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# **IS VALUE BILLING THE ANSWER?: A RESPONSE TO THE INDIVIDUAL PRACTITIONER AND COMMERCIALISM IN THE PROFESSION**

MARILYN V. YARBROUGH\*

Demetrios Dimitriou, in his paper *The Individual Practitioner and Commercialism in the Profession: How Can the Individual Survive?*,<sup>1</sup> succinctly sets the stage for our discussion of the survival of the solo practitioner in a practice setting that increasingly emphasizes economic rewards. In addition, he suggests an innovative method of pricing attorney services. This new method is designed to promote more emphasis on client needs and therefore return to a sense of professionalism from what he sees as too much emphasis on economic benefit. This paper responds to his thesis and raises the question of the effect of commercialism on all practitioners, regardless of where and how they practice.

The solution proposed by Mr. Dimitriou, ostensibly designed to focus the attorney's attention on the client, would have the attorney assume the economic risk attendant to evaluating a client's claim or defense and may exacerbate, rather than alleviate, the perceived problems. Unfortunately, little attention is paid to the legitimacy of the emphasis on the maximization of economic return.<sup>2</sup> This response explores reasons why not only solo practitioners, but all attorneys, especially those most recently licensed, must pay attention to the bottom line in order to serve their clients—not just to serve them competently, but to serve them at all.

At the outset, this response should affirm the concerns cited in Mr. Dimitriou's paper. The emphasis on law as a commercial enterprise is threatening the profession. This is not a new problem. In *The Legal Profession in America on the Eve of the Revolution*, Richard Morris documented the hostility of the American public and its elected representatives to "paid attorneys," a relatively new phenomenon in colonial times:

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

2. In his opening sentence Mr. Dimitriou warns his reader that he "do[es] not intend to expand upon the reasons why the practice of law is where it now is." That is quite understandable, given the necessity to focus the paper on a topic manageable in the amount of time this conference can devote to it.

A Maryland act of 1674 recited the allegation that the "good people of this Province are much burthened" by lawyers taking and exacting "excessive fees." Curbs continued into the eighteenth century. In 1707, Maryland's legislature set rules for controlling the admission of attorneys on the basis of the alleged "corruption, ignorance and extortion" of several of them and set such ceilings on fees that leading attorneys withdrew in protest from practice for a short time. The limitation on fees continued in force as late as 1729. In Virginia so deep-seated was anti-lawyer prejudice that a statute of 1645 virtually disbarred paid attorneys.<sup>3</sup>

Morris also noted:

While lawyers [in the Massachusetts Bay Colony] were not technically prevented from practice, Article XXVI of the Body of Liberties, the initial law code adopted in 1641, while permitting attorneys to plead causes other than their own, disallowed all fees or rewards, thus, for a time at least, withholding inducements to practice as a respectable means of livelihood.<sup>4</sup>

This antipathy toward the law as a profession and towards lawyers as practitioners was no doubt related to what was perceived as an emphasis on commercialism over professionalism directly resulting from the absence both of a recognized body of principles and values and of a formal course of education or qualification. The profession has come a long way in the last 350 years, with the appearance of bar associations and their attempts to regulate the profession in the early eighteenth century and the emergence after the Civil War of law schools as the preferred method of legal education. With the advent this century of requirements of legal education and prior college training and of licensure, a lever of universal professionalism previously unattainable in our very loose system of apprenticeships and individual entrepreneurship was at long last achieved. Robert Stevens, in discussing the state of the profession at the beginning of the twentieth century, noted:

Basically, anyone who wanted to be a lawyer could hang out his shingle, and there were very few requirements for doing so, except limited apprenticeship in some states. So the vast majority of lawyers at the turn of the century—80 to 90 percent—never saw the inside of a university, whether it was a law school or a college. Most of them had to take a bar exam, but, unlike the situation today, the market was the primary determinant of whether they would be successful.<sup>5</sup>

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3. Richard B. Morris, *The Legal Profession in America on the Eve of the Revolution, in* POLITICAL SEPARATION AND LEGAL CONTINUITY 3, 5-6 (Harry W. Jones ed., 1976).

4. *Id.* at 5.

5. Robert Stevens, *Democracy and the Legal Profession: Cautionary Notes*, 3 LEARNING & L., Fall 1976, at 12, 15.

Stevens' intimation that the market was not, in 1976, the primary determinant of whether lawyers would be successful is a puzzling contention. My admittedly personal and anecdotal observation is that for the twenty to thirty years prior to the mid-eighties, the external market was the chief determinant of success. Only in the last eight to ten years have the internal economic pressures on attorneys threatened to equal traditional supply-and-demand tugs on the profession. Well-documented accounts of the problems of debt overburden<sup>6</sup> and its effects on career choices for some students<sup>7</sup> help explain some of the economic pressures on most newly admitted practitioners.

Mr. Dimitriou's description of the current climate of the profession is accurate as far as it goes. The requirement for continued success in the large firm (that the practitioner not only be a "good guy" and a hard worker, but also be able to generate business) and its consequent effect on other professional practice settings, is neither as perplexing nor as pernicious as suggested. Competent lawyering is expensive. The direct cost of seven years of formal postsecondary education in this country can range from \$50,000 to over \$200,000.<sup>8</sup> Although it is well documented that most of this cost is paid by borrowed funds,<sup>9</sup> it is more accurate to acknowledge that these costs, including the expense of borrowing the funds, are passed on to the client. The need for continuing legal education in this age of rapidly changing law and regulation is likewise expensive, more so for individual practitioners than for lawyers in large firms that can both educate "in house" and keep the doors open for business when external education is required.

Regulation of the profession is likewise expensive. The rules of professional responsibility are not merely the "stumbling blocks" or "swords" described by Mr. Dimitriou, but rather are important protections in the profession's quest for loyal, competent, and vigorous representation of clients while also providing guidance to its members regarding their rights. Some client advocates (including me) disapprove of provisions of the rules of professional responsibility that allow individual attorneys to favor their own economic rights over otherwise privileged client interests,<sup>10</sup> but understand

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6. See, e.g., John R. Kramer, *Who Will Pay the Piper or Leave the Check on the Table for the Other Guy*, 39 J. LEGAL EDUC. 655 (1989).

7. See, e.g., Marilyn V. Yarbrough, *Minority Students and Debt: Limiting Limited Career Options*, 39 J. LEGAL EDUC. 697 (1989).

8. Seven years includes four years of undergraduate education and three years of law school. "Direct cost" refers to the cost of tuition, fees, books, and living expenses. This rough estimate assumes that attendance at public schools will cost as little as \$7,000 a year and at the most expensive private colleges and universities close to \$30,000 a year. Indirect costs such as lost economic opportunity from the lack of full-time employment during this period are not taken into account.

9. See, e.g., Kramer, *supra* note 6.

10. For example, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993) continues an exception to client confidentiality found in its predecessor *Model Code of Professional Conduct*

that, unlike clients in colonial times, clients today must underwrite the costs of competency of private practitioners in the legal profession.

My perception, unlike that of Mr. Dimitriou, is that this a problem for large firms, small firms, and solo practitioners not only in urban, but also in rural, settings. Moreover, unlike Mr. Dimitriou, I do not see the increased growth of solo practitioners and small firms as either necessarily, or even incidentally, shifting the focus of practice from clients to self. Furthermore, I do not see the billing plan proposed by Mr. Dimitriou as a solution to "the current lack of civility, integrity, and professionalism of the bar,"<sup>11</sup> rather, as noted above, I see it as potentially exacerbating, rather than alleviating, possible overreaching by attorneys with regard to the costs of client representation.

### THE PLAN: VALUE BILLING

Mr. Dimitriou proposes "value billing" as a method to cede control of the representation to the client. In what he refers to as "a value billing paradigm," he proposes that the value of the legal services be set by the client "after the client is placed in a position to make informed decisions concerning the type and scope of legal services to be rendered."<sup>12</sup> In that manner, he suggests, the economic risk of the expense of the services is shared by the attorney and the client. He maintains that at present, "[l]ittle or no concern is evidenced for the client's perception of the value of the legal services."<sup>13</sup> Mr. Dimitriou proposes educating the client as to the steps to be taken in addressing her legal problem, the scope and limits of legal solutions, and the necessity for (and risk of ignoring) certain actions. He would require that early in the relationship the attorney make reasonably accurate estimates of the cost of each facet of the representation and would leave the risk of error regarding those estimates on the attorney, stating: "The economic burden of the lawyer's inefficiency; lack of knowledge; or failure to properly analyze the legal issues, obtain the necessary information, or control costs rests with the lawyer."<sup>14</sup>

As intriguing as this proposal sounds at first blush, it leaves several

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by permitting an attorney to reveal confidential information to the extent believed necessary in order "to establish a claim . . . in a controversy between the lawyer and the client . . . ." The comment to Rule 1.6 states: "A lawyer entitled to a fee is permitted . . . to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1993).

11. Dimitriou, *supra* note 1, at 969.

12. *Id.* at 973.

13. *Id.*

14. *Id.*

questions unanswered and ignores some readily acknowledged difficulties in attorney-client relationships—not the least among them being the paradigm’s effect on less experienced, but still competent, attorneys already financially disadvantaged because of their lack of experience and greater educational debt. Because this brief response is designed only to pose questions for subsequent discussion by conference participants, I have the luxury of raising questions without the responsibility of answering them.

Under Mr. Dimitriou’s scheme:

1. Who bears the cost of the fact gathering and research necessary to determine the nature of the client’s problem and the steps necessary to solve it?
2. At what point has the attorney-client relationship been formed? In gathering the confidential information necessary to make an informed estimate for the client, is the attorney who is not ultimately retained by the client precluded from representing any potentially adverse parties? Is this a particular problem in rural or small-town settings?
3. Who bears the cost of underestimated expenses if it is subsequently determined that the client has not (through inadvertence, ignorance, or shame) thoroughly described the facts or nature of the problem?
4. Who bears the cost of educating clients regarding issues of professional responsibility and professional courtesy, as well as other legal, technical, and strategic issues relevant to choosing a course of action and now generally conceded to be within the purview of the attorney?
5. Should a client be able to waive the value billing paradigm, deferring to the attorney in all of these matters, including education of the client?<sup>15</sup>
6. If the attorney and the client differ regarding the issues mentioned in question 4 above, whose opinion should prevail?
7. Should value billing apply equally to criminal and civil legal matters? Should it replace the contingent fee that now allocates the risk of error almost entirely to the attorney in personal injury cases? Should it apply in domestic relations cases?

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15. Most clients encounter the legal system only in situations in which they have determined that they require professional assistance beyond their own knowledge and capabilities. Undoubtedly, there will be many clients who would say: “Why do you think I came to you? I want you to use your best judgment and experience and am willing to defer to you as a trained, competent, and experienced individual. Handle it!!”

8. Does the valuation of services by the client include the setting of compensation rates for each aspect of the representation, or is the client simply relegated to choosing the steps to be taken at rates set by the lawyer?
9. How will the paradigm discourage overly pessimistic (*i.e.*, inflated) estimates that subsequently become actual charges?
10. May the attorney take into account the professional responsibility to serve others who may not be able to pay when setting rates for individual paying clients?

Undoubtedly, many other questions would have to be answered. My point in posing the few listed above, however, is to help us focus on the inadequacy of this plan as a solution to the central issues suggested by the title for this conference. The current pricing practices that have evolved over the years have been debated and developed in the public arena, with due attention paid to the interests of both clients and members of the profession.<sup>16</sup>

Individual practitioners and their clients are affected by commercialism concerns not due to a lack of focus on the client or any overcharging of the client. The solo or small-firm practitioner, affected like other attorneys by the increased costs of competency mentioned above, is also affected by the economic realities that have seen our society turn from the corner grocer to the supermarket, from the neighborhood mechanic to the franchise with the fancy diagnostic equipment, from the family doctor who made house calls to the large practice with a variety of specialists, and, closer to home, from apprenticeships in law offices to the training of lawyers in classes of ninety to two hundred students.

Technological and other advances that create complexity or promote efficiency, the "information explosion," and other causes and byproducts of progress and growth are more easily accommodated when one has the luxury of economies of scale. Heightened competition, caused both by the increase in the number of attorneys available and the increased real costs involved in providing legal services, is likewise more easily met in larger practice settings than by solo practitioners. Solo practitioners, therefore, may be said to be *more* threatened than others. All practitioners, however, must guard against the dangers inherent in the necessary attention to the bottom line. How do we accomplish this? By turning over to clients the power to "control" the flow and cost of legal services? They have that power now. They are entitled not only to shop around for, negotiate with, or fire an attorney at will, but also to

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16. See *infra* note 19 for the example of how the *Model Rules of Professional Conduct* attempt to balance the interests of attorney and client.

have the attorney "keep [them] reasonably informed about the status of a matter[,] . . . promptly comply with reasonable requests for information[, and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>17</sup> In addition, with regard to decisions concerning the objectives of representation, the client has the ultimate authority.<sup>18</sup> Likewise, an attorney is under a legal and ethical obligation to set reasonable fees based not on estimates but on actual rendition of services to the client, except where the attorney essentially assumes all of the risk of representation independent of any estimate or of services rendered.<sup>19</sup> If the justification for value billing is that it forces the attorney to communicate with the client about the substance and pricing of the services, thus diverting attention from the attorney's selfish interest in the economic benefit of the representation, there are ample provisions already in force to compel this result.

One danger inherent in excessive attention to the bottom line is that practitioners, regardless of practice setting, will feel it necessary to set fees that will cause many who need their services to forego them. Concomitant risks are that attorneys, in an effort to eliminate services that do not pay, will specialize at the expense of general practice; that "supermarkets" that specialize in high-volume standardized solutions to what may or may not be routine legal problems will proliferate; or that unscrupulous individual practitioners will render less than competent representation by inadequate research, insufficient preparation, or inept negotiation. These dangers, and the likely solutions to them, will persist despite value billing.

The solution to the problems brought about by the decline in professionalism would seem to be more and better education about (1) what it means to

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17. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1993) (loosely modeled on Ethical Considerations 7-8 and 9-2 of the *Model Code of Professional Responsibility*).

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1993) provides: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."

19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1993) provides:

(a) A lawyer's fee shall be reasonable. 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.



belong to a profession and (2) what skills and values identify the professional. Improved screening of those granted the privilege of belonging to the profession and stricter enforcement of sanctions against those who are unable or unwilling to abide by the tenets of professional responsibility are essential. Unfortunately, despite the realization that commercialism and professionalism have historically been deemed incompatible, commercialism in the professions (not only law, but also medicine, theology, etc.) seems inevitable. The challenge is to recognize this while working to maintain the values that make us special.