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License to Bill = License to Kill? Ethical Considerations on Lawyers' Fees (with a View to Switzerland)

Peter Eggenberger*

I. Introduction

Lawyers are representatives of clients, officers of the legal system and public citizens having special responsibility for the quality of justice. Their conduct should conform to the requirements of the law, both in professional service to clients and in their own business and personal affairs. Virtually all difficult ethical problems arise from the conflict between lawyers’ responsibilities to clients, to the legal system and to their own interest in remaining upright persons while earning a satisfactory living. Issues of professional discretion must be resolved through the exercise of sensitive professional and moral judgment.

The legal profession has seen a major change over the last two decades. Main factors for this development are the advent of paralegalism, the introduction of office automation, the permissibility of advertising, the advent of legal clinics, the growth of corporate and government law departments, the development of legal insurance programs, the growth of major law firms, the deteriorating image of the profession and the growth in the number of law schools. Another factor is the abolition of minimum-fee schedules as a result of the U.S.

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2. Id. at 8 [4].
3. Id. at 8 [8].
4. Id. at 9 [8].
The Supreme Court’s decision in *Goldfarb v. Virginia State Bar.*\(^6\) The system of civil litigation is regarded as highly complex, privatized and lawyer-dominated.\(^7\)

In January 1993, the American Bar Association (hereinafter ABA) commissioned a comprehensive survey of public attitudes toward the standing of lawyers. One thousand two-hundred and two adults were questioned. Lawyers’ favorability rating was only 40%, compared to teachers’ 84% and pharmacists’ 81%.\(^8\) Public complaints could be placed into four categories: lack of caring and compassion; poor ethical standards and enforcement; and greed and distasteful advertising.\(^9\) According to this ABA survey, 59% consider tougher ethical standards as top priority to cover the numerous client-lawyer relations complaints not currently subject to the lawyer ethics code.\(^10\)

Much of the public’s unfavorable view of the legal profession can be attributed to problems with prevalent billing practices.\(^11\) One of the greatest challenges to the legal profession is overcoming the stigma that lawyers are untrustworthy. The widespread practice of unethical hourly billing is considered to be one of the reasons for this notion.\(^12\) The ABA itself considers as the gravest ethical problem with overbilling the dishonesty that is required in order to engage in such billing methods.\(^13\)

But there are also many other variables that call for more creative billing procedures. Among them are complexities of modern litigation, increased competition for legal business, client pressure to reduce legal expenses and achieve results, and more entrepreneurial, risk-accepting lawyers.\(^14\)

Surprisingly, we can find divergent opinions about the ethics of billing practices among the professionals themselves. Whereas a survey in 1991 analyzing answers of 272 private lawyers and 80 corporate counsel found out that only 7.3% believed their peers never deliberately padded their hours to bill clients for work they had not actually

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6. *Id.* at 5 (citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)).
9. *Id.*
10. *Id.* at 64.
performed, the Committee on Lawyer Business Ethics published a report in 1998 pointing out: "The Committee believes that the overwhelming majority of lawyers bill for their legal services in an ethical manner."16

In this article, ethical aspects of different billing methods will be discussed. An evaluation of some of the differences of the fee systems in the United States and in Switzerland will follow. The main difference is that in Switzerland contingent fees are generally not allowed. An assessment of the most important billing methods and proposals for improvements will constitute the second part of the article.

II. U.S. Fee System

A. General remarks

In general, clients and lawyers are free to contract for the fee that the client has to pay.17 Lawyers owe their clients greater duties than are owed under the general law of contracts.18 A fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client.19

Fifty years ago, the amount of the typical lawyer's bill was determined by what the lawyer considered appropriate.20 The history of the changing doctrines on the control of lawyers' fees in general includes influential analogies from the English profession, strict statutory regulation in the United States, the emphasis on complete freedom of contract, the persistent use of court decisions and rules to provide selective controls, bar association schedules, and the ever-present pressures of custom.21

The ABA, a national voluntary organization of lawyers, has assumed the primary responsibility for promulgating national ethical

17. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (hereinafter
RESTATEMENT) § 34 b (2000).
18. Id.
20. ZITRIN & LANGFORD, supra note 11, at 585.
standards for the legal profession. In 1983, the ABA published its new Model Rules of Professional Conduct. There are 55 Rules, divided into 8 sections (client-lawyer relationship, counselor, advocate, transactions with persons other than clients, law firms and associations, public service, information about legal services, and maintaining the integrity of the profession).

Although the ABA’s Model Rules only have force as a body of rules with its voluntary members, various states and federal courts have looked to the ABA versions as a basis for regulating lawyers within the jurisdiction. Courts often regard the ABA Rules as highly persuasive authority. The rules provide a framework for the ethical practice of law, guidance to lawyers, and a structure for regulating conduct through disciplinary agencies. Every lawyer should be responsible for observance of the Rules of Professional Conduct. Although the ABA Rules are persuasive authority in courts, the controlling authority for the ethics of U.S. lawyers remains whatever set of ethical rules has been adopted in their state of licensure. All 50 states have adopted (with variations) some form of the ABA Model Rules or some form of the ABA Code of Professional Responsibility.

B. Rule 1.5 Model Rules of Professional Conduct

Rule 1.5 (a) requires reasonable fees and states various criteria for the determination of reasonableness. Rule 1.5 (c) allows an agreement on a fee contingent on the outcome of the matter for which the service is rendered. Rule 1.5 (d) prohibits an agreement of a contingent fee in domestic relations matters and for representing a defendant in a criminal case. According to Rule 1.5 (c), a contingent fee shall be in writing and 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.

Rule 1.5 is specific about the cases in which the contingent fee is prohibited, but silent when it is advisable. The Rule has therefore been criticized as “too vague.”

C. Other Model Rules

Rule 1.8 (j) (2) repeats that lawyers are allowed to contract with a client for a reasonable contingent fee in a civil case whereas otherwise

25. Id. at 9 [11].
they shall not acquire a proprietary interest in the cause of action or subject matter of litigation.

Various other provisions of the Rules implicitly affect ethical considerations regarding fees. Rule 1.2 requires a lawyer to abide by a client’s decisions concerning the objectives of representation. Rule 1.4 (a) requires that lawyers keep their clients reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

To the extent that any Rule is needed to state the obvious principle that a lawyer should not bill excessive time to a client, the general proscription on conflicts of interest in Rule 1.7 should remind lawyers of the potential tension between a client’s actual needs and the lawyer’s economic interests.  

D. Determination of Fee

The core of the Model Rules’ treatment of billing is their emphasis on the reasonableness of the fee. What constitutes a reasonable fee varies with the facts and circumstances. There is no precise measure of reasonableness. The courts have the inherent power to determine the reasonableness of a lawyer’s fee and to refuse the enforcement of any contract that calls for clearly excessive or unreasonable fees. State bars and other lawyer regulatory agencies have rarely imposed discipline for charging excessive fees.

Model Rule 1.5 (a) enumerates the following criteria for the determination of the reasonableness of a lawyer’s fee: the time and labor required; novelty and difficulty of questions; skill requisite to perform legal service properly; preclusion of other employment; customary fee; amount involved and results obtained; time limitations; nature and length of professional relationship; experience, reputation, and ability of lawyer; and fixed or contingent fee. These factors were also set forth in Johnson v. Georgia Highway Express Inc, 488 F.2d 714, 717-19 (5th Cir. 1974).

Although the Rules provide only an outline for measuring the reasonableness of a fee, they indicate that time should not be the sole standard for the calculation of a fee. The determination of the reasonableness of a lawyer’s fee should not turn merely on the economic benefit received by the lawyer’s clients, although it should be tied to

some benefit.31

III. Swiss Fee System

A. General Remarks

Switzerland is a civil law country with an inquisitorial system. The primary distinction between an adversarial and an inquisitorial system lies in the distribution of authority between lawyers and judges. In an adversary system, parties develop the case and the judge is a largely passive umpire; whereas in an inquisitorial system, the judge or a panel of judges acts as director and also as decisionmaker, and lawyers play a less central role.32

Inquisitorial systems generally place less importance on protection of individual freedom and more emphasis on efficiency, uniformity, and equality of treatment.33 Unlike the American system, with its sharp division between trial and pretrial proceedings, the inquisitorial format involves a series of proceedings which seek to minimize overpreparation, inefficiency and surprise.34 Lawyers may face similar economic pressure under both systems. The American view is, however, that in an inquisitorial system the need for tactical maneuvers is less relevant and fewer incentives for unnecessary preparation and meter running exist.35 The Swiss view is that an adversarial system and the common law require in general more work for a lawyer than an inquisitorial system.36

B. Cantonal Law

Switzerland is divided into 26 states called cantons. The Swiss Constitution guarantees in art. 64 and 64bis that the organization of the judicial system as well as the rules for civil and criminal procedures remain in the competence of the cantons. Each canton has enacted referring statutes.

In the scope of this competence, the cantons are allowed to regulate lawyers’ fees for trials.37 Because of the diversity of the cantonal judicial

31. ZITRIN & LANGFORD, supra note 11, at 585.
33. Id. at 253.
34. Id. at 252.
35. Id. at 253.
systems and statutes, the fees for trials must be determined by cantonal, not federal law.\textsuperscript{38}

\section*{C. Rule 13 Swiss Model Rules of Professional Conduct}

The Swiss Bar Association (hereinafter SAV), a national voluntary organization of lawyers, has passed in 1973 twenty-four Model Rules of Professional Conduct. The Rules are divided into three sections (general duties, duties towards the client, duties towards other lawyers; see appendix). The Rules are being revised at present, but the results will only be disclosed at the end of 2002 at the earliest.\textsuperscript{39}

The Model Rules have been adopted by almost every Cantonal Bar Association.\textsuperscript{40} The Rules govern the professional conduct of all members of the referring Bar Association.\textsuperscript{41} The Rules are set by private organizations, but the courts often consider them in their decision-making process.\textsuperscript{42} The Rules are usually stricter than the cantonal law.\textsuperscript{43}

Rule 13 regulates lawyers’ fees. It says primarily that lawyers shall charge within the scope of the usage applicable in their canton, in the absence of an agreement with the client as to the professional fee. Lawyers may agree to an all-inclusive fee for legal advice. This should correspond with their expected services. Rule 13 finally forbids an agreement with a contingent fee.

\section*{D. Determination of Fee}

In civil and criminal cases, the lawyer is bound by the tariffs of the cantonal legislator.\textsuperscript{44} The fees are calculated by a percentage of the amount in controversy, combined with other factors like necessary time spent, material and legal difficulties of the case and responsibility of the lawyer.\textsuperscript{45} The Swiss Supreme Court has judged this cantonal way of calculating lawyers’ fees as constitutional.\textsuperscript{46} If the amount in controversy cannot be calculated, as in criminal cases and certain civil cases, the fee is determined by the amount of time spent.\textsuperscript{47} The cantons,

\begin{itemize}
  \item \textsuperscript{38} \textit{Id.} at 39 n.48.
  \item \textsuperscript{39} SAV-email of 10/18/2001 to the author.
  \item \textsuperscript{40} HÖCHLI, \textit{supra} note 37, at 102 n.427.
  \item \textsuperscript{41} GATTIKER, \textit{supra} note 36, at 34.
  \item \textsuperscript{42} Id. at 34.
  \item \textsuperscript{43} GIOVANNI ANDREA TESTA, \textit{Die Zivil- und Standandesrechtlichen Pflichten des Rechtsanwaltes gegenüber dem Klienten} 8 (2001).
  \item \textsuperscript{44} HÖCHLI, \textit{supra} note 37, at 41.
  \item \textsuperscript{45} Id. at 43.
  \item \textsuperscript{46} Decision published only in a cantonal publication (ZR 87 (1988) 90), but not in the official reporter of the Swiss Supreme Court.
  \item \textsuperscript{47} HÖCHLI, \textit{supra} note 37, at 45.
\end{itemize}
like the Model Rules, have established the prohibition of contingent fees in their tariffs.\(^4\) The Swiss Supreme Court has already at the beginning of the last century upheld this ban of contingent fees as constitutional on the grounds of a superior power of the lawyer towards the client and the danger of speculation.\(^4\) In a recent decision, the court has affirmed this decision and especially mentioned the dangers of unconscionability and dependency.\(^5\)

Based on Rule 13, the Cantonal Bar Associations have passed rules for the determination of the fees for non-forensic lawyering. The principle is the same as in the United States. The fee has to be reasonable in proportion to the time spent and the responsibility taken.\(^5\) Usually, the fee is calculated on an hourly basis with possible additions depending on the value of the object or interest dealt with.\(^5\)

If clients are not satisfied with their lawyer’s bill, three procedures are available. First, they can file a suit against their lawyer in a cantonal court. This procedure is normal in civil litigation. Second, they can take a special proceeding with a judge called moderation in which the judge sets the amount of the fee in a binding, but not directly enforceable way.\(^5\) Third, they can file a complaint with the cantonal governmental Supervisory Board for Lawyers.\(^5\) The judges as well as the governmental Supervisory Board will take the Rules of the Bar Associations concerning lawyers’ fees into consideration when they have to decide on the reasonableness of a fee.\(^5\)

IV. Contingent Fee

A. Definition

The U.S. Supreme Court defines a fee as contingent if the obligation to pay depends on the lawyering obtaining a particular result.\(^5\) The size or payment of the fee is conditioned on some measure of the client’s

\(^4\) GATTIKER, supra note 36, at 32.
\(^4\) BGE 41 II 481 (Reporter of the Swiss Supreme Court, Volume 41 (year 1916), section II (civil law), page 481).
\(^5\) BGE 113 Ia 279 (Reporter of the Swiss Supreme Court, Volume 113 (year 1988), section Ia (constitutional law), page 279).
\(^5\) HOCHLI, supra note 37, at 34, 38, 47-48.
\(^5\) Id. at 96.
\(^5\) TESTA, supra note 43, at 244-45. The exact procedure and the explanation why the judgment is binding, but not directly enforceable are rather complicated. I therefore do not go into further details.
\(^5\) HOCHLI, supra note 37, at 57.
\(^5\) Id. at 96.
success. The contingency fee is very often associated with the plaintiff side of personal injury cases; however, in the defense or commercial litigation context, a contingency fee may be reasonably subject to calculation based on the value of a deal closed or by basing the fee on the amount the plaintiff is actually paid versus some higher demanded amount.

The contingent fee has been called a "uniquely American development." The contingency fee has developed from a once illegal practice to an essential element of the American legal system. A study of professional economics and responsibilities in 1964 noticed that contingent fees were the dominant method at that time. In the 1970s, the method of hourly billing became predominant. But the contingency fee is still "one of the defining characteristics of civil litigation in the United States."

B. Functions

Contingent fee arrangements perform three valuable functions. First, they enable persons who could not otherwise afford counsel to assert their rights, paying their lawyers only if the assertion succeeds. The contingency fee system is regarded as "extremely important for insuring access to the civil justice system." Second, contingent fees give lawyers an additional incentive to seek their clients' success and to encourage only those clients with claims having a substantial likelihood of succeeding. Third, such fees enable a client to share the risk of losing with a lawyer, who is usually better able to assess the risk and to bear it by undertaking similar arrangements in other cases. The Supreme Court also emphasizes the possibility of risk-pooling of a lawyer operating on a contingency-fee basis.

A contingent-fee contract allocates to the lawyer the risk that the

57. RESTATEMENT, supra note 17, § 35a.
59. MACKINNON, supra note 21, at 209.
60. Kristin A. Porcu, Protecting the Poor: The Dangers of Altering the Contingency Fee System, 5 SUFFOLK J. TRIAL & APP. ADVOC. 149, 149 (2000). For a survey of the history of contingency fees, see id. at 150-53.
61. MACKINNON, supra note 21, at 205.
62. Watson, supra note 12, at 190.
64. RESTATEMENT, supra note 17, § 35b.
65. Kritzer, supra note 63, at 268.
66. RESTATEMENT, supra note 17, § 35b.
67. Id.
case will require much time and produce no recovery and to the client the
risk that the case will require little time and produce a substantial fee. In fact, uncertainty seems to be the main reason for the contingency fee system, and risk-sharing has emerged as a complementary justification for contingent fees. The client purchases additional services under a contingency fee arrangement, namely financing and a form of insurance. The contingency lawyer finances the litigation for the client while a case is pending. If the lawyer obtains no recovery for the client, the lawyer absorbs the entire opportunity cost of the time expended on the case and effectively insures the client for the value of the lawyer's time. On a successful outcome, on the other hand, lawyers typically receive from 33% to 40% of the proceeds recovered.

Where a lawyer invokes the court's equitable power to approve a settlement agreement to distribute the proceeds, the court must scrutinize the reasonableness of the contingent lawyer's fee contract which affects the net recovery to the plaintiff. A tribunal might find a contingent fee unreasonable due to a defect in the calculation of risk in two cases in particular: those in which there was a high likelihood of substantial recovery by trial or settlement, so that the lawyer bore only little risk of nonpayment, and those in which the client's recovery was likely to be so large that the lawyer's fee would clearly exceed the sum appropriate to pay for services performed and risks assumed.

V. Hourly Fee

Hourly billing means that the lawyer charges a fee that is the result of the time spent multiplied by a certain hourly rate. This fee, as must all lawyers' fees, has to be reasonable. The hourly fee would be that charged by lawyers of similar experience and other credentials in comparable cases, but not more than the standard rate of the lawyer in question for that type of work. The lawyer must show, by records or otherwise, the hours actually and reasonably devoted to the case in view

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69. RESTATEMENT, supra note 17, §34c.
70. Porcu, supra note 60, at 163.
72. Kritzer, supra note 63, at 270.
73. Id.
74. Id.
77. RESTATEMENT, supra note 17, § 35 c.
78. See id. §§ 2 (d), 3 (d).
79. Id. § 39c.
of the importance of the case to the client, the client’s financial situation and instructions, and the time that a comparable lawyer would have needed.80

Hourly fees are a common contractual basis of payment for legal services. Surveys imply that this method is presently the most common method of billing in the United States. A survey of almost 300 private lawyers found that in more than 97% of the law firms represented hourly billing was the principal type of billing.81

As we have seen,82 until the late 60s the main billing method was the contingent fee. Since then, most lawyers in private civil practice have based their fees almost entirely upon the number of hours that they have expended on services for their clients.83 One author predicts: “Hourly billing remains the standard, and it will likely be the norm into the foreseeable future.”84 Another author sees that “clients, law firms, legal consultants, and commentators are sharply divided about the future of hourly billing.”85 Yet another author predicted in 1987 that hourly rates for legal work would soon be replaced by fixed-fee prices. He mentioned four main factors for such a development: hourly time records and metered technical support allocable to specific types of cases and/or clients; accumulation and analysis of costs of production based on a large number of cases by experienced people; demand for fixed fees by clients; and competition from a growing number of lawyers and law firms.86 Another author supported this view in 1994: “Flat fee, or partially flat fee billing might well become much more prevalent.”87

VI. Alternative Billing Methods

The Business Lawyers Committee has noticed a “growing lure of alternatives” to the traditional and predominant billing methods of contingent and hourly fees.88 One reason for this notion can be that clients, sophisticated or not, want alternatives to traditional hourly billing

80. Id.
81. Massey & D’Amour, supra note 14, at 111 with further references.
82. See Restatement, supra note 17, § 4(a).
because of a quality-value perception that emphasizes solutions, results, and benefits obtained rather than the time spent on a project.\footnote{Burke, supra note 75, at 59.} Another reason can be that a lawyer should offer the client alternative bases for the fee and explain their implications when there is doubt whether a contingent fee is consistent with the client's best interest.\footnote{MODEL RULES ANNOTATED, supra note 1, at 22 (3).} The ABA approves in its opinion 94-389 a contingency fee if the fee is reasonable and the client is fully advised of alternative fees.

The fixed or flat fee is the price that will be charged for defined services. It may be the total fee for the engagement or may apply to segments of the total services. It may stand alone or be combined with either an hourly fee or a contingent fee.\footnote{Reed, supra note 5, at 89; ZITRIN & LANGFORD, supra note 11, at 591; Chan, supra note 11, at 626.} If the fixed or flat fee is combined with an hourly rate, the portions of the services that can be defined as to scope of services are charged on a fixed- or flat-fee basis, and the portions of the services that are not capable of being defined because of variables or uncertainties are charged on a time-rate or hourly basis.\footnote{Reed, supra note 5, at 94-95; Burke, supra note 75, 60.}

The lodestar method has its origin in the federal court system in \textit{Lindy Bros. Builders Inc. v. Am. Radiator \\& Standard Sanitary Corp.}, 487 F.2d 161 (3rd Cir. 1973). The method consists of multiplying the hours spent by a reasonable billing rate per hour to determine the lodestar. This amount is then multiplied by a factor to recognize factors other than time spent.\footnote{Reed, supra note 5, at 103.}

The blended hourly rate is a hybrid of the hourly rate. Instead of specific hourly rates for individual fee chargers, one rate applies to all hours billed on a matter.\footnote{Id. at 93.} This rate is usually lower with the possibility of a larger payment based on some potential result.\footnote{Massey \\& D’Amour, supra note 14, at 121.} The contingency factor can also be taken into account by agreeing upon one portion of the fee being hourly billed (e.g., pretrial activities), the other portion being measured by the achieved result (e.g., trial phase).\footnote{Reed, supra note 5, at 96; Porcu, supra note 60, at 165; BRADFORD W. HILDEBRANDT, ALTERNATIVE PRICING PRACTICES 106 (1995); South Carolina Ethics Opinion 84-11.}

Phased billing is one of the more complex variations on standard hourly billing. In phased billing, a budget is negotiated between client and lawyer based on phases of time and activity. As hourly bills are submitted, any amounts over the agreed budget for a phase are put into a
suspense account. Counsel can recoup these fees upon successful under-budget completion of earlier or later phases or the entire engagement.\textsuperscript{9}\textsuperscript{7}

The relative-value method of billing involves creating schedules that break down the services by subject matter and by task and assigning a relative value or multiplier to each. The value of each component service or task has to be determined. Once the relative-value schedules have been established, the base rate factor can be changed. The relative-value method combines elements of hourly, fixed- or flat-fee, and value billing.\textsuperscript{9}\textsuperscript{8} Value billing is based on the value to the client of the services rendered. It requires a clear arrangement as to the value to the client of the service provided, often over a fairly wide range of possible outcomes and with a whole number of factors to be considered in setting the final fee.\textsuperscript{9}\textsuperscript{9}

The percentage fee is based on a schedule of fees related to the amount involved in the matter being handled. The amount may be predetermined or may, in some instances, be related to the amount ultimately determined. The percentage rate may be constant or graduated.\textsuperscript{10}\textsuperscript{0}

Sliding percentage fees are schedules for contingent percentage fees under which the percentage rate increases as the litigation progresses from stage to stage or with the number of hours worked, or under which the percentage rate decreases as the size of recovery increases.\textsuperscript{10}\textsuperscript{1}

The reverse contingent fee is a percentage of the amount the client saved through the lawyer’s effort, namely a stated portion of the difference between the amount originally claimed by the plaintiff and the amount the client is ultimately required to pay.\textsuperscript{10}\textsuperscript{2}

Other possible methods are the conversion of a contingent fee to an hourly fee,\textsuperscript{10}\textsuperscript{3} in kind payments such as taking an equity share of the corporate client,\textsuperscript{10}\textsuperscript{4} unbundled fees (basic legal research from outsource

\begin{thebibliography}{100}
\bibitem{97} Committee, supra note 16, at 184.
\bibitem{98} Reed, supra note 5, at 104; Burke, supra note 75, at 62.
\bibitem{99} Committee, supra note 16, at 185; Chan, supra note 11, at 627.
\bibitem{100} Reed, supra note 5, at 97; Committee, supra note 16, at 186; Burke, supra note 75, at 61.
\bibitem{102} Brian P. Voke, Ethical Considerations in Alternative Fee Agreements for the Defense Lawyer, 30-Sum Brief 64, 66 (2001); ABA/BNA Lawyers’ Manual on Professional Conduct, 41:905 (1994).
\bibitem{103} HAZARD & Hodes, supra note 30, § 8.16.
\bibitem{104} Massey & D’Amour, supra note 14, at 121.
\end{thebibliography}
the loaning of a lawyer,\textsuperscript{105} the sale of a claim to the lawyer,\textsuperscript{106} and the client's borrowing against his claim.\textsuperscript{108}

Sometimes, the methods mentioned may be combined with caps,\textsuperscript{109} minima, incentive boni,\textsuperscript{110} credits against future unrelated legal work, guarantees of satisfaction, and other creative mechanisms that foster a mutually trusting relationship between the lawyer and the client.\textsuperscript{111}

VII. Ethical Assessment of Various Billing Methods

Almost any fee arrangement between lawyers and clients may give rise to a conflict. A lawyer employed at a daily or hourly rate would have a conflicting interest to drag the case on beyond the point of maximum benefit to the client. The contingent fee contract creates a conflict when either the lawyer or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. A lawyer who received a flat fee in advance would have a conflicting interest to dispose of the case as quickly as possible, to the client's disad-vantage. The variations of this kind of conflict are infinite.

As many clients seem to become more sensitized to the need for control over fees, they and their lawyers will work more closely to find acceptable solutions.\textsuperscript{112} But if it has to come to a trial because the client and lawyer cannot negotiate a settlement, judges appear to have approved most or all of the time submitted by lawyers in most reported decisions.\textsuperscript{113}

In examining the ethical impacts of various billing methods, you will notice that most of the authors treat only contingent and hourly fees,\textsuperscript{114} and that they will generally find more negative than positive aspects. Alternative billing forms besides fixed/flat fees are rarely ever evaluated.

\textsuperscript{105} Committee, supra note 16, at 183.
\textsuperscript{106} Id. at 186.
\textsuperscript{107} Clermont & Currivan, supra note 101, at 596; Kritzer, supra note 63, at 308, even proposes an auction for the service of lawyers.
\textsuperscript{108} Clermont & Currivan, supra note 101, at 597.
\textsuperscript{109} Committee, supra note 16, at 182.
\textsuperscript{110} ZITRIN & LANGFORD, supra note 11, at 591.
\textsuperscript{111} Burke, supra note 75, at 62.
\textsuperscript{112} ZITRIN & LANGFORD, supra note 11, at 592.
\textsuperscript{113} Ross, supra note 15, at 13.
\textsuperscript{114} Ross, id. at 83, even writes: "Discussions of the ethics of fees have concentrated almost entirely upon contingent fees and virtually have ignored hourly billing."
A. Contingent Fee

Allowing contingent fees requires an exception to the long-standing ethical precept that in order to maintain independent professional judgment on behalf of the client, a lawyer must not acquire a proprietary interest in the client's case.\footnote{Zitrin & Langford, supra note 11, at 192.}

The reasons for the ban of contingent fees in Switzerland are based on the duties of the lawyer towards the client, towards the government and towards the guild.\footnote{Gattiker, supra note 36, at 38.} The loyalty of the lawyer towards the client should prevent him from exploiting the client. The contingent fee is considered to have the inherent danger of a client's being ripped off because the client cannot assess the risk of a trial.\footnote{Id. at 38; Hochli, supra note 37, at 84.} The possible self-interest of the lawyer in the case is regarded as a potential for unfair trial conduct.\footnote{Gattiker, supra note 36, at 38, 122.} The duties towards the guild are believed to be in jeopardy by a loss of independence of the lawyer and his being reduced to a business partner of the client.\footnote{Id. at 39.} Besides this, there is the fear of a loss of dignity of the guild, improper solicitation, and commercialization of the profession.\footnote{Testa, supra note 43, at 222.}

The lawyer’s speculative interest in the claim is also one of the most common objections to a contingent fee in the United States. This objection has deep historical roots, but more recently it has come to rest on arguments that the speculative nature of the lawyer's interest is inconsistent with professional detachment and that this converts lawyering from a profession into a mere business.\footnote{Clermont & Currivan, supra note 101, at 570.} The lawyer’s economic interest in the outcome may tempt him to use improper tactics for ensuring victory and to slight the duties as an officer of the court; further, lawyers may find themselves unable to act disinterestedly in advising their client and unwilling to allow client participation in controlling the lawsuit.\footnote{Id.} The result may be an increase in abuses caused by the lawyers’ economic self-interests.

Contingent fees can give incentives to the lawyer to minimize time and risk in order to maximize return, whereas the client would seek to maximize the lawyer’s time and risk in order to minimize risk and maximize return. It is the lawyer who steers the process, and the client is usually not able to judge whether or not the lawyer’s self-interest determines the extent of work and assistance for the client’s case. The
timing and the amount of recovery seems to be a main conflict of interest if the lawyer is given a percentage of the recovery.\textsuperscript{123}

The agreement on a contingent fee implies other ethical problems. Impairment of the lawyer’s screening faculties by a “pot of gold” mentality may encourage groundless speculative suits.\textsuperscript{124} The premium may also override lawyer’s ethical reluctance to bring nuisance suits.\textsuperscript{125} Solicitation of lucrative cases could be another consequence.\textsuperscript{126} The premium induces other ethical violations by causing the lawyer to view a proffered case as a valuable commodity; thus, lawyers sometimes will refuse to refer the case away although they ethically should or will demand a heavy forwarding fee although they ethically should not.\textsuperscript{127} A pure referral fee would be unethical in most U.S. jurisdictions under Rule 1.5 (e).

On the other hand, the agreement of a contingent fee enhances the access of indigent persons to court.\textsuperscript{128} Its function as a financing device that enables a client to prosecute an otherwise unaffordable claim is the most commonly cited historic justification for the contingent fee.\textsuperscript{129} Part of a contingent fee can be seen as payment for assuming the risk that there will be no or no sufficient recovery; second, the contingent fee lawyer virtually never receives any compensation until the case is completed and thus can be said to provide a financing service.\textsuperscript{130}

Economic alignment brings with it at least three benefits that can offset the problems it induces. First, a virtual guarantee of at least that amount of zeal on which the adversary system depends; second, a virtual guarantee that the inevitable deviations from impartiality on the part of the lawyer will be in direction of alignment rather than misalignment of lawyer’s and client’s interest; and third, an increase in client satisfaction stemming from the feeling that the lawyer is a partner in interest.\textsuperscript{131} In too closely aligning themselves with the client, lawyers may even take on unacceptable reputational and financial risks.\textsuperscript{132}

The fear of frivolous cases can be dampened by the fact that the lawyer is likely to abstain from any case with such a low probability of

\textsuperscript{123} \textit{Id.} at 569, 575 n.146; \textit{Zitrin \& Langford, supra} note 11, at 190; Massey \& D’Amour, \textit{supra} note 14, at 119; Porcu, \textit{supra} note 60, at 149-50.

\textsuperscript{124} Clermont \& Currivan, \textit{supra} note 101, at 574.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} with further references.

\textsuperscript{128} \textit{Zitrin \& Langford, supra} note 11, at 190.

\textsuperscript{129} Brickman, \textit{supra} note 71, at 43.

\textsuperscript{130} Herbert M. Kritzer, et al., \textit{The Impact of Fee Arrangement on Lawyer Effort}, 19 Law \& Soc’y Rev. 250, 255 n.4 (1985); Gross, \textit{supra} note 7, at 322.

\textsuperscript{131} Clermont \& Currivan, \textit{supra} note 101, at 570.

\textsuperscript{132} Committee, \textit{supra} note 16, at 195.
success that it makes the case a bad investment. Under a contingent fee, the primary screening function shifts to the lawyer, and the lawyer will probably do a more effective screening job than the client.\(^{133}\)

A contingent fee can also motivate lawyers to work more diligently since their compensation depends upon their clients’ recovery.\(^{134}\) There is even the opinion that contingent fees could foster overzealous advocacy.\(^{135}\) The contingent fee is then to be seen as a reward for the good performance of the lawyer.\(^{136}\) It is well possible that such a system discourages the filing of small, but meritorious cases. But we must not forget that for a large proportion of contingency fee cases like those seeking injunctive or other equitable relief there is no “market treatment.”\(^{137}\)

Certainly, contingent fees place an added responsibility on the lawyers and make it harder for them to advise their clients objectively. It is not without reason that contingent fees are even in the United States not even allowed in criminal and in domestic relations cases. In criminal cases, paying lawyers a premium for acquittal would cause them to encourage their clients to turn down favorable plea bargains and to go to trial.\(^{138}\) And in divorce or custody cases, a contingent fee would create incentives to discourage reconciliation and encourage bitter and wounding court battles.\(^{139}\)

\[\textit{B. Hourly Fee}\]

Originally praised for its objectivity and efficiency, hourly billing increasingly has been condemned for encouraging inefficiency, excessive litigation, and fraud.\(^{140}\) The padding of bills is almost impossible to prove since there is no objective way to measure, except within very broad limits, the amount of time that a lawyer needs to spend on any particular task.\(^{141}\) Billable hours have steadily risen over the years. A study in 1965 found normal billing hours of 1,400 to 1,600 a year for associates and 1,200 to 1,400 for partners.\(^{142}\) A 1995 survey showed that the average number of billable hours by partners ranged from 1,513 to 1,847 a year and associate hours from 1,649 to 1,907.\(^{143}\)

\(^{133}\) Clermont & Currivan, supra note 101, at 570-71.

\(^{134}\) Brickman, supra note 71, at 44.

\(^{135}\) \textit{RESTATEMENT}, supra note 17, § 35b.

\(^{136}\) \textit{HÖCHLI}, supra note 37, at 84.

\(^{137}\) City of Burlington v. Dague, 506 U.S. at 564.

\(^{138}\) ZITRIN & LANGFORD, supra note 11, at 192.

\(^{139}\) \textit{RESTATEMENT}, supra note 17, at § 35g.

\(^{140}\) \textit{ROSS}, supra note 85, at 1 with further references.

\(^{141}\) \textit{ld.} at 2.

\(^{142}\) \textit{ld.} at 3 with further reference.

\(^{143}\) \textit{ld.} with further reference.
How can a method called "the most fair and efficient method of compensation," admired for its "simplicity," and deemed "the best technique as long as lawyers are honest," be so harshly criticized?

Hourly billing can be problematic for many reasons, including lack of incentive for lawyers to settle early, use of unnecessary personnel and improper delegation, increased charges for inexperienced personnel, inaccurate time records, unrealistic quotas for timekeeping, lack of risk sharing, lack of predictability of ultimate fee, performance of work without value to client, and insufficient evaluation of client satisfaction. Hourly billing can also be an incentive for failure to utilize modern technologies, duplication of work, excessive research, minimum billing increments, charges for internal conferences, vague time entries, and overstaffing.

Billing by the hour can put the client's and the lawyer's interests in direct conflict. The client wants the matter resolved as quickly, smoothly and inexpensively as possible. The lawyer on the other hand gets paid more the longer the matter carries on. There is no relationship between the task and the bill for the task. Lawyers get benefits for unproductive tasks, but not their clients. The client has no input into how the lawyer's time is spent on the file. One major problem with charging by the hour is that the hourly billing system in and of itself cannot realistically predict how much litigation will ultimately cost. In the litigation context, billing by the hour forces clients and their counsel to think carefully about strategy and the need to perform certain tasks when budgeting a project, thereby controlling costs and preventing needless expenditures. Lawyers answer only to their conscience in being honest; the method keeps honest lawyers within the bounds of ethical behavior, but fails to ground the unscrupulous.

Using the hourly billing system, the inefficient lawyer makes more money than the knowledgeable, high-tech lawyer who can turn out

145. Ross, supra note 15, at 84.
146. Ross, supra note 85, at 245.
147. Burke, supra note 75, at 59.
148. Ross, supra note 15, at 29-70; Richmond, supra note 144, at 222.
149. Jeffery L. Tolman, Billing by the Hour Should Be Banned, in BEYOND THE BILLABLE HOUR, AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS 73 (Richard C. Reed ed. 1989).
150. Id.
151. Id.
153. Richmond, supra note 144, at 210.
quality work quickly. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. On the other hand, an unreasonable limitation on the hours lawyers may spend on a client should be avoided as a threat to their ability to fulfill their obligation under Model Rule 1.1 to "provide competent representation to a client."  

C. Fixed/Flat fee

Ethics boards in Connecticut, New Hampshire, Oregon, and Wisconsin have held that a flat fee representation is permissible and does not violate the Rules of Professional Conduct in each respective state. This billing method is most commonly used for routine services and volume work done on a repetitive basis. The flat fee eliminates uncertainty and fee disputes with clients because clients theoretically know what the fee will be ahead of time. It also provides more freedom for lawyers in case management. Furthermore, because the fee is set, there is a great incentive for lawyers to be efficient. Because the fee is based on factors other than just the amount of time spent, there is an incentive for the development of forms and systems, and the utilization of technology and legal assistants or other support staff to provide services.

On the other hand, fixed fees may be more likely to create conflicts between lawyers and clients because this form of billing is less clearly defined and permits greater opportunities for negotiation. But because the fee is predetermined, it raises conflict of interest issues. It might limit lawyer representation and lower quality of service when representation becomes unprofitable. The grouping of cases and homogeneity of treatment could diminish the frequency of individualized and nuanced presentations of fine legal points. Lawyers could also be pressured to standardize the ways they handle their cases because the economic premium will be on generic, patterned approaches.

155. Richmond, supra note 144, at 210.
156. MODEL RULES ANNOTATED, supra note 1, at 22 [3].
157. ZITRIN & LANGFORD, supra note 11, at 594.
158. Voke, supra note 102, at 69.
159. Chan, supra note 11, at 626; Reed, supra note 5, at 90.
160. Chan, supra note 11, at 626.
162. Chan, supra note 11, at 626; Watson, supra note 12, at 200; Ross, supra note 85, at 240.
163. Chan, supra note 11, at 626.
164. Id.
Furthermore, a fixed or flat fee measures the value of the legal services rendered imperfectly. Flat fees have especially been held to be unethical in the insurance defense context, where they are seen as a potential disincentive to zealous advocacy.

A fixed legal fee so low that it forces the lawyer to perform less than competently would not be reasonable, and the agreement would violate the Model Rules of Professional Conduct. If the fixed fee were so low that lawyers would have to put their own personal and financial interests ahead of the interest of the client, the resultant conflict of interest would also violate the Rules.

D. Other Forms

Authors believe that alternative forms of billing would not necessarily encourage a higher degree of lawyer honesty, would have greater potentials for misunderstanding and liability, would not be satisfactory, and would fail to reduce fees or costs.

One author considers a time-based lodestar adjusted by other factors as the best method. This method would, in his opinion, be superior to hourly and value billing as it would provide a reason-ably objective basis for billing, namely time, and would allow for other factors that should properly be reflected in the calculation of a bill. The prospect of a diminution of fees for insufficiency or an increment based upon quality would help to discourage the time-wasting of time-based systems. The adjusted lodestar system would also discourage padding to the extent that it would enable lawyers to recover for the honest value of their work, eliminate the dishonesty of surreptitious adjustments and remove much of the pressure to bill massive numbers of hours that afflicts so many lawyers. Others think, however, that this method provokes inefficiency, discourages early settlement, is too complicated, and may not reflect the market value of the services.

Hybrid fees put more pressure on the lawyer’s ability to maintain independent professional judgment, especially since the more complicated the fee arrangement, the harder it will be, particularly for

166. Richmond, supra note 144, at 210 n.22 with further references.
167. Voke, supra note 102, at 67-68.
168. Ross, supra note 85, at 238.
170. Richmond, supra note 144, at 210 n.21.
171. Watson, supra note 12, at 200.
172. Ross, supra note 85, at 247.
173. Id.
174. Id. at 247-48.
175. Reed, supra note 5, at 103.
unsophisticated clients, to understand the basis of the fee clearly. An advantage hybrid fees have over a straight contingency fee is that clients may avoid paying a perceived windfall fee if the lawyer obtains an early favorable recovery.

Such hybrid fees might endanger the quality of work unless quality controls are institutionalized. This type of billing should only be used when the work involves a typical pattern and the fee charger mix to do the work is reasonably foreseeable; if the matters subject to the agreement vary in the required level of expertise and specialization or in the responsibility assumed, it should not be used. As far as minima and maxima are part of the agreement, the lawyer has to be especially careful because caps can be "dangerous and unfair" and formalized fees with minima might be a violation of antitrust laws.

Relative-value billing is prone to abuse especially because many lawyers value bill their clients without their clients' knowledge. Another significant ethical problem with value billing is the degree of discretion it gives a lawyer in determining legal fees. Because clients often do not know how difficult or easy it was to obtain a particular result in a matter, they rely on their lawyers to tell them whether the result was a good one or not. The temptation for lawyers to misrepresent and deceive is greater in value billing than with hourly billing; finally, there is a risk that fees based on value billing will be unreasonable or excessive. The determination of value in the production of legal services may or may not coincide with the client's perception of value. This method should only be used when the tasks to be performed can be classified and are reasonably predictable.

A contingent hourly-percentage fee is praised as "uniquely sound and practical." The authors think that this system solves the problems associated with hourly and contingent fees. Because of its contingency, the system would facilitate access by the poor to legal services. It would measure well the cost to the lawyer and the value to the client of the legal services rendered. Its practicability would make implementation feasible. A contingent hourly-percentage fee would also mitigate the

176. ZITRIN & LANGFORD, supra note 11, at 192.
177. Massey & D'Amour, supra note 14, at 120.
178. Reed, supra note 5, at 94.
179. Id.
180. CLARK Jr., supra note 86, at 184.
181. Selinger, supra note 87, at 675.
182. Chan, supra note 11, at 627.
183. Id.
184. Id. at 628.
185. Reed, supra note 5, at 104.
186. Clermont & Currivan, supra note 101, at 598.
client's dissatisfaction with having to pay for losing. The percentage component would reward the lawyer for effective representation, thus giving him a direct economic incentive to work as diligently and efficiently as possible. The system would encourage small, meritorious claims and discourage nuisance suits, and it would eliminate interest conflicts between lawyer and client over the timing of recovery.

VIII. Proposals

As we have seen, most of the billing systems have advantages and disadvantages. Neither of the two main methods, either contingent fees or hourly billing, is fully satisfying. In my opinion, the most convincing alternative is the contingent hourly-percentage fee. This proposed fee would be payable only in the event of recovery and would be computed by adding the lawyer's time charge for the hours worked to a small percentage of 5-10% of the amount by which the recovery exceeds that time charge. We have seen that this method does not have many disadvantages but combines a lot of the advantages of the two main billing methods.

The only significant drawback of the two present fee systems that the proposed fee fails to eliminate is the possibility of abuse by the lawyer in setting the fee. The hourly component of the proposed fee is still a danger of bill-padding. The element of contingency is still a risk of overreaching. To control abuse in setting a fee, it would have to suffice the criterion of reasonableness.

The structure of the proposed fee is simple enough that both clients and lawyers should not have problems to understand it. Although the proposed fee is innovative, the fee does not differ drastically from the predominant forms. The clients should, however, still be able to decide whether or not they want the contingency feature; and in certain areas of legal practice, the proposed fee would not work, but the hourly fee would. I do not see any major problems connected with the inquisitorial system that would prevent this system from being effective also in Switzerland. The ban on the contingency feature could therefore, in my opinion, be lifted in Switzerland for this system.

Banning the contingency factor in billing could have several
consequences, among them an increase in illegal behavior to achieve contracts with contingency features, an increase of sales of claims to lawyers, and an increase in litigation insurance. Trial would become a less credible threat, as the defendant would know that the plaintiff has to pay new money to go to trial after pre-trial negotiations. The abolition of the contingency feature could probably cause a significant reduction in litigation. Self-representation in court would rise, and representation by a lawyer would much more be a question of wealth. The consequence of this could be a simplification of the procedures and the creation of alternatives to formal litigation. Finally, the need for legal aid would certainly significantly rise.

In Switzerland, legal aid is an important factor for the access of indigent parties to the courts and can be seen as a substitute for the contingency fee system. If a party cannot afford a trial and the case is not frivolous, she does not have to pay the court’s fees and the fee of her lawyer. The government pays these fees unless the indigent party wins the case. If the indigent party wins the case, the losing party has to pay these fees. The government can require a payback from the losing indigent party during 10 years after the trial if the party gets money in this period, e.g., by inheriting a certain sum or by winning in a lottery. A lawyer can be forced to take over a case of an indigent party although the fee is only 80% of the normal fee.

The introduction of a fee system with a contingency feature like the one described in this paragraph or the introduction of a straight contingent fee would most probably reduce the considerable amount of money spent every year by Swiss cantonal governments for legal aid. The introduction of a contingency-based system would equal lawyers in Switzerland with fiduciaries, tax consultants and banks who all are already allowed to bill on a contingent fee basis.

It is possible that courts in Switzerland would grant higher damages, especially in personal injury cases, if lawyers were paid on a contingent fee basis. Swiss courts grant only fractions of the sums awarded by

195. Gross, supra note 7, at 323.
196. Id. at 325.
197. Id. at 330.
198. Id. at 339, 342.
199. Id. at 337-38.
200. TESTA, supra note 43, at 229.
201. The reduction by 20% is seen as a compensation for the fact that the lawyer has a secure payer, the government, and does not have to worry about fee-collection. I do not base this information on specific literature because I think a thorough treatment of legal aid would be beyond the scope of this article. I have described the general principles as they are applicable in every Swiss canton. See also Rule 16 of the Model Rules of Professional Conduct (appendix).
202. HÖCHLI, supra note 37, at 102 n.433.
American courts in such cases. The reasons are manyfold: Swiss law knows neither punitive damages and damages for pain or emotional distress nor class actions, and the trials are held without juries so that the judges determine the amount of damages awarded.

The only Swiss author who has tried to examine the consequences of the introduction of a contingency fee has reached the conclusion that not much would change, neither in trials nor in the nonforensic lawyering, because the contingency fee would only apply to plaintiffs, only in some areas of the law, and only to cases with high amounts in controversy.\textsuperscript{203} He did not see the solution for the existing problems in the introduction of the contingency fee system but in the introduction of a system where court and lawyer fees would be calculated proportionate to income and fortune of the parties.\textsuperscript{204}

Besides this and irrespective of the billing system, there could be more improvements. Better and more communication between lawyer and client seems to be a major concern.\textsuperscript{205} The other suggestions range from tightening the ethical standards\textsuperscript{206} and introducing mandatory CLE courses concerning billing\textsuperscript{207} to imposing audit billing systems\textsuperscript{208} and monitoring of junior lawyers' billing by senior lawyers.\textsuperscript{209}

On the side of the lawyers, avoiding billing and fee problems can be as simple as picking the right clients, including a thorough conflicts check.\textsuperscript{210} The clients, on the other hand, should actively and aggressively participate in the billing process and scrutinize their lawyers' bills.\textsuperscript{211} Last but not least, the exercise of disciplinary powers and a restrictive judicial scrutiny of lawyers' bills can help achieve higher ethical standards with billing.\textsuperscript{212}

IX. Conclusion

Billing methods are a subject that is seen to be "very much in flux."\textsuperscript{213} This might be the time to re-examine ethics in the billing

\begin{thebibliography}{9}
\bibitem{203} GATTIKER, \textit{supra} note 36, at 138-39.
\bibitem{204} \textit{Id.} at 139.
\bibitem{205} Richmond, \textit{supra} note 84, at 285; Watson, \textit{supra} note 12, at 189, 200; Massey & D'Amour, \textit{supra} note 14, at 117; Louisiana State Bar Association (hereinafter Louisiana Bar), \textit{Lawyers Helping Lawyers}, \textit{LA BAR J.}, August/September, 142, 143 (2001).
\bibitem{206} Clermont & Currivan, \textit{supra} note 101, at 593 n.218.
\bibitem{207} Watson, \textit{supra} note 12, at 200.
\bibitem{208} ROSS, \textit{supra} note 85, at 250.
\bibitem{209} Ross, \textit{supra} note 15, at 89.
\bibitem{210} Louisiana Bar, \textit{supra} note 205, at 142.
\bibitem{211} Chan, \textit{supra} note 11, at 635; Ross, \textit{supra} note 15, at 88.
\bibitem{212} Porcu, \textit{supra} note 60, at 155; MACKINNON, \textit{supra} note 21, at 205; Chan, \textit{supra} note 11, at 636; ROSS, \textit{supra} note 85, at 252; Clermont & Currivan, \textit{supra} note 101, at 593 n.218.
\bibitem{213} Committee, \textit{supra} note 16, at 177.
\end{thebibliography}
context. Increased economical pressure carries the danger of engaging in unethical billing. Auditors are split on whether time-based billing is the engine driving the overbilling machine.\textsuperscript{214} The prevalence of time-based billing encourages resistance to less adversarial forms of litigation that would better serve the truth-finding function of litigation without significantly eroding its adversarial foundations.\textsuperscript{215}

A 1985 study came to the conclusion that hypotheses about the relationship between fee arrangements and the way lawyers handle civil cases are misleading, at best.\textsuperscript{216} The survey showed that in cases involving less than $10,000, contingent fee lawyers would usually spend less time on a case than hourly fee lawyers; above that level, the opposite effect appeared to occur.\textsuperscript{217}

Unethical billing harms the client, the legal profession, the courts, and the public.\textsuperscript{218} One problem is that the most specific guidelines cannot anticipate the infinite number of ethical dilemmas billing lawyers encounter.\textsuperscript{219} Another problem is that a change in the ethical rules is not likely to have much effect if the unscrupulous lawyer's tendency of dishonestly billing is based on a flaw in his character.\textsuperscript{220} Ethical billing requires constant sensitivity to the inherent conflict between the economic interests of the lawyer and the real needs of the client.\textsuperscript{221} Ethical billing also requires a vigilant awareness of the potentials for abuse that are endemic to a system of time-based billing.\textsuperscript{222}

When considering possible changes to the present system, it is important to keep the purposes of the legal system in mind (compensation for injured parties, administering justice, prevention of future wrongs, livelihood of lawyers).\textsuperscript{223} Creative billing methods can be a market asset. But no billing method is without faults. And, as always, there is no simple solution to lawyers' unethical behavior. An ethical lawyer following the professional model will charge a fair fee no matter what method is used. But we should not end up like Richard A. Salomon, a rising-star Chicago law firm partner who consistently billed more than 3,000 hours annually by adopting a routine of reclassifying nonrecoverable client costs for billing purposes and in all seriousness

\textsuperscript{214} Darlene Ricker, \textit{Greed, Ignorance and Overbilling}, ABA JOURNAL, 62, 64 (Aug. 1994).
\textsuperscript{215} Ross, \textit{supra} note 15, at 79.
\textsuperscript{216} Kritzer et al., \textit{supra} note 130, at 272.
\textsuperscript{217} \textit{Id}.
\textsuperscript{218} Ross, \textit{supra} note 15, at 90.
\textsuperscript{219} Watson, \textit{supra} note 12, at 196.
\textsuperscript{220} \textit{Id}. at 197.
\textsuperscript{221} Ross, \textit{supra} note 15, at 90.
\textsuperscript{222} \textit{Id}.
\textsuperscript{223} Porcu, \textit{supra} note 60, at 168.
blamed a psychological disorder as main reason for his unethical behavior.\textsuperscript{224}

\textsuperscript{224} Ricker, supra note 214, at 64.
Appendix: Swiss Model Rules of Professional Conduct
(professional unauthorized translation)

A. General Duties

1. The Lawyer shall practice his profession completely independently.
2. The Lawyer shall be under a duty to examine conscientiously the matters entrusted to him. He shall only represent matters for which he can be responsible before the law and his conscience.
3. The lawyer shall, in the practice of his profession, only use the means which are permissible according to the law.
4. The lawyer shall refrain from all activities which run contrary to the dignity of his status.
5. The lawyer shall promote the settlement of disputes out of court, provided that this is in the interests of the client, and as advising lawyer, shall consider the essence and purpose of mediation, in connection with which he shall respect the decisions of the client, and shall limit himself to legal advice. The lawyer shall be bound clearly to ascertain his client from the outset (representative, advice to one side only, joint consultation, mediation).
6. Advertising for lawyers shall be allowed within the federal and cantonal statutory limitations in preservation of the dignity of the profession of lawyer and respect for professional secrecy. The cantonal societies reserve the right to make more precise regulations within the scope of these basic principles.
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9. The lawyer shall only make contact with persons who can be considered to be witnesses, as an exception and when this is necessary for the preparation of proceedings. He shall avoid any suspicion of influencing them. It shall not be permissible to send the witnesses instructions or rules of conduct.

B. Duties Towards the Client

10. The lawyer shall be under an obligation of loyalty and confidentiality towards the client. The duty to maintain silence shall also extend to partners and employees. The duty to maintain silence shall also continue to exist after instructions have been fulfilled. The lawyer may also invoke the duty to maintain silence if the client
has released him therefrom, if he considers it to be in the interests of
the client.

11. The lawyer shall never serve different persons whose interests
conflict.

12. The lawyer shall treat entrusted property with care and shall at all
times be in a position to return it. Monies belonging to the client
shall be forwarded without delay. The right of the lawyer to pay
himself for his claim shall remain reserved.

13. The lawyer shall charge within the scope of the usage applicable in
his canton, in the absence of agreement with the client as to
professional fee.

The lawyer may not share in the proceeds of proceedings in the
place of a professional fee (pactum de quota litis) or accept in
advance an unfavourable outcome to the proceedings. The lawyer
may agree an all-inclusive fee for legal advice. This should
 correspond with the expected services of the lawyer.

14. The lawyer may not enter into an agreement with any person which
infringes the basic principle of free choice of lawyer.

15. The lawyer shall normally be required to demand reasonable
advance payment on account of costs.

16. The lawyer shall handle legally-aided cases with the same care as
other cases and shall be content with the legal aid professional fee,
unless the impoverished party comes into wealth.

17. The lawyer shall normally receive the client at his office and shall
 give no legal advice outside of the same.

18. The lawyer shall ensure that the interests of the client and
professional secrecy shall survive his death.

C. Duties Towards Other Lawyers

19. The lawyer shall not make a personal attack on other lawyers.
He shall be entitled to copies of applications without demand unless
this is done by the court or official authority where the matter is
pending. This rule shall not apply to proceedings in camera (for
example, in preliminary investigations in criminal proceedings).

20. Where a lawyer accepts instructions in a matter in which another
lawyer was involved, he shall inform this lawyer. The duty to
maintain lawyer confidentiality remains reserved.

21. The lawyer shall not deal directly with the opposing party who is
represented by an authorised lawyer, without his consent.

22. The lawyer shall approach the President of the Cantonal Bar
Association or his deputy before taking any kind of preventive
measures, if the lawyer shall determine a breach of a professional
duty by another lawyer. The lawyer shall carefully examine whether action against the other lawyer is necessary in the interests of the client, where he has accepted instructions to act against another lawyer. He shall afford the other lawyer the opportunity of settling the matter out of court prior to filing a civil action, and he shall notify the matter to the President of the Cantonal Bar Association or his deputy prior to laying information.

23. A lawyer who has a personal dispute with another lawyer shall notify the President of the Cantonal Bar Association of this before proceeding.

He shall approach the President of the Cantonal Bar Association before commencing judicial proceedings.

24. The rules concerning the conduct between lawyers shall also apply to lawyers of other cantons and foreign lawyers. A lawyer who is required to take proceedings against a lawyer of another canton shall approach directly or through the good offices of the council of his Cantonal Bar Association, the President of the Bar Association or his deputy to which the other lawyer belongs. The same provisions shall apply to disputes with non-members in connection with which the President of the cantonal organisation at the place of residence of the non-member shall be responsible.