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# Law Firms, Technology, and The Double-Billing Dilemma

KEVIN HOPKINS\*

## INTRODUCTION

In 1992, a panel of experts attending a conference on legal technology in Chicago predicted that emerging legal technologies would significantly alter the practice of law in the United States.<sup>1</sup> During that conference, the panelists concluded that computerized advances in the practice of law would not only go beyond the obvious, such as increasing productivity or the manageability of large-scale litigation, but would significantly “change the structure of the law. . . .”<sup>2</sup> Other experts have predicted that by the year 2005, “technology will completely transform the practice of law, to the point where it will be unrecognizable from what we know today.”<sup>3</sup>

As expected, within the last few years, legal technologies have created atmospheres of intense competition between law firms for revenues and markets — one forcing law firms to consider seriously the growing demands and expectations of their clients.<sup>4</sup> Lawyers are quickly recognizing that the effective

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\* Assistant Professor of Law, The John Marshall Law School. I am grateful for the thoughtful comments of Dean Robert Johnston, Julie Spanbauer, William Mock, John Scheid, and Steven Kropp during the preparation of this Essay. Brad Ullrick’s editorial work was superb.

1. *Legal Technology: Slayer Of The Billable Hour?*, MASS. LAW. WKLY., Apr. 20, 1992, at S9 [hereinafter *Legal Technology*]. The panelists were attendees at the 1992 Techshow “Technology in the Law Practice: The Future is Now,” sponsored by the Law Practice Management Section of the American Bar Association. *Id.*

2. *Id.* The “growing acceptance of electronic media discovery for litigators and graphics and video reenactments to influence juries” are a few examples of significant changes in the practice of law as a result of technology. *Id.*

3. Richard Becker, *Memo to Firm: Technify, Lest We Die*, N.J. L.J., Jan. 23, 1995, at 2. During the last several years, law firm technologies have increased dramatically. For example, traditionally, the most important tools in a law office included the telephone, photocopier, word processor, and law library. Howard A. Nunes, *Databases 101: Efficiency in The Law Office*, MASS. LAW. WKLY., May 16, 1994, at S1. Today, however, lawyers have found computer databases to be equally as important as the traditional tools of legal practice. *Id.*

4. See *Legal Technology*, *supra* note 1, at S9 (describing clients’ demands for quick, innovative, and low-cost solutions to their problems); see also Jeff Coburn, *Cutting-Edge Firms Share Technology Secrets*, MASS. LAW. WKLY., Apr. 8, 1996, at B3 (predicting that “the intensifying competition for revenue, the growing demands and expectations of clients, and the continued pressure on law firm economics will impact firms everywhere”). Today’s clients demand and expect greater innovation and a swifter response to their problems, while refusing to pay lawyers for “reinvent[ing] the wheel each time they need legal help.” See *Legal Technology*, *supra* note 1, at S9. To meet client demands, many firms have created “intranets” or “extranets” (electronic databases accessible as a Lexis or Westlaw database when using an internet browser like Netscape Navigator) to facilitate the sharing of documents amongst lawyers and with clients, and have customized billing to electronic document exchanges. See Wendy R. Leibowitz, *Clients Force Tech on Firms*, NAT’L L.J., Apr. 14, 1997, at A1 (describing clients’ demands that lawyers become technology proficient). See also Wendy R. Leibowitz, *Dealing with the*

use of computerized in-house databases can increase their proficiency while dramatically reducing the cost of services for the client.<sup>5</sup> Unlike in the past, today's law firms often consist of multiple offices throughout the United States and the world, employing hundreds of attorneys. With the advent of technology, the global firm enjoys open access to the resources of its entire legal staff at any specific time or place, simply through the use of a computer.<sup>6</sup> By creating and maintaining centralized databases, lawyers employed at any of the firm's branch offices can access research and documents on file that have addressed the same or similar questions.<sup>7</sup>

Technology, however, has its price. As society approaches the 21st Century, competition for revenue, plus the increasing demands and expectations of clients, will continue to present important ethical issues for the legal profession. Law firms that have diligently incorporated current technology in their practices have discovered the positive benefits technology can have in reducing the time spent in performing a service for the client, while enhancing their own efficiency. Yet, many of these firms continue to employ billing practices that fail to account for these savings. If a lawyer's fee is based upon an hourly billing rate, technology that increases the lawyer's ability to resolve a legal issue in a quick and speedy

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*Human Factor: Tech May Challenge Work Habits*, NAT'L L.J., Apr. 20, 1998, at B8 (explaining that lawyers are "excited" about extranets, which allow them to collaborate with clients) [hereinafter Leibowitz, *Dealing with the Human Factor*].

5. See Nunes, *supra* note 3, at S1 (describing the benefits of databases for such tasks as time billing and accounting, case management, document standardization, management statistics, and litigation support). For example, many law firms have recently begun to use computer software packages often referred to as "groupware" that permit its users "to collaborate electronically, sharing and updating a common database while allowing for intergroup communications." Jim Feuerstein, *Groupware Boosts Firm's Ability To Share and Update Information*, N.Y.L.J., July 15, 1997, at 5. Common groupware products include: Exchange, Collabra Share, and GroupWise. *Id.* One important feature of a groupware product is its ability to create " 'knowledge-bases' or work product libraries" that allow for sharing of information with clients and with lawyers in other offices. *Id.* Electronic databases can be used for a much greater variety of purposes and eliminate the physical work, floor space, and paper necessary for maintaining the traditional "file cabinet." See Nunes, *supra* note 3, at S1 (comparing and contrasting databases with file cabinets).

6. Many law firms have created "brief banks" to share information and prevent against duplication of efforts and work. See Wendy R. Leibowitz, *New Tech Helps Curb Legal Fees*, NAT'L L.J., July 14, 1997, at B11 (discussing the "DuPont network," a private database shared by approximately 38 law firms that serve the E.I. du Pont De Nemours & Co., located in Wilmington, Delaware). See also Feuerstein, *supra* note 5, at 5 (explaining the role of workgroup software in building databases and brief banks). The process involved in developing a brief bank is simple. Once a lawyer drafts a memorandum, brief, or document in a case, the lawyer submits a copy of the document for inclusion in the brief bank. The document is then categorized by subject matter and is available for use by all lawyers in the firm or participating lawyers with access to the network. Becker, *supra* note 3, at 2.

7. See Feuerstein, *supra* note 5, at 5 (discussing the benefits of "groupware" products). The sharing of information through centralized databases is rapidly increasing in the practice of law. For example, using current technology, "[a] major law firm in New York City can share a case notebook — including discovery documents, testimony, research, memos, witness profiles[,] and issue discussion — with litigation team members in their Chicago office, with a client in Kansas City, with a partner traveling in Europe, with local counsel and a trial team in a small town in Texas." *Id.*

manner may result in a loss of profit, and ultimately, the over-billing of time for work not actually performed in the handling of a client's case.<sup>8</sup>

This Essay addresses the ethical dilemma of double-billing a client for recycled work.<sup>9</sup> Part I provides a brief overview of the current ethical rules regarding legal fees and billing for services. It discusses the Whitewater investigation into the billing practices of former Associate Attorney General Webster Hubbell to illustrate double-billing and the recent change in public opinion concerning lawyer accountability to clients for double-billing of fees. Part II analyzes the American Bar Association's Formal Opinion concerning billing for professional fees, in the context of three scenarios that illustrate the double-billing dilemma and points to exceptions to which the Opinion is inapplicable. Finally, Part III advocates the use of modified hourly billing as a more effective approach to counter the negative effects of technology that often occur under the hourly billing fee structure. In conclusion, this Essay proposes an amendment to Rule 1.5 of the *Model Rules of Professional Conduct (Model Rules)* to legitimize this practice.

## I. THE ETHICS OF BILLING

### A. REASONABLE FEES AND HOURLY BILLING

The Federal Rules of Civil Procedure and their state counterparts are designed to assist courts in reaching the "just, speedy, and inexpensive determination of every action."<sup>10</sup> In accordance with the spirit of the Federal Rules of Civil Procedure, the American Bar Association's *Model Rules* provide some guidance in assisting the lawyer in determining reasonable fees for services. First, Rule 1.4(b) requires the lawyer to explain a matter to the extent reasonably necessary in order to assist the client in making an informed decision regarding the representation.<sup>11</sup> Second, Rule 1.5(a) and (b) of the *Model Rules* mandate that "[a] lawyer's fees shall be reasonable" and require the lawyer to communicate to the first-time client the basis or rate of the fee "before or within a reasonable time

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8. Leibowitz, *Dealing with the Human Factor*, *supra* note 4, at B8. This phenomenon is sometimes referred to as the "technology paradox." *Id.*

9. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993) [hereinafter Formal Opinion 93-379] prohibits the double-billing for recycled work products, work done on travel time, and simultaneous court appearances. The scope of this Essay is limited only to considering the ethics of double-billing in the context of the recycled work product.

10. FED. R. CIV. P. Rule 1 advisory committee's note. The 1993 Amendments to Rule 1 note that "[a] officers of the court, attorneys share this responsibility with the judge to whom the case is assigned." *Id.*

11. MODEL RULES OF PROFESSIONAL CONDUCT ANNOTATED Rule 1.4(b) (1994) [hereinafter MODEL RULES]. Rule 1.4(b) states: "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests . . ." *Id.* cmt. 2.

after commencing the representation.”<sup>12</sup> In determining whether a fee is reasonable, *Model Rule 1.5(a)(1)* allows the lawyer to consider the time expended in performing a task.<sup>13</sup> Finally, under Rule 7.1, a lawyer must not make a “false or misleading communication” concerning a fee.<sup>14</sup>

Traditionally, most law firms have used some form of hourly billing rates coupled with the actual time spent on a matter in assessing fees for their services.<sup>15</sup> Under this system, the lawyer records the time expended for a specific task along with a brief description of the services rendered.<sup>16</sup> Once a month, the billing entries are collected and internal pre-bills are printed.<sup>17</sup> A supervisory lawyer reviews the bills and may edit the actual time and descriptions of services submitted.<sup>18</sup>

The hourly billing method, however, is often problematic and may lead to over-billing. First, law firms primarily rate lawyers on their short-term financial performance as represented by their billable hours recorded and submitted.<sup>19</sup> Unfortunately, this approach places an enormous amount of pressure on the lawyer to bill hours, despite whether or not the submitted time honestly represents the actual service rendered.<sup>20</sup> Second, law firms often fail to exercise sufficient accountability over the supervisory lawyers responsible for reviewing time and cost submissions.<sup>21</sup> Finally, because today’s clients demand increased

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12. *Id.* Rule 1.5(a) & (b). Rule 1.5(a) lists several factors to be considered in determining the reasonableness of a fee: “(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.” *Id.*

13. *Id.*

14. *Id.* Rule 7.1 (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services”). The comment to this rule further explains that “[w]hatever means are used to make known a lawyer’s services, statements about them should be truthful.” *Id.* cmt. 1.

15. The Task Force on Lawyer Business Ethics, *Statement of Principles*, 51 BUS. LAW. 1303, 1315 (Aug. 1996) [hereinafter *Statement of Principles*]. For example, many lawyers bill their time in increments of 6-, 15-, 20-, and sometimes 30-minutes. *Webster Hubbell Gives Double Billing A Bad Name*, ILL. LEGAL TIMES, Mar. 1995, at 6 [hereinafter *Webster Hubbell*]. Every task, despite its actual size, is billed at these minimums. *Id.*

16. Brad Malamud, *How Times Have Changed: A Systematic Approach to Billing for Legal Services*, 62 DEF. COUNS. J. 583 (1995).

17. *Id.*

18. *Id.* Although some supervising lawyers perform a detailed review of the fee, time, and cost submissions, making proper adjustments when necessary, others routinely send the unaltered bill to the client. *Id.* The latter action, however, potentially violates *Model Rule 1.5(a)*’s requirement of reasonable fees. See *supra* text accompanying note 12 (discussing *Model Rule 1.5*).

19. Benjamin Wittes, *It Could Happen To You, Too*, N.J.L.J., Dec. 19, 1994, at 4. As Chief Justice William Rehnquist noted in an article on the legal profession, “[i]f one is expected to bill more than 2,000 hours per year, there are bound to be temptations to exaggerate the hours actually put in.” Chief Justice William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 155 (1987).

20. Wittes, *supra* note 19, at 4.

21. See *supra* note 18 (explaining that supervising attorneys fail to edit bills before sending them to clients).

innovation and quicker responses for problem solving, clients understand that the hourly billing method “undermines efficiency and avoids risk-sharing.”<sup>22</sup> Hourly billing provides law firms with incentives to “procrastinate, complicate, add staff, mark up expenses, and create new categories of timekeepers, like paralegals, document clerks[,] and so on.”<sup>23</sup>

Taken collectively, Rules 1.4, 1.5, and 7.1. allow wide discretion for lawyers to bill in various ways, including hourly billing, provided that clients are informed of the lawyer’s means for calculating charges and give their informed consent. None of the rules, however, expressly address instances, nor provide guidance in determining, an appropriate fee for time, when the lawyer uses a recycled work product. Recognizing the problems that were created in billing practices as a result of pressures placed on lawyers by law firms to bill a minimum number of hours in order to increase profits, the American Bar Association’s Committee on Ethics and Professional Responsibility issued a formal opinion to address this dilemma.<sup>24</sup>

## B. DOUBLE-BILLING

“Double-billing” is the billing of fees and costs to more than one client for the same work or the same hours.<sup>25</sup> Until recently, many law firms viewed double-billing for fees as favorable and acceptable.<sup>26</sup> Lawyers who double-billed for expenses were rewarded in the short-run with bonuses for surpassing the firm’s yearly hourly billing quotas, and in the long-run with partnerships. They were not reprimanded by their law firms, and for the most part, the severest sanction that could be expected as a result of double-billing was an angry client complaining

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22. Gail Diane Cox, *Excessive Fees Are Attacked Across the Board*, NAT’L L.J., Nov. 4, 1996, at A1. Former attorney and management consultant Richard C. Reed noted that “win, lose[,] or draw, the client knows [the hourly billing] clock is still running.” *Id.*

23. John W. Toothman, *Real Reform: Speedy and Inexpensive Justice Will Come About by Reining in Hourly Fees and Overly Zealous Advocacy, Not by Writing More Rules, the Winner of This Year’s Writing Contest Argues*, 81 A.B.A. J. 80 (1995).

24. See Formal Opinion 93-379, *supra* note 9. The Committee noted that the purpose for its opinion was to address the discouraging public opinion of the legal profession as a result of problematic billing practices that arise from the pressures placed upon lawyers to bill a minimum number of hours and on law firms to maintain and improve profits. *Id.*

25. *Id.* For example, many clients consider it double-billing when several attorneys confer on a matter, in the client’s absence, and then charge the client for each attorney’s time. Robert W. Denney, *Responding to Cost-Conscious Clients*, NAT’L L.J., Nov. 18, 1991, at S5.

26. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 5, 92, 97 (1991). In 1991, Professor William Ross at the Cumberland School of Law surveyed 272 private lawyers and 80 corporate lawyers nationwide to gauge their attitudes towards billing. *Id.* at 5. Fifty percent of the private lawyers and 70% of the corporate lawyers surveyed admitted to some occasional double-billing or believed that others have billed two clients for work performed at the same time. *Id.* at 92, 97. Thirty-eight percent of the private lawyers (1.4% of the corporate lawyers) described double-billing as ethical, even if the client was not informed. *Id.* Finally, an additional 21% of the private lawyers (16.9% of the corporate lawyers) viewed the practice as ethical if the client was informed. *Id.*

about an excessive bill.<sup>27</sup> However, this laissez-faire<sup>28</sup> attitude towards double-billing quickly changed after the resignation and imprisonment of former United States Associate Attorney General Webster Hubbell for federal income tax evasion and improper billing for fees, prior to his appointment to the Justice Department.<sup>29</sup> On March 14, 1994, Webster Hubbell, the third highest-ranking official at the Justice Department, submitted his resignation to the President.<sup>30</sup> At that time, Mr. Hubbell stated that his resignation was due to the growing controversy over his billing practices while a partner at the Rose Law Firm in Little Rock, Arkansas, and that an investigation into these practices threatened to “interfere with [his] service to the country and the president’s agenda.”<sup>31</sup>

In early 1993, the Rose Law Firm, after receiving a client question regarding a bill, initiated a routine review of billing for the four attorneys who had left the firm to join the Clinton Administration.<sup>32</sup> The investigation uncovered several irregularities in Hubbell’s billing records, including charging personal expenses to client accounts and double-billing for work performed by associates.<sup>33</sup> After partners approached Hubbell concerning the discrepancies, Hubbell stated that the bills were legitimate and offered to supply the appropriate receipts.<sup>34</sup>

27. *Webster Hubbell*, *supra* note 15, at 6.

28. The laissez-faire attitude towards double-billing is illustrated in the following excerpt of a March 1996 telephone conversation between former Associate Attorney General Hubbell and his wife, Suzanna Hubbell, taped during his incarceration for tax evasion and improper billing practices:

Suzanna Hubbell: You didn’t actually do that, did you, mark up time for the client, did you?

Webster Hubbell: Yes, I did. So does every lawyer in the country.

*ABC Nightline* (ABC television broadcast, Transcript # 98043001-j07, Apr. 30, 1998).

29. Wittes, *supra* note 19, at 4. Hubbell pled guilty to one count of mail fraud and tax evasion, and to defrauding both the Rose Law Firm and its clients by passing off personal expenses as “billable case-related expenses and, more often, as business expenses that the firm itself paid.” *Id.*

30. *Clinton Friend Hubbell Quits Justice Post*, FACTS ON FILE WORLD NEWS DIGEST, Mar. 17, 1994, at C2 [hereinafter *Clinton Friend Hubbell*]. Associate Attorney General Hubbell was a close friend of President Clinton and First Lady Hillary Rodham Clinton’s former law partner at the Rose Law Firm in Little Rock, Arkansas. *Id.* Hubbell was a senior leader in the Rose firm and at one time, had served as the firm’s ethics officer. See Wittes, *supra* note 19, at 4.

31. *Clinton Friend Hubbell*, *supra* note 30, at C2.

32. See Wittes, *supra* note 19, at 4. Other members of the Rose Law Firm who left were First Lady Hillary Rodham Clinton, the late Vincent Foster Jr., who served as deputy White House counsel, and former Associate White House Counsel William Kennedy, III. *Id.*

33. John Riley, *A Tangled Web of Ethical Questions*, NEWSDAY, Mar. 15, 1994, at 5. Hubbell’s bills included charges for purchases at shops such as Victoria’s Secret and a fur salon, and were noted as “publication costs” and “deposition costs.” *Lawyers Accused of Double-Billing*, THE LEDGER, Apr. 4, 1995, at 4A. One of the clients Hubbell double-billed was the federal government. *Webster Hubbell*, *supra* note 15, at 6. Hubbell billed tax payers more than \$20,000 for work on a savings and loan case that he claimed to have averaged more than eight billable hours a day for three weeks, without taking at least one weekend day off. Darlene Ricker, *Greed, Ignorance and Overbilling: Some Lawyers Have Given New Meaning To the Term ‘Legal Fiction.’ Now the Profession is Asking Why, How Widespread and How Do We Stop It?*, 80 A.B.A. J. 62 (1994). Finally, the Rose Law Firm’s investigation raised concerns that Hubbell double-billed clients, under his name, for work performed by associates. *Id.*

34. Wittes, *supra* note 19, at 4.

However, the partners became suspicious after several months passed and Hubbell failed to produce documentation.<sup>35</sup>

On March 15, 1994, senior members announced the firm's decision to seek official sanctions against Hubbell for alleged improper billing practices after finishing their internal investigation of expenses incurred in cases Hubbell had handled while a partner at the Rose Law Firm.<sup>36</sup> By December 1994, Hubbell ultimately pled guilty to charges of tax evasion, mail fraud, and defrauding the Rose Law Firm and his clients through over-billing.<sup>37</sup> Finally, on June 28, 1995, Hubbell was sentenced to twenty-one months in prison.<sup>38</sup> Interestingly, the Rose Law Firm's investigation of Hubbell's billing practices surfaced just a few months after the issuance of Formal Opinion 93-379. It is likely the opinion was a significant factor in the firm's decision to review Hubbell's billing records, and ultimately, in the severity of Hubbell's sentence.

The Hubbell case provides several practical examples of double-billing and illustrates the recent change in public attitudes concerning the appropriateness of this practice. It also serves as notice to the Bar that the worst consequence facing lawyers today who double-bill could be imprisonment.

## II. FORMAL OPINION 93-379 AND RECYCLED WORK

In December 1993, the American Bar Association Standing Committee on Ethics and Professional Responsibility spoke out against several questionable billing practices.<sup>39</sup> The Committee's action was the Bar Association's first formal

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35. *Id.*

36. *Clinton Friend Hubbell*, *supra* note 30, at C2. At the center of the Rose firm's inquiry was an unsuccessful patent-infringement lawsuit that Hubbell had handled on behalf of P.O.M. Inc., a parking meter company owned by Hubbell's father-in-law. *Id.* Hubbell had acted contrary to the firm's policy by taking the case on a contingency-fee basis. *Id.* Because the suit failed, the firm was left with \$1 million in expenses and unpaid fees. *Id.* Also, Hubbell had taken from the firm's funds to reimburse himself for expenses for which he failed to offer proper documentation. *Id.*

37. *Prosecutor Opposes Leniency for Hubbell*, REUTERS WORLD SERV., June 28, 1995. Hubbell pled guilty to mail fraud and tax evasion in a case brought by Whitewater Special Prosecutor Kenneth Starr, who had been investigating the business and professional lives of President and Mrs. Clinton and other Arkansas politicians. *Id.* The investigation revealed Hubbell had claimed \$482,410 in expense reimbursements from clients and evaded \$143,747 in federal income taxes. *It Has Some Tough Competition for Judge of the Year Award*, DAILY OKLAHOMAN, Oct. 5, 1995, at 4.

38. *Looking Back At 1995 Nation and World*, THE ORANGE COUNTY REG., Dec. 31, 1995, at A21. Hubbell served 18 months at the Federal Correctional Institution at Cumberland, Maryland. Julia Malone, *Federal Prisons Routinely Tape, Use Inmate Conversations*, COX NEWS SERV., May 4, 1998. Interestingly, in a 1996 telephone conversation that was taped while he was in prison, Hubbell raised the possibility that Whitewater prosecutors were investigating First Lady Hillary Rodham Clinton for double-billing of her legal work. *Hubbell Tapes: Billing Probe of First Lady?*, SACRAMENTO BEE, May 2, 1998, at A1. In the taped conversation, Hubbell implied that prosecutors believed he did the legal work but that both he and Mrs. Clinton billed the client for it. *Id.*

39. See Formal Opinion 93-379, *supra* note 9. The Committee decided to address several practices that were the subject of frequent inquiry in an attempt to help lawyers adhere to their ethical obligations to their clients, despite economic pressures. *Id.* The Committee on Ethics and Professional Responsibility has the power to issue



opinion on billing practices and specifically prohibited: (1) billing of surcharges on services contracted with outside vendors or for overhead expenses generally associated with properly maintaining, staffing, and equipping the office;<sup>40</sup> (2) double-billing for recycled work product;<sup>41</sup> and (3) billing multiple clients for work performed during travel time and in simultaneous court appearances.<sup>42</sup> The opinion was an attempt to balance three competing interests: protection of clients from unreasonable charges for legal services; insurance that the lawyer receive sufficient compensation to serve the client effectively; and preservation of the integrity and independence of the legal profession.<sup>43</sup> Prior to this opinion, there was very little consensus among lawyers as to whether double-billing for recycled work was ethical.<sup>44</sup> As evidenced by the Hubbell investigation, lawyers continue to ponder this issue.

Recent legal technologies in the practice of law, however, have resulted in serious consequences for lawyers who charge on an hourly rate.<sup>45</sup> Under the

opinions on proper professional and judicial conduct, either on its own initiative, or when prompted by a member of the bar or the judiciary. MODEL RULES app. D (1992). Its purpose is to advise or assist bar associations in activities relating to "the development, modification[,] and interpretation of statements of the ethical standards of the profession such as the Model Rules of Professional Conduct. . . ." *Id.* The Committee may issue two types of opinions: Formal Opinions and Informal Opinions. *Id.* Formal Opinions are those that address subjects the Committee determines to be of widespread interest or importance. *Id.* All other opinions are considered Informal Opinions. *Id.* The *Model Code of Professional Responsibility* is not effective in any state until it is adopted and serves only as a guide or model basis for the Committee's interpretative opinions which are advisory in nature. *Id.*

40. Formal Opinion 93-379, *supra* note 9. The opinion prohibits a lawyer from charging a client more than his or her disbursements for services provided by third parties such as court reporters, travel agents, and expert witnesses, unless the costs are in addition to the direct costs for the third-party services. *Id.* It also prohibits a lawyer from charging the client for overhead expenses in maintaining the office, but allows the lawyer to recoup those expenses reasonably incurred in handling the client's case for services performed in-house such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar charges as long as the charge reasonably reflects the actual costs for the services rendered. *Id.*

41. *Id.* The opinion prohibits a lawyer from billing a second client, who has agreed to be charged on the basis of the actual time spent on his case, the same amount billed for a recycled work product that he created for the first client. *Id.*

42. *Id.* A lawyer may not bill more than one client for the same hours spent. *Id.* If travelling on a plane on behalf of one client, the lawyer who decides to do work on another client's case during the trip may not bill both clients for the total time spent while working on the plane. *Id.* Likewise, the lawyer may not bill multiple clients for the total time spent, when the lawyer schedules a court appearance for all clients on the same day and spends several hours at the courthouse as a result. *Id.*

43. *Id.*

44. See Ross, *supra* note 26, at 93, 98 (referring to a survey of corporate lawyers). Out of 272 private lawyers and 80 corporate lawyers surveyed in 1991, 87.6% of the private lawyers (86.8% of the corporate lawyers) believed that double-billing for recycled research or drafting was ethical in some situations. *Id.* Eight percent of the private lawyers surveyed (19.7% of the corporate lawyers) believed that double-billing for recycled work was ethical if the second client was informed that the work was recycled. *Id.* Finally, 20% of the private lawyers (2.6% of the corporate lawyers) believed the practice was ethical even if the lawyer had not informed the client that the work was recycled. *Id.*

45. See Leibowitz, *Dealing with the Human Factor*, *supra* note 4, at B8 (referring to the problem as the "technology paradox"). A lawyer's assets continue to be his time, skill, and legal judgment. *Billing for Technology Still a Knotty Problem, Trends in Law Office Technology*, ILL. LEGAL TIMES, Mar. 1992, at 17.

Committee's interpretive opinion, instead of being rewarded for brilliance or previous expertise, the lawyer who has agreed to bill primarily on an hourly basis must pass these benefits on to the client.<sup>46</sup> Under an hourly billing arrangement, the lawyer is penalized for being efficient. The following examples illustrate the problem.

- (1) A lawyer has previously performed research on a topic for Client A, but the same research is relevant to Client B's case. The lawyer charges Client B for the total amount of time and costs required to conduct the research for Client A.
- (2) A lawyer is asked to prepare a document for Client A and later discovers that his law firm's electronic brief bank contains a document previously prepared for a similar transaction. As a result, the lawyer simply pulls the document up on his computer terminal, modifies the previous document, changing names, dates and subject matter, and bills Client A for the full amount of time it would have taken if the lawyer had created the document from the start.
- (3) The premier expert on products liability, a lawyer, researches and prepares the definitive brief for a central issue in a defective product case. The issue arises repeatedly in every case on the lawyer's docket. As a result of his expertise in the subject area, the lawyer can prepare a pleading on the issue in a matter of minutes. In handling similar cases, the lawyer, under an hourly billing arrangement, bills all subsequent clients for a set fee, despite the actual time spent in preparing the specific pleading.

Under each of the above scenarios, Formal Opinion 93-379 prohibits the lawyer from billing the new client for the same time spent in conducting the initial research or in creating the initial documents in a case.<sup>47</sup> However, the opinion provides a few exceptions. First, Formal Opinion 93-379 is applicable only for situations where the billing arrangements are based in whole or in part on hourly fees.<sup>48</sup> Second, a lawyer who agrees to bill on an hourly basis, may, with

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Although technology increases productivity, it does not "revolve around the hour." *Id.* In reality, changes in technology reduce the cash flow in the firm and make the "dollar-per-hour" concept much more difficult. *Id.*

46. See Formal Opinion 93-379, *supra* note 9. The opinion expressly states: "If a lawyer has agreed to charge the client on [an hourly fee] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it will not be permissible to charge the client for more hours than were actually expended on the matter." *Id.* This conduct would violate *Model Rule 7.1's* restriction on the making of false and misleading statements. See *supra* note 14 (discussing *Model Rule 7.1*). The lawyer, however, may continue to charge for the actual time spent retrieving the work product from his files or the firm's brief bank. '*Ethics' is Intended to Stimulate Awareness of Ethical Problems and to Illustrate the Varying Approaches of Different Jurisdictions*, 78 A.B.A. J. 120 (1992).

47. See Formal Opinion 93-379, *supra* note 9.

48. *Id.* The Committee's opinion is limited solely to billing arrangements for legal fees determined on the basis of hourly rates and hours spent. *Id.* Because the Committee has the sole power to speak on issues of interpretation of the *Model Rules*, Formal Opinion 93-379 is the definitive interpretation of *Model Rule 1.5* in the subjects for which it speaks. MODEL RULES app. D. *Model Rule 1.5*, however, does not require that the billing

full disclosure, renegotiate for additional compensation because of a “particularly efficient or outstanding result,” or because the lawyer was able to recycle previous work product on the client’s behalf.<sup>49</sup> Finally, if the handling of a matter becomes more extensive to accomplish than initially anticipated, such that more hours would be necessary in order to handle the matter adequately, the lawyer may bill for the additional hours, unless the initial billing arrangement was for a fixed rather than an hourly fee.<sup>50</sup>

### III. ESCAPING THE TECHNOLOGY PARADOX: A PROPOSAL FOR MODIFIED HOURLY BILLING

Double-billing is not an issue in fee arrangements that are based in whole or in part on considerations other than the number of hours spent.<sup>51</sup> As noted in the exceptions to Formal Opinion 93-379, a lawyer may request additional compensation even under an hourly fee arrangement, when he has achieved a “particularly efficient or outstanding result” or when he is able to reuse a prior work product on behalf of a client.<sup>52</sup> Therefore, implicit in the opinion is the solution for escaping the technology paradox: modified hourly billing.<sup>53</sup>

Because most law firms continue to use an hourly-billing arrangement, yet often adjust bills to reflect the value of their services anyway, the more effective and practical billing arrangement would be one that utilizes an hourly billing rate but allows the lawyer some freedom to modify the rate when special circumstances dictate.<sup>54</sup> This would be consistent with the current legal practice.<sup>55</sup> As

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arrangement be based solely on time, and provides several factors to be considered in determining a reasonable fee. MODEL RULES Rules 1.5(a) & (b).

49. Formal Opinion 93-379, *supra* note 9.

50. *Id.* The opinion provides that a lawyer may take as much time as is reasonably required to complete a project. *Id.*

51. *Id.*

52. *Id.*

53. Recently, lawyers and their clients have become increasingly creative in designing alternatives to hourly billing. *Statement of Principles*, *supra* note 15, at 1303. See also Denney, *supra* note 25, at S5 (discussing specific billing alternatives in greater detail). Other alternatives to hourly billing include: (1) value billing; (2) fixed fees; (3) fee caps; (4) contingent fees and reverse contingent fees; (5) blended rates; and (6) stock options. *Statement of Principles*, *supra* note 15; Denney, *supra* note 25, at S5.

A popular alternative utilized by many lawyers is value billing. Roland F. Banks, *Measuring Output Rather than Input; Value Billing: An Alternative That Can Work*, 11 ACCT. FOR LAW FIRMS 1 (1998). Under this arrangement, the lawyer bills the client for the value of the services performed, rather than for the actual time spent in performing the service. *Id.* However, successful value billing requires a complete rethinking of the firm’s current billing process, which can be both difficult and time consuming. *Another Stab at Value Billing Can Make It Workable (and Profitable)*, LAW OFF. MGMT. & ADMIN. REP., Mar. 1997, at 4. Finally, value billing is prone to abuse. John Doe, *Billing: Yes: Associates Lack Guidance*, 76 A.B.A. J. 42 (1990). Lawyers often engage in value billing without first informing their clients. *Id.* For example, value billing typically occurs when a lawyer recycles the research from one client’s case in order to assist in another client’s case. *Id.* See also *supra* text accompanying note 47.

54. Federal courts have used modified hourly billing practices in awarding statutory attorney’s fees. See *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711-12 (E.D. La. 1970), *aff’d*, 437 F.2d 959 (5th Cir. 1971)

discussed previously, the *Model Rules* and Formal Opinion 93-379, as they stand, allude to this but do not expressly state it.<sup>56</sup> Therefore, this Essay proposes the adoption of an amendment to *Model Rule* 1.5 to allow expressly for the consideration of special circumstances in modifying the final bill when the client has agreed to an hourly billing arrangement.<sup>57</sup>

A modified hourly billing arrangement would combine the advantages of hourly billing and value billing.<sup>58</sup> As contemplated by the Supreme Court in *Hensley v. Eckerhart*,<sup>59</sup> it would provide a reasonably objective foundation for billing based upon time, but would provide the lawyer with the flexibility to consider other circumstances that should properly be reflected in the final bill.<sup>60</sup> This approach would discourage “padding” of bills because it would enable lawyers to recover for the full value of their work.<sup>61</sup> The potential for modifying a bill in order to compensate for inefficiency or brilliance would also discourage the wasting of time that often occurs under the traditional hourly billing system.<sup>62</sup>

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(considering the *Model Code of Professional Responsibility's* factors in determining the reasonableness of a fee). See also *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (relying on *Clark v. American Marine Corp.*, the Fifth Circuit considered 12 factors in determining the reasonableness of a fee award). But see *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (holding a fee arrangement based upon a formula consisting of the number of hours spent on the case multiplied by a reasonable hourly rate of compensation for the several attorneys involved would provide “[t]he most useful starting point for determining the amount of a reasonable fee” because it provides an “objective basis on which to make an initial estimate of the value of a lawyer’s services”). The *Hensley* ruling, however, continued to uphold consideration of the factors enumerated in *Johnson v. Georgia Highway Express, Inc. Id.* Under a modified hourly billing arrangement, one special circumstance that could be considered would be the effect of technology on the specific services provided. *Another Look at How Law Firms Are Dealing With the Technology Paradox*, LAW OFF. MGMT. & ADMIN. REP., May 1997, at 1. For example, a modified hourly billing arrangement could allow for additional compensation such as surcharges for overhead to cover the firm’s investment in legal technology. *Id.* Other circumstances could include additional compensation for the lawyer’s expertise in a specific area of law, or access to previously drafted documents and research memoranda contained in the firm’s brief bank. See *supra* text accompanying note 47 (discussing modified billing).

55. See Ross, *supra* note 26, at 87 (noting that “many if not most attorneys already adjust their hours upward or downward to reflect quality and results”).

56. See MODEL RULES Rules 1.5(a) & (b). Rule 1.5(a) lists several factors that can be considered in determining the reasonableness of a fee. *Id.* Rule 1.5(a).

57. My proposal reads as follows:

When the lawyer and client have agreed upon an hourly billing arrangement for services, the lawyer, in considering those factors enumerated in subsection (a) of this Rule, and after full disclosure to the client, may modify the final fee to conform more accurately with the quality of the service performed and other special circumstances that have contributed significantly to the representation of the client.

MODEL RULES Rule 1.5(f) (proposed amendment).

58. Banks, *supra* note 53, at 1. As technological advances in the practice of law continue, lawyers will no longer be able to maintain profitability solely by charging for their services on an hourly basis. *Id.* A billing arrangement that includes factors such as output and performance is not only economical, but more reasonable for both the lawyer and client. *Id.*

59. 461 U.S. at 433.

60. Ross, *supra* note 26, at 86-87.

61. *Id.* at 87.

62. *Id.*

More importantly, however, this approach would remove much of the pressure to bill massive numbers of hours to generate revenues and would eliminate the widespread practice of double-billing for recycled work, thus, helping to preserve the integrity and independence of the legal profession.

#### CONCLUSION

Legal technologies have significantly changed the practice of law, creating a paradox for lawyers and firms that charge clients under a traditional hourly billing arrangement that often results in the double-billing of time to recoup the sunk costs of efficiency. In order to protect clients from unreasonable charges for legal services that may occur from the time loss as a result of technological innovations in the practice of law, while insuring the lawyer receives sufficient compensation for his services, the American Bar Association should amend *Model Rule 1.5* to recognize specifically “modified hourly billing.” This would allow lawyers to adjust their final bills to reflect more accurately the full nature of their services during the representation of their clients. More importantly, it would help to eliminate the pressures placed on lawyers to double-bill and would restore public confidence in the integrity of the legal profession.