorneys of all skill levels. This area of law is exceptionally complex, and the consequences for its misapplication are grave. During the past two decades, more and more law firms have established a dedicated compliance role—usually a full-time attorney serving as a risk management professional, an ethics/compliance expert, or a law firm’s general counsel, assigned to handle these important questions.¹

In many circumstances, such as when an attorney steals money from a client, the ethical and professional obligations of a general counsel and risk management professional are clear. However, in instances involving less clear-cut violations of professional duties, the path forward quickly becomes complicated. Occasionally, a law firm’s general counsel or risk management professional might not know how to proceed after learning about circumstances that loosely suggest that malpractice could have been committed or an ethical duty could have been violated.

This Article discusses the most important initial steps and questions that a law firm’s general counsel or other risk management professional must address when hearing that serious mistakes or improprieties may have occurred—but without any concrete confirmation that something problematic has, in fact, happened.² Collectively, these circumstances are

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1. *The Lawyers’ Lawyers: The Emergence of the Law Firm General Counsel*, 5 PRACTICE (2019), <https://thepractice.law.harvard.edu/article/the-lawyers-lawyers/>.

2. For example, a firm’s general counsel may become aware that a relatively inexperienced associate has been tasked with handling a notoriously difficult matter, or that a lawyer has failed to respond to inquiries from colleagues on a matter for an extended period of time. Cf. MILTON C. REGAN, *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004) (telling the sad tale of a BigLaw lawyer who hid an Order to Show Cause from his colleagues).

referred to as the “specter of malpractice,”³ because a malpractice claim has not yet fully materialized (and it is not entirely clear that one will materialize), but enough risk factors have surfaced to capture the risk management team’s attention.⁴ Included among these important and difficult questions are:

- Could this type of mistake constitute an ethics violation or a future malpractice claim?
- What duty does a firm’s general counsel or risk management professional have to investigate the situation?
- What action is required with respect to the firm’s legal malpractice insurer and when should the law firm take that action?
- What action is required with respect to the law firm’s clients and when should the law firm take that action?

COULD THIS TYPE OF MISTAKE CONSTITUTE AN ETHICS VIOLATION OR A FUTURE MALPRACTICE CLAIM?

Like all humans, lawyers make mistakes, ranging in severity from a simple typo in correspondence to forgetting to file a claim before the statute of limitations has run. Identifying which mistakes might result in a malpractice claim, and preventing those potential claims, are the most important responsibilities of a law firm’s general counsel and risk management team. However, distinguishing between immaterial mistakes and those that could potentially result in a malpractice claim or professional sanction requires knowledge of countless rules and regulations governing these areas of law. To make matters more complicated, some mistakes trigger a contractual or an ethical duty to act (e.g., notify the malpractice insurer and/or the client), even if the error could never support a malpractice claim.⁵ The consequences for an incorrect assessment or classification can be severe, such as damages, loss of a client, or even loss of malpractice insurance coverage. Therefore, it is critical to understand when a lawyer’s mistake could form the basis of future sanction or liability, and when it could not.

The ABA Model Rules of Professional Conduct (hereinafter the “Rules”) and various ABA Ethics and State Bar Association opinions provide

3. The phrase “specter of malpractice” should be understood to encompass “ethical violations,” too, when both “malpractice” and “ethical violations” are not explicitly mentioned together as separate concepts.

4. An alternative, but equally appropriate, analogy for the circumstances that this Article aims to cover would be to liken these instances to a Schrödinger’s Cat for malpractice or ethics violations—the act occurred, but whether or not it could support a malpractice case can only be ascertained through investigating the matter or opening the proverbial box.

5. ABA Comm. on Ethics & Pro. Resp., Formal Op. 481 (2018) [hereinafter ABA Op. 481].

guidance about ethics violations and set forth a useful framework for making this distinction. Although a violation of a state's version of these Rules does not impose malpractice liability *per se*, it can help to establish the professional standard of care element for a malpractice action,⁶ using it as the baseline for expert testimony required by courts.⁷ For a law firm's general counsel and risk management team, the Rules can also offer a useful barometer to assess the specter of malpractice on a real-time basis, because sifting through the complex web of malpractice cases and factual implications for each error can be overwhelming and impractical. The Rules provide a relatively clear explication of general ethics law that serves as an appropriate proxy for determining the "seriousness" of, and potential liability for, a professional mistake.⁸

The ABA provides a framework for determining which errors are "material" in the context of describing which errors require self-reporting to clients. Material errors are ones that "a disinterested lawyer would conclude [are] (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that [they] would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."⁹ There are several practical aspects to this definition that a prudent general counsel or risk management professional should consider when assessing whether the specter of malpractice is merely an illusion or has transformed into something much more real.

First, a mistake can require action on the part of the law firm's general counsel or risk management professional *before* the client suffers damages. Although actual damages are required for a civil malpractice claim,¹⁰ an error is still material under the Rules if there is a reasonable likelihood of harm or prejudice.¹¹ For this reason, a mistake cannot be ignored simply because it has not yet caused damages, at least for determining ethics violations.

6. MODEL RULES OF PRO. CONDUCT pmbl. cmt. 20 (AM. BAR ASS'N 2020).

7. *Grimm v. Fox*, 33 A.3d 205, 213 (Conn. 2012). This case was a civil action for recovery of attorney's fees in which the court held that the aggrieved plaintiff failed to proffer ample expert testimony to support his legal malpractice claim. *Id.*

8. Law firm general counsel and risk management professionals should consult their state's adopted ethics standards—we use the ABA Model Rules as generally applicable for purposes of this Article.

9. ABA Op. 481, at 4.

10. *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1997). Although a violation of a state's ethics rules only supports disciplinary action (as opposed to damages), the ethics rules often do set the standard and bolster an allegation that there has been a violation of the professional standard of care. MODEL RULES PRO. CONDUCT pmbl. cmt. 20 (AM. BAR ASS'N 2020).

11. For example, some mistakes—such as filing a pleading in the wrong jurisdiction, long before a statute of limitations runs—are fixable and, once fixed, would not trigger damages (as long as the lawyer zeroes out any fees incurred for fixing the mistake).

Indeed, best practices in risk management revolve around early detection and preventative steps, not reactive measures taken only after there is a full-fledged mess.¹²

Second, a mistake may necessitate attention even if there is no threat of actual damages to the client. A mistake severe enough to cause a client to reasonably reconsider the attorney's representation is sufficient. This standard is highly individualized because the particularities of a specific client supplant normal materiality standards.¹³ Practically speaking, this degree of subjectivity may cause more risk-averse general counsel and other risk management professionals at a law firm to investigate, examine, and treat even less egregious missteps with greater scrutiny, as if they were more severe problems.¹⁴

Third, there may be other "soft" reasons for the firm's general counsel and risk management professionals to address less severe errors that fall within the specter of malpractice. For example, if a client is likely to discover an immaterial error, it is often prudent and beneficial to tell the client about the error simply for client-relations purposes, in order to preserve the client's confidence in the attorney's abilities and integrity or to promote open lines of communication, even if that error has no reasonable potential to harm the client or cause the client to terminate the relationship. Sometimes the "soft" reasons are the ones that tip the balance when it comes to the degree of investigation into and disclosure of the specter of malpractice.

WHAT DUTY DOES A LAW FIRM'S GENERAL COUNSEL OR RISK MANAGEMENT PROFESSIONAL HAVE TO INVESTIGATE THE SITUATION?

As a matter of sound business practice, a firm's general counsel or risk management professional should investigate all bona fide specters of malpractice to determine whether there are actual violations, to understand the potential liabilities to the firm, and to take remedial actions to limit liability. However, the legal imperative to conduct such investigations is

12. See Thomas L. Browne & Thomas P. Sukowicz, *Attorney Liability Risk Management*, in ATTORNEYS' LEGAL LIABILITY 16-9 (Thomas P. McGarry ed., 2018) ("Counsel should not make the mistake of failing to disclose a significant risk in the belief that the problem may never materialize. Problems addressed at the outset of representation often can be resolved. If the difficulties are of a type that cannot be initially resolved, they will only fester through time and neglect.").

13. For the ABA's most recent opinion on attorneys responding to social media, see ABA Comm. on Ethics & Pro. Resp., Formal Op. 496 (2021) [hereinafter ABA Op. 496].

14. In the best light, clients are frequently quirky. In the darkest light, clients can be irrational when it comes to engaging or firing counsel, acting on subjective beliefs, talking to others about counsel's performance ("my attorney is awful!"), and even posting bad reviews on social media. See ABA Op. 496, *supra* note 13.

somewhat poorly defined, opening the door for less proactive professionals to ignore the responsibility to investigate potential problems. Prudence dictates that one should not be lulled into inaction by the opaque nature of the duty to investigate specters of malpractice and the temptation to brush uncomfortable situations under the rug. The consequences may be dire.

In the Rules, the primary mechanism that compels the investigation into specters of malpractice can be found in Rule 5.1, which states in part:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.¹⁵

Comment 2 of Rule 5.1 supports the existence of an affirmative duty to investigate the specter of malpractice, which clarifies that Rule 5.1 requires “reasonable efforts to establish internal policies and procedures . . . [which] include those designed to *detect and resolve* conflicts of interest . . . and ensure that inexperienced lawyers are properly supervised.”¹⁶ This Comment explicitly calls for measures designed to proactively uncover a conflict (i.e., where a conflict of interest somehow negatively affects a client’s matter) and could logically support the principle that there is an affirmative duty to proactively and properly investigate every plausible specter of malpractice.¹⁷ Prime examples of how these ethics rules can impose additional sanctions for attorneys who inadequately investigate the specter of malpractice come from *In re Cohen*,¹⁸ *Attorney Grievance Commission of Maryland v. Kimmel*,¹⁹ and *In re Robinson*,²⁰ three disciplinary cases.

In *In re Cohen*, the court considered sanctions for a supervisory attorney for his subordinate lawyer’s transgression in erroneously filing an abandonment of a trademark application.²¹ The supervising attorney had no knowledge of the mistake, but the court held him accountable under Rule 5.1 because “attorneys supervising other lawyers must take reasonable steps to become knowledgeable about the actions of those attorneys in representing clients of the firm.”²² The court affirmed the duty to investigate potential

15. MODEL RULES OF PRO. CONDUCT r. 5.1(a) (AM. BAR ASS’N 2020).

16. *Id.* at cmt. 2 (emphasis added).

17. *Id.* Under the Model Rules themselves, conflicts need not cause any harm whatsoever to be considered ethics violations; however, the reality is that few bar counsel will pursue no-damage conflicts because the conflict issues will largely go undetected and/or will remain unknown to anyone other than the attorney and her client.

18. 847 A.2d 1162 (D.C. 2004).

19. 405 Md. 647, 955 A.2d 269 (Md. 2008).

20. 74 A.3d 688 (D.C. 2013).

21. *In re Cohen*, 847 A.2d at 1163, 1165.

22. *Id.* at 1166.

malfeasance, finding that “a lawyer of reasonable prudence and competence would have made the inquiry necessary to determine the status of the application proceeding.”²³ This case involves a particularly ethereal specter of malpractice because the supervising attorney had relatively little knowledge of the situation. Law firm general counsel and risk management teams should be careful to avoid a similar fate by ensuring that subordinates are properly supervised and by timely investigating situations involving specters of malpractice when inexperienced attorneys are handling matters more advanced than their experience would suggest is appropriate.

In *Kimmel*, a relatively inexperienced lawyer was tasked with opening a branch of a law firm in a new jurisdiction. When that task (quite predictably) went poorly, the court, in the context of a disciplinary action, found that the partners of the firm had violated Rule 5.1 because “a higher level of supervision may be indicated when an employee is new to the firm” and “[r]equests for help, however generalized . . . warrant investigation.”²⁴ This rationale led the court to recommend an indefinite suspension for the supervising partners at the firm.²⁵ When comparing this case to the specters of malpractice that a risk management professional might face at a larger firm, one should not take solace in the fact that this case deals with direct supervisory authority in a relatively small law firm. Senior attorneys in larger law firms have the same duty as their counterparts at smaller firms. Indeed, the practical reality of life in a larger firm and the scope of the risks and challenges posed by hundreds or thousands of lawyers places a greater burden²⁶ to create and uphold appropriate policies and procedures than does life at smaller firms.²⁷ For law firm general counsel and other risk management professionals in larger firms, the challenges are magnified, given the scope, volume, and complexity of matters (and attorneys) at larger firms.

In re Robinson likewise provides insight into what constitutes an appropriate investigative reaction to the specter of malpractice. In that case, the respondent was found by the District of Columbia Disciplinary Board to have violated Rules 1.15(a) (negligently misappropriating client funds), 1.15(b) (failing to promptly deliver funds to a client), and 5.1(a) (failure to assure firm compliance with disciplinary rules).²⁸ These violations resulted in the mishandling of client funds by a junior attorney at the respondent’s law

23. *Id.* at 1167.

24. *Kimmel*, 405 Md. at 676, 678, 955 A.2d at 286, 288.

25. *Id.* at 687, 955 A.2d at 293.

26. And, certainly, the risk of exponentially larger damage payouts.

27. *In re Anonymous Member of S.C. Bar*, 552 S.E.2d 10, 13, 14 (S.C. 2001).

28. *In re Robinson*, 74 A.3d 688, 690, 692 (D.C. 2013).

firm.²⁹ That junior attorney also happened to be the respondent's son-in-law.³⁰ The respondent's son-in-law improperly commingled client funds and the firm's operating funds, in contravention of ethical rules.³¹ The respondent learned about these missteps when the firm's financial institutions notified him and D.C. Bar Counsel of an overdrawn account.³² Notwithstanding this first transgression, the respondent simply asked his son-in-law to "find out what had happened."³³ The respondent did not thoroughly investigate the situation, provided no further oversight or training to his son-in-law, and took no remedial measures.³⁴ The problem repeated itself, to the detriment of respondent's clients.³⁵

Upholding the Disciplinary Board's findings and a seven-month suspension from the practice of law, the D.C. Court of Appeals stated, "once the alarm bell of an overdraft rang, the matter was too important to be left to a subordinate without at least diligent follow-up of any investigation by the subordinate into the apparent flaw."³⁶ Specifically, merely asking an attorney who may actually be involved in the specter of malpractice to investigate the root of the problem is not sufficient to absolve the supervising attorney of ethical liability.³⁷ When a situation smacks of the specter of malpractice, a firm's general counsel or risk management team must be able to offer concrete evidence that steps were taken to effectuate a diligent investigation into the matter to meet the minimum standards and expectations of the courts, based on applicable case law.

A separate basis for the duty to investigate the specter of malpractice, but one that does not require a risk management professional to be classified as a "supervisory attorney," comes from Rule 1.3, which states that a reasonable lawyer, acting as a fiduciary of the client, must exercise diligence when representing a client.³⁸ Failing to investigate the specter of malpractice is likely to fall below that standard of reasonable diligence, as demonstrated in *In re Dickens*.³⁹

29. *Id.* at 692.

30. *Id.*

31. *Id.* at 693.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 697.

37. *Id.* at 696; see also Nancy B. Rapoport, *The Curious Incident of the Law Firm that Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98 (2007) (reviewing MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004)) (high-profile case in which a senior attorney was held criminally liable for failure to disclose a conflict of interest). For more information regarding this attorney, see REGAN, *supra* note 2.

38. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020).

39. 174 A.3d 283 (D.C. 2017).

In *In re Dickens*, Mr. Dickens unduly delayed the execution of a will for the law firm's client.⁴⁰ The court determined that Ms. Luxenberg, a more senior attorney at the firm who was tangentially involved in the matter, violated her fiduciary duty of diligence under Rule 1.3 because she ignored "clear warning signs"⁴¹ that Mr. Dickens could no longer be trusted, by virtue of his long delays in correspondence and his frequent travel.⁴² The court explained that Ms. Luxenberg was effectively "on notice" and failed to make "reasonable efforts" to ensure that Mr. Dickens' behavior conformed to the Rules of Professional Conduct.⁴³ Ultimately, Ms. Luxenberg was suspended for six months for her transgression.⁴⁴ *In re Dickens* underscores that any law firm general counsel or risk management professional who ignores the proverbial warning signs puts his or her professional life, and the firm, in peril.

Although these examples dealt with disciplinary proceedings, the risks associated with failing to properly investigate the specter of malpractice extend far beyond license suspensions. Malpractice liability to clients is an ever-present risk. Legal malpractice insurers also may have a basis for denying coverage claims for risk management professionals who do not adequately investigate specters of malpractice or ethics violations.

WHAT ACTION IS REQUIRED WITH RESPECT TO THE FIRM'S LEGAL
MALPRACTICE INSURER AND WHEN SHOULD THE LAW FIRM TAKE
THAT ACTION?

Contracts with malpractice insurers can vary greatly from policy to policy and from state to state. But it is fair to assume that nearly every insurance policy requires a law firm to undertake some investigative activities once the specter materializes. For example, most insurance renewal forms include a question asking whether the firm has reason to believe that it might be subject to a liability claim. If the firm has knowledge, pre-dating the policy, of "circumstances, acts, errors, and omissions that [it] could have reasonably expected to be the basis of a claim or suit[,]" then the insurer may be absolved from providing coverage for those claims.⁴⁵ One court described the knowledge requirement as depending on whether or not "a reasonable lawyer in possession of such facts would have had a basis to believe that the

40. *Id.* at 298.

41. *Id.*

42. *Id.* at 303.

43. *Id.* (citations omitted).

44. *Id.* at 307.

45. *Joseph v. Certain Underwriters at Lloyd's London*, 844 S.E.2d 852, 854 (Ga. Ct. App. 2020).

insured had breached a professional duty.”⁴⁶ The court in *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.* provides clarity around this reasonableness standard, holding that a belief that a legal malpractice claim had expired does not absolve a lawyer of the responsibility to report the potential claim to the insurer.⁴⁷ Generally, this reasonableness standard is one for juries to determine,⁴⁸ so risk management professionals should take the decision out of the jury’s hands and investigate and report specters of malpractice as they occur.

In addition to understanding renewal notice requirements, it is essential to be familiar with ongoing notice requirements to a malpractice insurer. Malpractice insurance policies often set a standard for giving notice to the insurer that is different from the standard for giving notice to a client. For example, provisions sometimes require a lawyer to report any potential claims upon “becoming aware of any negligent act, error, omission or [p]ersonal [i]njury . . . which could reasonably be expected to be the basis of a [c]laim.”⁴⁹ Insofar as the specter of malpractice triggers a reporting obligation to a malpractice insurer, an investigation into problematic behavior by the general counsel and risk management team is not only prudent but also required.⁵⁰ If that reasonable investigative step has not been taken, and no potential claim is reported (when appropriate), the firm’s malpractice policy may not cover the cost of the malpractice suit.⁵¹ Inaction can be costly.

WHAT ACTION IS REQUIRED WITH RESPECT TO THE CLIENT AND WHEN SHOULD THE LAW FIRM TAKE THAT ACTION?

The duty to self-report potential malpractice claims and ethics violations to clients is another reason for general counsel and risk management professionals to be careful when dealing with specters of malpractice. The duty to self-report potential malpractice claims (the specters of malpractice) to the client is derived from Rule 1.4, which outlines the responsibilities of a lawyer’s communications with a client.⁵² The duty also stems from the lawyer’s role as a fiduciary. The most direct reference to the self-reporting duty comes from Comment 7 to Rule 1.4, which states that “[a] lawyer may

46. *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 (3d Cir. 1998).

47. *See Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302 (3d Cir. 2001).

48. *Joseph*, 844 S.E.2d at 857.

49. *Sirignano v. Chicago Ins. Co.*, 192 F. Supp. 2d 199, 202 (S.D.N.Y. 2002) (emphasis omitted).

50. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS’N 2020); *In re Dickens*, 174 A.3d 283 (D.C. 2017).

51. *See, e.g.*, *Bellefonte Ins. Co. v. Albert, P.C.*, 99 A.D.2d 947 (N.Y. App. Div. 1984).

52. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS’N 2020); ABA Op. 481.

not withhold information to serve the lawyer's own interest."⁵³ ABA Ethics Opinion 481 specifically interprets Rule 1.4 to obligate "a lawyer to inform a current client if the lawyer believes that he or she *may* have materially erred in the client's representation."⁵⁴ ABA Ethics Opinion 481 requires disclosure even if an attorney has not reached an absolute conclusion that a material error occurred.⁵⁵ The opinion further defines the standard requiring client disclosure as whether or not a "disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."⁵⁶ The invocation of a "reasonable lawyer" standard in this definition places the burden on attorneys to exercise reasonable diligence when self-reporting.⁵⁷ As previously discussed, reasonable diligence involves investigating specters of malpractice and ethics violations as they arise, so failing to investigate a specter of malpractice (and failing to notify the client of its existence) would violate the self-reporting duty.

General counsel and risk management professionals should also generally be aware of other features of this self-reporting requirement for purposes of determining when to investigate specters of malpractice:

- A lawyer may consult in-house counsel or an insurer before disclosing a mistake to a client.⁵⁸
- A delay in notifying the client (and therefore a delay in conducting an appropriate investigation into a specter of malpractice) carries the potential for damages to be incurred, and therefore increase the size of the potential lawsuit.⁵⁹
- The duty to self-report only applies to current clients; if a potential malpractice claim is discovered after a client has terminated the attorney-client relationship, then there is no duty to disclose, according to ABA Ethics Opinion 481.⁶⁰
- A firm must disclose the mistake and ramifications to clients, but there is a jurisdictional split on whether the firm must also disclose that a potential malpractice claim exists (e.g., New

53. MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 7 (AM. BAR ASS'N 2020).

54. ABA Op. 481, at 8 (emphasis added).

55. *Id.*

56. *Id.* at 2.

57. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020).

58. ABA Op. 481, at 5.

59. See *In Re Hoffman*, 883 So. 2d 425, 433–34 (La. 2004); *McAlister v. Slosberg*, 658 A.2d 658, 660 (Me. 1995).

60. ABA Op. 481 at 7.

York requires disclosure of the potential claim,⁶¹ but Colorado does not).⁶²

A lawyer who becomes aware of the specter of malpractice may be additionally obligated to take remedial action with respect to his or her client. Rule 5.1(c)(2) states that a lawyer is to be held responsible for another lawyer's violation if the lawyer has "direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but *fails to take reasonable remedial action*."⁶³ This Rule directly imposes an affirmative duty for lawyers in certain circumstances to take remedial action. Although the knowledge standard included in the Rule may not directly apply to the awareness of the specter of malpractice, the court in *Kimmel* considered the attorneys' remedial actions when determining the length of suspension.⁶⁴ In addition, because malpractice cases are generally limited to the amount of actual damages incurred by the client,⁶⁵ there may be compelling business reasons to take remedial action. However, where the remedial action could potentially result in additional, irreparable damages, general counsel should consult with the firm's malpractice insurance carrier to ascertain the limitations on any ability to take remedial action.

KEY TAKEAWAY

As the primary parties responsible for managing malpractice risk and ethics violations, a law firm's general counsel and risk management professionals should take great care when they become aware of the specter of malpractice. Although the path forward after any transgression might not be clear, there are multiple obligations that arise even before the potential or actual mistake has matured into a formal complaint of malpractice or a state bar disciplinary proceeding. Chief among these responsibilities is the duty to investigate potential malpractice claims and ethics violations, to provide notice of potential infractions to the malpractice insurer, and to self-report mistakes to the client. Failure to properly respond could lead to additional professional liability or loss of malpractice insurance coverage. The adage that "an ounce of prevention is worth a pound of cure" is particularly apt here.

61. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 734 (2000).

62. Colo. Bar Ass'n Ethics Comm. & Continuing Legal Educ. in Colo., Inc., Formal Op. 113 (2005).

63. MODEL RULES OF PRO. CONDUCT r. 5.1(c)(2) (AM. BAR ASS'N 2020) (emphasis added).

64. Att'y Grievance Comm'n of Md. v. Kimmel, 405 Md. 647, 687, 955 A.2d 269, 293 (Md. 2008) ("Because of [r]espondents' intense, immediate, and largely effective recovery efforts, however, we ultimately conclude that they may apply for reinstatement no sooner than 90 days.") (citation omitted).

65. Mattco Forge, Inc. v. Arthur Young & Co., 60 Cal. Rptr. 2d 780, 788 (Cal. Ct. App. 1997).

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