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ALTERNATIVES TO VALUE BILLING: A RESPONSE TO DEMETRIOS DIMITRIOU

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I welcome the opportunity to respond to Demetrios Dimitriou's thoughtful paper. My principal theme will be that focusing on client expectations, rather than on the bottom-line economic expectations of the lawyer, is the key to ameliorating the increasing overcommercialization of law practice. This is Dimitriou's main point, and I wholeheartedly endorse it. Before proceeding to outline my suggestions on how to accomplish this renewed emphasis on client orientation, however, I feel compelled to comment on several of Dimitriou's inferences with which I disagree.

First, the commercialization of law practice is not per se bad. Legal services are delivered much more efficiently and cost-effectively than when I started practicing in the mid-1960s. Dry copiers and cassette-tape dictating machines were just becoming widely available, and no lawyer I knew at that time envisioned the use of word processors, fax machines, or computerized legal research in a law practice. Moreover, paralegals were not "invented" until several years after I began to practice (although experienced legal secretaries performed some of the functions that paralegals routinely perform today). I spent the majority of my first two years of practice checking titles in the courthouse and adjusting automobile accident cases for insurance companies represented by my law firm. These are tasks that very few lawyers perform today because most lawyers understand that they can be performed more cost-effectively by nonlawyers.

The revolution in law-office systems and mechanization that began in the late 1960s has benefitted both clients and lawyers. But what started out as a change in management philosophy driven largely by a desire to deliver more efficient services to clients has turned into a bottom-line mindset having as its primary goal maximizing the income of lawyers. Law firms often construct their budgets starting with the income each partner wants and working backward to the hourly rates that must be charged to achieve that income. Management systems designed to ensure that every lawyer in the firm is recording every possible billable hour and that every lawyer and department are meeting established goals reinforce this bottom-line mentality. The needs of clients cannot be an integral part of this type of system unless a conscious effort is made to bring the ideal of client service to the forefront. In short, it is not commercialization per se, but the overemphasis on bottom-line lawyer

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income, or *over*commercialization, that is wrong.

Second, I disagree with Dimitriou's inference that the increasing number of lawyers leaving large firms are somehow misfits who may well not survive in smaller firms or may in some fashion corrupt the smaller firm practitioners. In my opinion, very few lawyers have the type of personality suitable for long-term survival in the hierarchical, structured atmosphere that exists in many large firms. Most of the lawyers I know who have left large firms, voluntarily or involuntarily, should never have gone to a big firm, and they blossom and become quite successful after they find practice situations that are compatible with their personalities and lifestyles. It is a pity they do not discover their mismatch before grabbing for the supposed golden ring.

Moreover, the vast majority of lawyers in this country practice in small firms. A recent American Bar Association study reported that, in 1988, 71.3% of all lawyers in private practice were either solo practitioners or in firms of ten or fewer lawyers.[1] Thus, despite the advent of the mega-firms, solo practices and small law firms are the predominant forms of practice. This will, in my opinion, continue to be the case. Large law firms are important but, contrary to what much of the literature on law firms would lead one to believe, they are not dominant except with respect to large corporate and institutional clients.

Third, Dimitriou decries the increasing pressure for specialization in the practice of law. Virtually all lawyers, however, regardless of the size of the law firms in which they practice, specialize to some degree. No lawyer can be competent to practice in every field of law. Even solo practitioners who pride themselves on being generalists eventually limit their practices to a few fields, even though they may not qualify as certified specialists in any field under state-approved certification programs.

Specialization is not per se bad. To the contrary, it is desirable, and perhaps necessary, for competency. Overspecialization, in the sense of having a practice that is limited to a very narrow subfield in a specialty area, can, however, be dangerous. Narrowly specialized lawyers in large firms often find themselves without sufficient work to justify their draws when economic conditions or changes in the law cause significant reductions in their workloads. Retraining is possible but may be painful and expensive, and a law firm with a bottom-line mindset might not be willing to carry the lawyers through the transition period.

The need for versatility and concerns about obsolescence due to overspecialization are good reasons why young lawyers should be exposed to a broad range of practice fields in their formative years. Even if the lawyers end up

1. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 33 (1992) [hereinafter MACCRATE REPORT].

specializing in a narrow area after several years of practice, it will be easier for them to move to a related or different area if their primary specialty becomes unprofitable. Lawyers who have been trained essentially as generalists also have a broader perspective which enhances their ability to understand all of the facets of their clients' legal problems.

Finally, large law firms are not inherently uncaring, overcommercialized institutions that are unconcerned about the needs of their clients. To the contrary, large law firms exist precisely because of client needs. The advent of the national mega-firms is largely due to the demands of their large corporate clients.

It is true that the centrifugal forces in large firms are greater today than a quarter of a century ago due in part to a change from firm-capital compensation systems to systems based on individual productivity.[2] Nevertheless, large law firms, even those that are structured on a shared-firm-capital basis, have always experienced rather high turnover. For the most part, however, they are dynamic, exciting places to work, and they produce very high-quality legal work.

Despite these quibbles about some of Dimitriou's inferences, I agree wholeheartedly with his main theses that overcommercialization in the practice of law is pervasive and corrupting and that something must be done about it. What is needed is a coherent set of concepts that can apply to any practice setting, whether a lawyer is a partner in a mega-firm or a solo practitioner.

As Dimitriou clearly states, adopting a style of practice that focuses on meeting client expectations is the pivotal concept. For some unknown reason, however, lawyers' perceptions of what clients expect are different from their clients' actual expectations. A 1963 statewide survey in Missouri[3] found that clients and their lawyers had very different views about the factors that are important to a satisfying attorney-client relationship. This point was illustrated by the following chart[4] listing the five most important characteristics reported by laypersons and lawyers:

Laypersons	*Lawyers*
1. Friendliness	1. Results
2. Promptness, businesslike manner	2. Honesty
3. Courtesy	3. Efficiency
4. Not condescending	4. Personality
5. Keeping the client informed	5. Education

2. *See* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985).

3. A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT 66-69 (The Missouri Bar/Prentice-Hall 1963).

4. *Id.* at 68.

The differences in perception are striking. The most interesting difference is that while lawyers gave top priority to results, only two percent of clients rated results as a significant factor in their evaluation of their attorneys.[5] Interestingly, "good results" was also not on the list of significant factors listed by clients in the Barbara Curran survey of the legal needs of the public discussed in Dimitriou's paper.[6]

Over the years I have mentioned the results of these surveys to many lawyers. With rare exceptions, they have expressed disbelief in their accuracy and have argued that good results are by far the most important factor in a successful lawyer-client relationship. Alternatively, they have maintained that while the survey results may be applicable to the average consumers who use lawyers for personal matters, they do not apply to business clients. A recent article based on interviews with business clients conducted by a leading law-firm consulting firm, however, listed fourteen things clients look for in a lawyer.[7] "Results" was not on the list.

Even if results are as important as many lawyers maintain, then lawyers should adopt a lawyering style that will maximize the chances that they will achieve good results for their clients. Good results and the supposed resulting client satisfaction are the two most frequently cited justifications for what are known as "hardball" or "Rambo" litigation tactics. There is evidence, however, that such tactics do not work on a long-term basis. As Robert Sayler, a prominent Washington, D.C. litigator, has stated:

> [Hardball advocacy] tends to be one-dimensional and, therefore, completely predictable. Because the hardball litigator's strategy is an open book, it is easy to set traps for him, goading him into a temper tantrum at depositions or before the jury or judge.
>
> And the regular use of hardball tactics lessens the force of occasional stern trial tactics. The problem is that the full-time raver has no atom bomb left over to use if it is ever genuinely called for.[8]

As for its success with clients, Sayler commented:

> Hardball is as likely to turn off as many clients as it attracts. Even if a client hires a lawyer because of his tough-guy reputation, he's unlikely to retain him after opposing counsel has humiliated him or the trial judge has

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5. *Id.* at 66, 68.

6. *See* Demetrios Dimitriou, *The Individual Practitioner and Commercialism in the Profession: How Can the Individual Survive?*, 45 S.C. L. REV. 965, 971-72 (1994).

7. *See* Alan P. Levine, *Looking for Mr. Goodlawyer: What Clients Want*, A.B.A. J., Sept. 1992, at 60.

8. Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79, 80.

berated him in open court or tagged him with sanctions.[9]

Hardball tactics also are less effective than a more cooperative style in negotiations. In one well-known negotiation simulation involving lawyers,[10] fifty-nine percent of the cooperative negotiators were judged effective, and only three percent were judged ineffective.[11] On the other hand, only twenty-five percent of the competitive negotiators were judged effective, and thirty-three percent were judged ineffective.[12]

In short, clients like kinder and gentler lawyers, and kinder and gentler lawyers get better results for their clients. Why so many lawyers do not understand and accept these simple facts is very perplexing. Yet the growing number of civility codes[13] adopted by courts and bar associations in recent years indicate that the use of hardball litigation tactics and other forms of incivility are becoming more, not less, widespread.

Being more attentive to the human-relations aspects of the lawyer-client relationship is important for another reason. Nationally, each year one grievance is filed with a disciplinary agency for approximately every ten lawyers.[14] The vast majority of these complaints are dismissed after an initial investigation, however, because they are determined not to be serious ethical violations that call for disciplinary sanctions, but instead are determined to be essentially contract disputes, such as misunderstandings about legal fees, negligently missing filing deadlines, or failures of communication.[15] Virtually none of these complaints would have been filed if the lawyers had shown proper respect for their clients and had used good manners and common sense.

Client surveys are an easy way to determine on an ongoing basis whether client expectations are being met. These surveys can be conducted by the periodic use of questionnaires[16] or personal interviews. Very few law firms,

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9. *Id.*

10. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-20 (1983).

11. *See id.* at 19.

12. *See id.*

13. *See, e.g.*, FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT (June 1992), *reprinted in* 143 F.R.D., at 441.

14. *Compare* CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDING COMM. ON PROFESSIONAL DISCIPLINE, AMERICAN BAR ASS'N, 1990 SURVEY ON LAWYER DISCIPLINE SYSTEMS chart 1, at 11 (1992) *with* CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDING COMM. ON PROFESSIONAL DISCIPLINE, AMERICAN BAR ASS'N, SURVEY ON LAWYER DISCIPLINE SYSTEMS—1989 DATA chart 1 (1991) *and* CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDING COMM. ON PROFESSIONAL DISCIPLINE, AMERICAN BAR ASS'N, SURVEY ON LAWYER DISCIPLINE SYSTEMS—1988 DATA chart 1, at 9 (1989).

15. *See* Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 949-78.

16. *See* Charles R. Coulter, *Surveying Your Corporate Clients*, LAW PRAC. MGMT., May/June

however, have so far been willing to conduct such surveys.[17]

Fully meeting client expectations, however, requires more than good client relations. In addition to wanting a lawyer who treats them with the same respect and concern as would a good friend, clients also expect, and have the right to receive, competent legal services. Perhaps the most significant challenge facing the legal profession in this country today is to implement effective self-regulatory mechanisms that will provide assurance to the legal profession and the public that competent legal services are being rendered by all lawyers, regardless of their practice setting.

Several recent developments indicate that we are making some meaningful progress toward meeting this challenge. Perhaps the most important is the growing understanding and acceptance by lawyers that competency requires more than the basic analytical skills, substantive knowledge, and library research techniques that are acquired in law school. Instead, achieving and maintaining legal competency is a lifelong quest that begins in law school and continues throughout a lawyer's career.

The most comprehensive formulation of this concept is contained in a 1992 publication by the American Bar Association Section of Legal Education and Admissions to the Bar Task Force on Law Schools and the Profession: Narrowing the Gap, entitled *Legal Education and Professional Development—An Educational Continuum*[18] but generally known as the "MacCrate Commission Report." Chapter Five of this important publication contains a detailed statement of ten fundamental lawyering skills and four fundamental professional values that are required for competency.[19] The ten fundamental lawyering skills are: problem solving; legal analysis and reasoning; legal research; factual investigation; oral and written communication; counseling; negotiation; litigation and alternative dispute resolution procedures; organization and management of legal work; and recognizing and resolving ethical dilemmas.[20] The four fundamental professional values are: providing competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.[21]

Law schools can and should do a better job of developing courses and academic programs that provide basic training in all these skills and values. But it is unreasonable and unrealistic to expect law schools to produce graduates who are competent lawyers at the time of graduation. Additional post-law-school training in basic skills through continuing legal education

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1991, at 41.

17. *See* Laura Duncan, *Client Surveys: While Law Firms May be Reluctant to Ask, Respondents Aren't Shy*, CHI. DAILY L. BULL., June 17, 1993, at 1.

18. MACCRATE REPORT, *supra* note 1.

19. *See id.* at 135-221.

20. *Id.* at 138-40.

21. *Id.* at 140-41.

(CLE) and in-house training programs is necessary.

At present, most CLE courses focus on substantive and procedural issues. CLE providers need to give greater emphasis to the development of more skills-oriented courses. The typical one-day to one-week "bridge-the-gap" programs for recent graduates that exist in many states today are simply insufficient.[22] In my opinion, it takes a minimum of seven years, beginning with matriculation to law school, for a lawyer to become minimally competent. If this assumption is correct, we need to develop a four-year, post-law-school, skills-training curriculum that can be adapted for use not only in large law firms, many of which already have fairly sophisticated in-house training programs, but also in small firms and by solo practitioners. Making these programs readily available to solo practitioners and lawyers in small law firms in rural areas will be quite a challenge, but it is a challenge that must be met. Meeting the needs of these lawyers in a cost-effective manner is often overlooked by CLE providers, and this shortcoming is one of the most prevalent objections to mandatory CLE programs.

The greater availability of skills-training courses and programs will be a major step in the right direction, but additional quality-control measures to assure lawyer competency will also be necessary. One such measure that has great potential, in my opinion, is peer review. A peer-review system, similar to those used by physicians and accountants, in which lawyers from other law firms would review and critique files of other lawyers[23] may never be accepted on a voluntary basis by lawyers in this country. Nevertheless, several quality-control measures have been developed in recent years that can achieve at least some of the goals achieved by the more ambitious peer-review models used in other professions. One simple device is a periodic self-assessment of a law firm's internal quality-control systems (such as its docket-control and conflict-of-interest review systems) and its billing practices.[24] Attorneys' Liability Assurance Society (ALAS), which provides malpractice insurance for some of the largest law firms in this country, has carried this device one step further. Its representatives make periodic visits to the firms it insures to discuss loss prevention and quality control. ALAS also regularly distributes memoranda analyzing law practice problem areas and outlining policies and procedures that law firms can adopt to avoid these problems.

The ALAS system could easily be adapted for more widespread use. One intriguing suggestion made by Professor Susan Martyn of the University of

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22. *Id.* at 289-99.

23. *See* ALI-ABA COMM. ON CONTINUING PROFESSIONAL EDUC., A MODEL PEER REVIEW SYSTEM (Discussion Draft 1980); ALI-ABA COMM. ON CONTINUING PROFESSIONAL EDUC., LAW PRACTICE QUALITY EVALUATION: AN APPRAISAL OF PEER REVIEW AND OTHER MEASURES TO ENHANCE PROFESSIONAL PERFORMANCE (1988).

24. *See* John F. Corrigan, *Peer Review in the Law Office*, *in* THE QUALITY PURSUIT: ASSURING STANDARDS IN THE PRACTICE OF LAW 61 (Robert M. Greene ed., 1989).

Toledo is to develop agreed-upon quality-control practice criteria and incorporate them in self-assessment questionnaires.[25] In addition to using the questionnaires, a lawyer or firm could periodically invite consultants familiar with the criteria to speak about loss prevention and quality control and to make concrete proposals for dealing with specific problem areas.[26]

Such a system could be administered by a bar association and should be available for use both by small and large firms and by solo practitioners. Assuming that lawyers are used as the consultants, the members of the team visiting a particular lawyer or firm should be selected from distant parts of the state in order to avoid competitive-advantage issues. Since the analysis and the conferences with the consultants would be based on the results of the self-assessment questionnaires rather than on a review of client files, little likelihood exists of unauthorized disclosures of client confidential information.

A final recent development that I would like to discuss is the establishment in California and a few other states of programs under which a lawyer accused of an ethical infraction that does not justify a public disciplinary sanction can agree to attend an ethics course for lawyers. If the lawyer successfully completes the course, no further action on the grievance will be taken.[27] A complaint against a lawyer who habitually fails to return telephone calls from clients is an example of the type of case where the lawyer could be given the option of attending the ethics school.[28] According to William W. Davis, who directs the State Bar of California Ethics School, the one-day program is being expanded and has been well accepted by the lawyers who have agreed to attend.[29]

Programs like these, that focus on remediation rather than punishment, have great potential, in my opinion, for reducing in the long term the inordinate number of grievances based on poor manners and minor lawyer-client contract disputes that are filed with disciplinary agencies each year. More time and energy can then be spent on vigorously investigating serious ethical violations that merit severe disciplinary sanctions. Without diversionary programs such as the ethics school, the lawyer disciplinary system may well become overwhelmed, thereby threatening the cherished concept of self-regulation.[30]

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25. *See* Susan R. Martyn, *Peer Review and Quality Assurance for Lawyers*, 20 U. TOL. L. REV. 295, 319-23 (1989).

26. *Id.* at 319.

27. Faye A. Silas, *The Florida Bar Plans to Establish an Ethics School*, BAR LEADER, July-Aug. 1992, at 29.

28. *Id.*

29. Telephone Interview with William W. Davis, Assistant Chief Trial Counsel, The State Bar of California Office of Intake/Legal Advice (Jan. 15, 1993).

30. *See* CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDING COMM. ON PROFESSIONAL DISCIPLINE, 1990 SURVEY ON LAWYER DISCIPLINE SYSTEMS 11 (1990) (in 1990, 105,602

CONCLUSION

None of the suggestions made in this response—good client relations that focus on meeting reasonable client expectations, post-law-school skills-training courses, peer-review systems, and ethics schools for lawyers—is new or radical. As a package, however, they can help to ameliorate the bottom-line-driven overcommercialization that appears to be spreading throughout the legal profession.

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grievances were filed nationwide against lawyers; less than five percent resulted in some form of public or private disciplinary sanction); *cf.* Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991) (describing widespread ethical violations observed by law students working as interns in law offices).