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Billing Without Bilking: Regulating Time-Based Legal Fees

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The billable hour is the most common method for calculating legal fees in Canada. Codes of conduct state that time-based fees must be "fair and reasonable" and "disclosed in a timely fashion," but provide very little additional guidance. Throughout a time-based retainer, lawyers and clients are confronted with ethical ambiguity. This creates both opportunities for exploitation and conflicts of interest.

This article argues that clear rules and efficient procedures are required to determine what specific billing and disclosure practices are "fair," "reasonable," and "timely." Detailed rules are already replacing vague standards for contingency fees, and time-based fees should move in the same direction. This includes banning certain unfair billing practices, such as misleading docketing and profit-maximizing approaches to file management. The court-based procedure for resolving disputes about legal fees also requires reform because it is inaccessible, vulnerable to strategic abuse, and irrationally divorced from the lawyer discipline system.

L'heure facturable est la méthode la plus courante pour calculer les honoraires d'avocat au Canada. Les codes de conduite stipulent que les honoraires basés sur le temps doivent être « justes et raisonnables » et « divulgués en temps opportun », mais ils fournissent très peu d'indications supplémentaires. Tout au long d'un mandat de représentation en justice basé sur le temps, les avocats et les clients sont confrontés à une ambiguïté éthique. Cela crée à la fois des possibilités d'exploitation et de conflits d'intérêts.

Le présent article soutient que des règles claires et des procédures efficaces sont nécessaires pour déterminer quelles pratiques spécifiques de facturation et de divulgation sont « justes », « raisonnables » et « opportunes ». Des règles détaillées remplacent déjà les vagues normes relatives aux honoraires conditionnels, et les honoraires basés sur le temps devraient aller dans le même sens. Il s'agit notamment d'interdire certaines pratiques de facturation déloyales, telles que les registres trompeurs et les approches de gestion des dossiers visant à maximiser les profits. La procédure judiciaire de résolution des litiges relatifs aux honoraires doit également être réformée, car elle est inaccessible, vulnérable aux abus stratégiques et irrationnellement séparée du système disciplinaire des avocats.

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Introduction

A lawyer should be a loyal ally for each client and should never exploit a client for personal gain. Legal services regulation should prevent such exploitation. It should also create certainty and foster trust in every lawyer-client alliance.

When it comes to time-based legal fees, Canadian legal services regulation is not yet doing its job. Throughout Canada, rules say that legal fees must be "fair and reasonable," and "disclosed in a timely fashion."[1]

1. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as updated October 2019, Ottawa: FLSC, 2019), s 3.6-1 and provincial equivalents, online: <https://perma.cc/CP94-U3Q5> [FLSC Model Code]. In Quebec's Code, the words "disclosed in a timely fashion" do not appear, but s. 100 is similar: "A lawyer must provide to his client, in a timely manner, all the

These fine sentiments are supported by long lists of factors to be considered when a legal fee is called into question and then assessed retrospectively. That is, more or less, all that the codes of conduct have to say about time-based legal fees.

What we lack are clear rules and efficient procedures to determine what specific billing and disclosure practices are—and are not—"fair," "reasonable," and "timely." The status quo gives *unethical* lawyers room to take advantage of inexperienced clients in niches such as family law, estate law, and employment law, in which time-based billing is common.[2] It also subjects *ethical* lawyers, and their clients, to unnecessary distrust and disputes regarding fees. Reconciling the need to charge and collect fees with the ethical obligation to practice "honourably and with integrity"[3] is a challenge for which regulators should offer more concrete guidance. Without fixing prices or curtailing flexibility in billing arrangements, regulatory reform can create a much fairer field for agreements between lawyers and clients about time-based fees.

Part 1 of this article considers first the beginning, then the middle, and finally the end of a typical retainer involving time-based billing and an inexperienced client. At each of these three junctures, we find ethical ambiguity creating both opportunities for exploitation and conflicts of interest. The vagueness of the rules requires a lawyer to make unilateral decisions that increase or decrease the client's bill. This creates a conflict between the lawyer's financial self-interest and their fiduciary obligation to put the client's interest first.

Part 2 argues for more detailed regulation of time-based legal fees to prevent exploitation, create certainty, and eliminate fee-related conflicts of interest that undermine trust in the lawyer-client relationship. Drawing on regulatory theory, I argue that a move from vague *standards* to more precise *rules* would create certainty, without significantly constraining flexibility. Wherever possible, the best practices for time-based billing already used by ethical and conscientious lawyers should be written into regulation. Clear guidance on issues such as rounding dockets, double-billing, and changes to billing rates during the life of a file should be

explanations necessary for the client to understand the amount of the fees or the statement of fees and the terms and conditions of payment." A Quebec lawyer must also avoid "greedily seeking a profit or abusing his status as a lawyer in order to enrich himself:" Gouvernement du Quebec, *Code of Professional Conduct of Lawyers*, chapter B-1, r 3.1, s 7, online: <https://perma.cc/3KKQ-SH8L>.

2. Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should be Done About It" (2004) 83:3 Can Bar Rev 859; Brooke MacKenzie, "Better Value: Problems with the Billable Hour and the Viability of Value-Based Billing" (2011) 90:3 Can Bar Rev 675 (last accessed: 6 April 2020).

3. FLSC Model Code, *supra* note 1, s 2.1-1 ("Integrity"), and provincial and territorial equivalents.

provided by the Rules. Lawyer decisions and recommendations affecting legal bills should be made with exclusive reference to the best interests of the client and every element of a legal fee should be explained in writing at the outset of a retainer.

Part 3 turns from the rules to the procedure that is meant to enforce them. I argue that the court-based process for identifying and remedying unethical billing is inaccessible, inconsistent, and vulnerable to strategic abuse by both lawyers and clients. Making law societies fully responsible for regulating legal fees would make the system more holistic, accessible, and consistent.

I. *Ethical ambiguity from beginning to end*

1. *The beginning of a matter: Drafting retainer terms*

Lawyers are required to enter into a retainer contract to provide legal services in exchange for consideration. For most matters, written contracts with concrete terms specifying fees are encouraged, but not required, by the Rules of Professional Conduct.[4] Contingency fee contracts, in most provinces, must be in writing.[5]

Time-based fees are the focus of this article. They are used by 88.6 per cent of Canadian lawyers for at least some of their files.[6] A time-based fee may seem like a simple arrangement.[7] The client agrees to pay $x for each hour docketed by the lawyer on the client's matter. Typically, the firm will require the client to provide a retainer deposit before starting work. If the lawyer is not a sole practitioner, the client also agrees to pay for each hour worked by others within the firm, at rates varying with the seniority and credentials of the worker.

The apparent simplicity of the time-based fee is deceptive. Many questions are created by a time-based retainer, including:

- Will the quoted hourly rates apply until the retainer ends? Or will the firm have the right to raise the hourly rates a client pays after

4. FLSC Model Code, *supra* note 1, s 3.6-1, Commentary 3 and provincial and territorial equivalents. See section 1.4, below, regarding the lack of any firm or enforced obligation on Canadian lawyers to discuss fees at the outset of a retainer.

5. E.g. Law Society of British Columbia, *Law Society Rules,* Rule 8-3(a); *Solicitors Act (Ontario)*, RSO 1990, c S15, s 3, s 28.1(3).

6. Marg Bruineman, "Steady optimism—2019 Legal Fees Survey," *Canadian Lawyer Magazine* (8 April 2019), online: <https://perma.cc/M9XD-42S8>. The study also reports that 62.7 per cent use flat fees for some of their files, and 33.6 per cent use contingency fees for some files.

7. Indeed, simplicity is said to be one of the virtues of this model: see e.g. Nayeem Syed, "Will technology bring an end to the billable hour?" (26 January 2017), online (blog): <https://perma.cc/J9RJ-46QR>; MacKenzie, *supra* note 2 at 79-80.

the file has remained open for some time? If so, does the firm have an unlimited right to do so unilaterally?

- Apart from the work of the individuals named in the contract, what other labour will be billed to the client? Will any—or all—work by non-lawyers (e.g. clerks or assistants) on the client's file be "free" to the client, or will it be included on the bill?[8]
- If fees are not paid when due, what interest rate will be charged to the client?[9] Interest, like the fee itself, must be "fair and reasonable" under law.[10] However no further guidance is given,[11] so the only clear ceiling is the criminal rate of sixty per cent per annum.[12]
- Can a client be billed for time during which work was being done for the client, but the timekeeper was also doing something else that did not benefit the client?[13] One example is time a lawyer spends travelling on the client's behalf, while simultaneously doing document review or correspondence that is being billed to another client. Another is time that a lawyer spends productively thinking about a client's matter, while walking the dog or taking a shower.[14]
- Can a client be billed for time the lawyer spends trying to secure payment from the client?[15]
- Are dockets rounded to the minute, to the 1/10 hour, or to the 1/5 hour?[16] Can "0.2" be billed when the lawyer actually worked for 10 minutes rather than 12? Can 0.2 be billed if the lawyer worked for 7 minutes or 3 minutes?[17] Rounding as taught in elementary school

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8. The Law Society of Upper Canada Tribunal held that "a lawyer cannot charge for the services of his or her staff unless there is an agreement to the contrary": *Law Society of Upper Canada v Hale Luther Miller*, 2007 ONLSHP 41, [2007] LSDD No 26 at para 108. However, there appears to be no guidance regarding what types of non-lawyer work can be charged to the client, if the firm's right to charge for this work is mentioned in the retainer.
9. In Ontario and some other provinces, legislation gives clients a certain interest-free period after the bill is rendered. See e.g. *Solicitors Act (Ontario)*, RSO 1990, c S15, s 33.
10. FLSC Model Code, *supra* note 1, s 3.6-1 and provincial and territorial equivalents.
11. The author is grateful to Sarah Boyd for this point: Comments, Noel Semple, "Shady Billing: Closing the Hall of Shame," *Slaw.ca*, (30 January 2018), online: <https://perma.cc/7ST9-SYMY>.
12. *Criminal Code*, RSC, 1985, c C-46, s 347(2).
13. MacKenzie, *supra* note 2 at 683; Lee A Watson, "Communication, Honesty, and Contract: Three Buzzwords for Maintaining Ethical Hourly Billing" (1998) 11:2 Geo J Legal Ethics 189 at 192.
14. Duncan Webb, "Killing time: A Limited Defence of Time-Cost Billing" (2010) 13:1 Legal Ethics 39 at 48.
15. See for example *LSUC v Tollis* 2009 ONLSHP 33 (CanLII), [2009] LSDD No 37. Agreed Statement of Facts paras 79 and 88. The client was incapacitated and unable to visit his bank in order to obtain the retainer deposit. The lawyer billed the client for the time he spent performing these tasks pursuant to the client's instructions.
16. At least in the United States, 15 minute increments are not unheard of: Daniel Fisher, "'Grazing,' Photocopying And Other Tricks Inflate Legal Bills," *Forbes Magazine* (11 May 2011), online: <https://perma.cc/34MA-V6TY>; Woolley, *supra* note 2 at 866.
17. According to an article by Toronto lawyer Alan Shanoff, "many law firms use minimum dockets

includes rounding some numbers *down*. Does the same apply to dockets?[18]

- Does a docket for *x* hours literally mean that no less than x rounded hours were spent on the client's matter? Or can *x* be an "estimate" that might significantly exceed the time actually spent, e.g. because the lawyer does not stop the clock for breaks,[19] or the lawyer has no reliable practice for recording time actually spent?[20] Can *x* exceed the time actually spent because the lawyer believes that their efforts during that time were especially meritorious, because the outcome was especially good, or simply because the client's matter happens to involve a large amount of money changing hands?[21]

Each of these questions has (i) an answer that is maximally favourable to the client, (ii) an answer that is maximally favourable to the firm, and (iii) a range of intermediate possibilities. This is not to say that the drafting of terms is entirely zero-sum. The client's interest is favoured by terms that give the firm a measure of profitability and flexibility. If they did not do so then service quality would suffer. However, terms on all of the questions written above can be, and sometimes are, written in a manner that grants the firm significant financial advantages at the expense of the client.

Corporate and other experienced clients may understand and negotiate fee-related terms in retainer contracts.[22] Inexperienced clients generally accept whatever the lawyer drafts, with little or no discussion. Many lawyers draft financially-significant fee terms that are favourable to clients, consonant with the foundational obligation that lawyers practise with honour and integrity.[23]

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of two-tenths of an hour." Alan Shanoff, "Lawyers Billing Badly," *Toronto Sun* (26 December 2014), online: <https://perma.cc/HFR2-CLSQ>.

18. Webb, *supra* note 14 at 48, suggests that "[n]aturally the lawyer will round, and human nature would suggest that rounding up is more likely than rounding down. This amounts to a kind of time-padding, and it is a short leap from rounding up a few minutes here and there to rounding 55 minutes up to an hour, or rounding a 1 hour 45-minute meeting up to 2 hours."

19. Webb, *ibid* at 47.

20. Some lawyers estimate dockets hours or even days after the work was done: Woolley, *supra* note 2 at 866.

21. See MacKenzie, *supra* note 2 at 681 regarding lawyers who accomplish a task more quickly than expected, and then docket the amount of time that the task "should" have required. An example is what Woolley labels "recycling" work done for a previous client, with the time billed to the new client being equivalent to what would have been required if the recycling had not been possible. Woolley, *supra* note 2 at 889.

22. Anita Balakrishnan, "Firms Need Data to Back Up their Prices, Say Experts" *Law Times* (5 June 2019), online: <https://perma.cc/X8YX-5J4Q>.

23. FLSC Model Code, *supra* note 3.

2. *A personal interest conflict*

Nevertheless, the discretion to draft these terms without substantive regulatory guidance places any lawyer who does so in a personal conflict of interest, at least if the client is unlikely to scrutinize the terms.[24] If an individual has met a lawyer for an initial consultation and agreed to retain them, that individual is already a client of the lawyer.[25] If the lawyer drafts the retainer contract after this point in the relationship, the lawyer already owes a duty of loyalty to the client.[26]

This creates an obligation to avoid conflicts of interest, defined by the Model Code as any circumstance bearing a "substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person."[27] The Model Code specifically states that a conflict exists where a lawyer "has a personal financial interest in a client's affairs."[28] A lawyer drafting fee terms for their own client is in this position, because the terms are both part of the lawyer's financial interest and part of the client's affairs. Ontario's rules state that a "personal interest" conflict exists where "a lawyer is asked to advise the client in respect of a matter in which the lawyer…has a material direct or indirect financial interest."[29] Placing a retainer contract in front of a new client and asking her to sign it so that work can begin constitutes advice to that client, and the lawyer has a direct financial interest in whether the client accepts that advice.

The situation is analogous to the textbook example of a personal interest conflict: the lawyer with a substantial investment in a corporation, who is retained to sue that corporation. Likewise, the lawyer drafting a time-based retainer contract is pushed in one direction by personal financial interests, and pushed in another direction by their fiduciary obligation to

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24. If a client does scrutinize and negotiate the terms, then the lawyer does not have the power to unilaterally establish the terms of the contract with that client. The more likely a client is to do so, the more reasonable it is to see the provision of a draft contract to that client as part of an arms-length negotiation about the terms upon which legal services will be provided, as opposed to the provision of legal advice to that client.

25. This conclusion results from the definition of "client" in the Rules: "'Client' means a person who: (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf." The Commentary adds that "A lawyer-client relationship may be established without formality." FLSC Model Code, *supra* note 1, s 1-1 and provincial equivalents.

26. *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 [*McKercher*]; FLSC Model Code R 3.4-1 and provincial equivalents.

27. FLSC Model Code, *supra* note 1, Rule 1.1-1, and provincial and territorial equivalents.

28. *Ibid*, Rule 3.4-1, Commentary 11c, and provincial and territorial equivalents.

29. Law Society of Ontario, *Rules of Professional Conduct (Ontario)*, Toronto: LSO, 2019, R 3.4-1, Commentary 4, online: <https://perma.cc/FW5C-PNWQ>.

the client. The financial incentive to draft the retainer contract in a self-serving way is significant. The final fee produced by a contract in which all of the questions above are answered in a maximally profitable way could plausibly be at least twenty-five per cent greater than it would be if these questions were answered in the most client-friendly possible way. The size of the financial incentive suggests that a "substantial risk" of impaired loyalty does in fact exist.

The vulnerability of retainer contracts to self-serving drafting is unhealthy for lawyer-client relationships. Given pervasive popular skepticism about lawyers and other professionals,[30] it can be presumed that many clients, including inexperienced ones, know or suspect that lawyers have discretion in drafting retainers. Thus, no matter how the lawyer actually proceeds, the lawyer-client relationship is exposed to the client's reasonable suspicion of the retainer contract.

Corporate clients may have to invest resources in scrutinizing and negotiating this document; it would be helpful to spare them this task if possible. However, the problem is worst for inexperienced individual clients. At the outset of the alliance—when trust has yet to be established—the client is asked to sign a document that can legally contain at least four or five small-print terms which can enrich the lawyer at the client's expense in a surprising way. Commentary in the Model Code states that "if a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing."[31] While the relationship can survive some skepticism, the doubt created by the lack of regulatory guidance for time-based retainers is unhelpful and unnecessary. It will be argued below that *time-based legal fees should be subject to more detailed regulation, ideally in the form of a mandatory retainer contract.*

Fee-related conflict of interest cannot be completely eliminated, so long as fees are charged to clients. Lawyers will always face a pecuniary incentive to counsel clients to purchase unnecessary legal services from them. However, the Model Code provides that conflicts can be *managed*—for example through informed client consent—to minimize "material adverse effects" upon clients.[32] This paper argues that more detailed

30. Julie Macfarlane, *The New Lawyer : How Settlement is Transforming the Practice of Law* (Vancouver: University of British Columbia Press, 2008) at 130; John Craig, "Production values: Building shared autonomy" in John Craig, ed., *Production Values: Futures for Professionalism* (London: Demos, 2006), online: <http://www.demos.co.uk/files/productionvalues1.pdf> (last accessed: 14 October 2020).

31. FLSC Model Code, *supra* note 1, Rule 2.1-1, Commentary 1, and provincial and territorial equivalents.

32. FLSC Model Code, *supra* note 1, Rule 3.4-2, and provincial and territorial equivalents.

regulation can help lawyers effectively manage fee-related personal interest conflicts, by replacing the discretion that gives rise to the conflicts with mandatory and fair terms.

3. *The middle of a matter: How much work to be done, by whom?*

After a time-based retainer begins, ambiguous regulation of legal fees continues to create similar problems for inexperienced clients and their lawyers. The contract typically gives the firm discretion to allocate tasks and decide how much work to do.[33] Because this exercise of discretion has ramifications for firm profitability, regulation's failure to guide it has bad consequences.

a. *Dividing labour within the firm*

A law firm is responsible for allocating work on a file to different people within the firm. When time-based billing is used, the allocation of work affects the fee. If maximizing profit is the goal, tasks should be allocated as much as possible to employees whose time will be billed to the client rather than those whose work will not (e.g. assistants). Among time-keeping employees, the work should be done by those with the highest hourly rates.[34]

Conversely, it is presumptively in the client's interest for every task to be done by the competent worker within the firm with the *lowest* hourly rate (including those whose work is free to the client),[35] except where a more expensive worker can be expected to produce an improvement in quality or timeliness that would justify the increased cost.[36] This presumption regarding the client's interest could, of course, be rebutted by the client's instructions. Some clients might instruct the firm to assign work with other goals in mind, such as promoting diversity within the firm or ensuring that a particular lawyer is—or is not—on the file.

33. By contrast, experienced clients may negotiate litigation budgets specifying how much work will be done, by whom, and at what rates.

34. Having lawyers do clerical tasks when non-lawyers are available within the firm is one example: Woolley, *supra* note 2 at 876.

35. Noel Semple, "Accessibility, Quality, and Profitability for Personal Plight Law Firms: Hitting the Sweet Spot," Ottawa: Canadian Bar Association, 2017, Chapter 5, online (pdf): <https://perma.cc/HD96-K3VJ> (last accessed: 6 April 2020) [*Hitting the Sweet Spot*]; Julie Macfarlane, "Paying for Legal Services with Time rather than Value: the Billable Hour & its Consequences for Clients" (13 January 2015), online (blog): <https://perma.cc/H3MN-VM8K>.

36. In other words, the firm that places the client interest first should always assign a task to worker X rather than worker Y where worker X has a lower hourly rate and the quality expected from the two employees is identical. Where worker X charges a higher rate than worker Y but is expected to produce higher quality, worker X should be chosen only if the lawyer honestly believes that client, if fully informed, would want worker X to do the task.

b. *Deciding how much work to do*

Similar considerations arise when a lawyer decides *how much* work her firm will do on a client matter. At any point in time, the client has the right to instruct the lawyer to "put down the pen."[37] However, most clients (especially inexperienced ones) do not provide such instructions. They defer to the lawyer's discretion regarding how much work will be done, in the hope that this discretion will be exercised in their (the client's) interest.

The lawyer's financial interest is best served by continuing to work on a matter until the expected net fee[38] for the next hour of work is smaller than the opportunity cost[39] of working for that hour. The client's interest is in work being done on his matter until the cost to the client of the next hour exceeds the expected benefit that the firm can obtain for the client by working that hour.

In many legal matters, the appropriate number of hours is not clear cut. A certain minimum number is necessary for competent service. After a certain maximum number is reached, further efforts will produce no benefit for the client. Doing and charging for "work" that clearly has no potential to benefit to the client is fraud.[40] In a few extreme cases, lawyers have been disciplined for "churning" or over-working a file. One spent 81 hours at $390 per hour researching and drafting a single statement of claim.[41] Another spent 30 hours at $400 per hour negotiating over household chattels of minimal value in a family law case.[42]

Between the minimum and the maximum, each additional hour of work can be expected to produce diminishing returns for the client.[43] A lawyer who does not "put his pen down" until they have researched every conceivably relevant corner of case law, or reread every sentence of a contract five times to catch the smallest typographical error, is not exactly defrauding the client. Real work is being done and it could conceivably make a difference.[44] However, this lawyer will produce a very high bill, when a smaller bill could have been produced with negligible sacrifice

37. FLSC Model Code, *supra* note 1, Rule 3.7-7(a), and provincial and territorial equivalents.
38. The "expected net fee" would take into account risks, such as client non-payment of the bill, or client complaints to regulators about the bill.
39. Opportunity cost is the loss of alternatives that occurs when one alternative is chosen. The opportunity cost of spending a minute working on a file includes loss of ability to work on other files.
40. Woolley, *supra* note 2 at 864.
41. *Law Society of Upper Canada v Sawhney*, 2012 ONLSHP 13 (CanLII), [2012] LSDD No 16.
42. *Byrnes v Law Society of Upper Canada*, 2015 ONSC 2939.
43. Webb, *supra* note 14 at 50; MacKenzie, *supra* note 2 at 682.
44. Woolley, *supra* note 2 at 871-873.

of quality. The same analysis applies to firms that "over-lawyer" files by assigning too many lawyers to them.[45]

c. *The best interests of the client rule*

In *Hodgkinson v Simms*, the Supreme Court of Canada held that "clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed."[46] This best interests of the client rule is a central doctrine of fiduciary law. However, the application of this principle to professional fees has not been clearly established in case law or codes of conduct. Clearly, if there is to be a functioning market for professional services, professionals must have some scope to assert their own financial interests against their clients. For example, they must be allowed to require retainer deposits and take action to collect unpaid accounts.

Neither fiduciary law nor legal services regulation has tackled the question of where the obligation to put the client first ends and the professional's right to seek profit begins.[47] Regulators should demarcate a sphere of permissible profit-seeking behaviour within the lawyer-client relationship, and impose the fiduciary best-interests-of-the-client standard for everything else the lawyer does. *Apart from decisions to set prices, deposit requirements, and efforts to secure payment of fees, the* Model Code *should explicitly state that all decisions or recommendations that are likely to increase the client's legal fees should be made with exclusive regard to the best interests of the client, and no regard to the lawyer's profit.*[48] This would include decisions about dividing labour within the firm, and decisions about how much work to do on a matter.

d. *Disbursements*

The FLSC Model Code states that "a lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third

45. In *Cannon v Funds for Canada Foundation*, Justice Belobaba stated that "docket-padding and over-lawyering…are already pervasive problems in class action litigation" 2013 ONSC 7686 at para 5. See also Woolley, *supra* note 2 at 874.

46. *Hodgkinson v Simms*, [1994] 3 SCR 377, [1994] SCJ No 84 [*Hodgkinson*].

47. Regarding the American situation, see Deborah A DeMott, "The Lawyer as Agent" (1998−1999) 67:2 Fordham L Rev 301 at 313.

48. A somewhat similar idea is embraced by the *Legal Profession Uniform Law* of New South Wales: "Avoidance of increased legal costs: A law practice must not act in a way that unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs." *Legal Profession Uniform Law* (NSW) No 16a, Part 4.3, s 173.

party by the lawyer on a client's behalf."[49] "Marking up" disbursements, to create profit for the firm, constitutes professional misconduct.[50] However some disbursements which benefit clients also produce benefits for the lawyers who authorize them. Examples include payments to service-providers who are relatives of the lawyer and (at least in the United States) payments to corporations that have been created by the firm to "rent out" conference facilities within the firm's own offices to clients.[51]

Adverse cost insurance may be an example of a disbursement that benefits the firm, along with the client. Such a policy covers some or all of the risk of being ordered to pay costs to a litigation adversary and is a legitimate disbursement, to the extent that it protects the client from the risk. However, adverse cost insurance can also protect law firms from disbursements or costs that they otherwise might have to pay. Commonly, the client will be responsible for the entire premium if the litigation is successful. A law firm that recommends such a policy without paying part of the premium is recommending the use of the client's money to protect itself (along with the client) from risk.[52] *If a disbursement provides any benefit or revenue for the firm, the Rules should require the firm to pay a share of the disbursement cost equivalent to the market value of the benefit received by the firm.*

4. *The end of a matter: Choosing one's own fee*

At the end of a retainer, a lawyer may be in a position to decide, more or less unilaterally, how much a client should pay him. There are two ways this can happen. Some time-based retainers give a lawyer broad discretion over their own fee. For example, the model provided by LawPRO (Ontario's professional indemnity insurer) includes the following term:

> While we expect that our fee will be calculated on the basis of our regular hourly rates, we reserve the right to charge more in appropriate cases, such as pressing circumstances, the requirement for work outside normal business hours, exceptionally successful or efficient representation, or special demands on us.[53]

Clearly, the question whether a firm's success in a case was "exceptional" or its representation was "efficient" admit a great deal of discretion.[54] A

49. FLSC Model Code, *supra* note 1, Rule 3.6-3, Commentary 1, and provincial and territorial equivalents.
50. *Law Society of British Columbia v Pham*, [2015] LSDD No 70, 2015 LSBC 14.
51. Fisher, *supra* note 16.
52. Aidan Macnab, "Adverse Cost Insurance," *Canadian Lawyer* (9 October 2018), online: <https://perma.cc/9VGZ-9KVC>.
53. PracticePro, "Retainer Agreement (General)," online: <https://perma.cc/XR2W-6GH2>.
54. Richard F Devlin & Porter Heffernan, "The End(s) of Self-Regulation" (2008) 45:5 Alta L Rev

lawyer may also be in the position to choose his own fee because the retainer contract had no clear price term, as illustrated in *Newell v Sax*, discussed below. [55]

Canadian law, it must be acknowledged, takes steps to encourage written retainers with explicit fee terms. In *John v Macdonald* and *Khan v Kazakoff*, the lawyers worked without written retainers, and had their bills challenged by clients.[56] Both lawyers claimed that they had agreed, orally, on contingency arrangements with their respective clients. In both cases, the courts were unconvinced and the lawyers walked away without payment. When a lawyer proceeds without a written retainer, and the lawyer's evidence about the terms of the retainer is contradicted by the client, courts typically side with the client unless the lawyer discharges a heavy onus.[57] In *John v Macdonald*, the court cited Rule 3.6.1 Commentary 3 to emphasize the importance of articulating fee agreements in writing:

> A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

Commentary 4 adds that "a lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses."[58]

These are steps in the right direction: toward full disclosure and no surprises for clients. However, the word "should" is used rather than "must," and the recommended standard of disclosure is vague. A retainer term giving the lawyer the right to choose her own success bonus—such as the LawPRO paragraph quoted above—might satisfy Commentary 3's requirement for "reasonable and practical" information about the "basis on which fees will be determined."[59] Quebec's *Code of Professional Conduct of Lawyers* is better, stating that "a lawyer must, before agreeing with the

169 at 180.

55. *Newell v Sax*, 2019 ONCA 455. Below, note 65 and accompanying text.

56. *John v MacDonald*, 2015 ONSC 4850; *Khan v Paul A Kazakoff Professional Corporation*, 2019 ABQB 168.

57. "Lawyers have a duty to establish their retainers with clarity and to reduce the contract to writing. A rule has developed because of that duty: where there is no written retainer, and there is a conflict in the evidence of the lawyer and the client as to a term of the retention, weight must be given to the version advanced by the client rather than that of the lawyer." *Ross, Barrett and Scott v Simanic et al,* 163 NSR (2d) 61, 1997 CanLII 2931 at para 25. See also *Singleton & Associates*, 2009 NSSM 41 (CanLII), [2009] NSJ No 458.

58. FLSC Model Code, *supra* note 1, and provincial and territorial equivalents.

59. *Ibid*, and provincial and territorial equivalents.

client to provide professional services, ensure that the client has all useful information regarding his financial terms and obtain his consent thereto."[60]

In *Arctic Installations (Victoria) Ltd v Campney & Murphy*, the law firm periodically issued time-based bills during a litigation matter. After a surprisingly complete victory in the litigation, it billed the client for a success bonus of $22,270.[61] The BC Court of Appeal found that the series of purely time-based bills issued by the firm foreclosed the possibility of a success bonus. The lawyer had also testified that, even if the litigation had turned out poorly, none of the billed fees would have been refunded to the client.[62] However, billing once at the end of the litigation, and including a previously-uncommunicated success bonus in the fee, would be consistent with the rule from *Arctic Installations.*

Surprise success bonuses are tolerated in Ontario as well. In *Wilson v Edward*,[63] the clients had brought a personal injury claim against an insurer. Their previous lawyer had obtained a settlement offer of $60,000. Wilson took over the file, worked on it for 12 years, and ultimately secured an excellent offer from the defendant for over $1 million. There was one written document pertaining to fees: a letter sent by Wilson to his clients at the outset, in which he offered to work for $300 per hour, plus disbursements. There was nothing in writing about a contingency fee or success premium. Wilson's 2009 bill simply stated "Fees: $300,000.00," followed by several words explaining disbursements and GST and a total of $336,626.13, which he deducted from the clients' funds held in trust. He testified that $100,000 of this amount was a premium for success. The assessment officer reduced the premium to $50,000. On appeal, the Superior Court of Justice found that "in light of the significant success, a premium of ten percent of the recovery could be expected," and restored the $100,000 premium. In 1997, formal contingency arrangements were still illegal in Ontario. Thus, a discretionary bonus of the type that Wilson chose for himself was, at the time, perhaps the only way to produce a fee fairly reflecting the degree of success achieved in the case.

Ontario legalized contingency fee contracts in 2004. Fees can now be tied to case outcome through a formula to which the client has consented. Nevertheless, *Newell v Sax*, decided by the Ontario Court of Appeal in 2019,[64] suggests that discretionary "bonus billing" is still tolerated. Leonard

60. *Code of Professional Conduct of Lawyers*, chapter B-1, r 3.1 at s 99.
61. 109 DLR (4th) 609, 1994 CanLII 1676 at para 26 [*Arctic Installations*].
62. See also *McDonald Crawford v Morrow*, 2002 ABQB 239, in which a success bonus was disallowed because the contract did not sufficiently bring this possibility to the client's attention.
63. 2015 ONSC 596.
64. *Newell v Sax*, 2019 ONCA 455 [*Newell*].

Sax accepted a retainer to sell an apartment building on behalf of his client, Eileen Newell. There was no agreement (written or oral) about fees. After the building was sold for $14 million, Sax decided that his fee should be $165,000. He subsequently estimated that he had worked 75 hours on the file, making the fee he chose equal to $2,200 per hour. The client sought assessment of this bill, and the dispute eventually reached the Ontario Court of Appeal. After a cursory reference to the value of the matter, the lawyer's "effort…beyond his time records," and the "complications" that had arisen in the transaction, the Court decided that $100,000 would be an appropriate fee. This is equal to more than $1,333 for each of the hours that Sax claimed to have worked for the client.[65]

None of the three tribunals to hear *Newell v Sax* referred to Rule 3.6-1 Commentary 3, discussed above, which states that lawyers "should" provide information about fees at the outset of a retainer. None of the three tribunals found any fault in Sax's decision to start work without any communication to the client about his fees.[66] Nor has any disciplinary action been taken by the Law Society of Ontario against Sax.[67] *Sax v Newell* suggests that failure to communicate about fees at the outset of a retainer is not likely to be punished in any way. It did not prevent Leonard Sax from ultimately collecting a fee of $100,000, for the equivalent of two weeks' full-time work.

In the author's view, a fee of $100,000 or even $165,000 would not necessarily be ethically problematic, if that fee were clearly understood and accepted by the client at the outset. Contingent fees, which vary depending on the degree of success obtained in a case, often serve the interests of clients as well as lawyers.[68] In *Sax*, the evidence was that the real estate transaction threatened to collapse at one point, and was saved by the lawyer's efforts.[69] It would have been entirely reasonable for Sax's fee to reflect the outcome, especially if he were to accept some of the downside risk from a poor outcome as well. All provinces now permit contingency fees (with some exceptions for criminal and family law matters). There is no reason why a contingent fee formula cannot be agreed to in a written retainer, providing both the advantages of contingency and the advantages

65. He subsequently reported that some of the time was spent on a previous matter for the same client, and that some of the time was spent on clerical tasks.

66. The Assessment officer did impose a twenty per cent reduction on his fee because he did not track his time or provide a bill to the client before deducting his fee at the end of the retainer.

67. According to a search of the LSO's Law Society Tribunal database on 24 August 2020.

68. Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective" in Trevor Farrow & Les Jacobs, eds, *The Cost and Value of Justice* (forthcoming) (Vancouver: University of British Columbia Press, 2020), online: https://perma.cc/5LKG-KQMS).

69. *Newell, supra* note 64 at 32.

of certainty. A contingent retainer can be drafted to provide a flat bonus, a multiple of the normal hourly rate, or almost any other success incentive upon which lawyer and client agree.

Sax and his client Newell "were close and had a long relationship," according to comments in the press from Sax's lawyer.[70] This was the reason, according to that report, why Sax did not discuss fees with her, or keep dockets. However, billing a client is inherently inconsistent with a friendly, non-commercial relationship. If avoiding fee conversations that might spoil a friendship is the lawyer's priority, then the lawyer should assume the file is *pro bono*, and content himself with whatever reward the client voluntarily chooses to bestow. Billing and collecting fees are exercises of professional power, backed by the threat of legal enforcement. It is reasonable to require lawyers who use these tools to discharge their professional obligations to clients. The author's view is that *a lawyer should be allowed to bill a fee, or a portion thereof, only if the fee or the formula for calculating the fee was clearly disclosed and accepted by the client at the outset of the retainer.*[71]

Arguably, existing law addressing the fiduciary lawyer-client relationship requires no less. The Supreme Court's judgment in *Hodgkinson v Simms* states that "unless the contrary is disclosed," a client is entitled to assume that their professional advisor will act in the client's interest, "to the exclusion of all other interests."[72] Billing the client after the work is complete is not in the client's interest. Thus it seems to follow from the dictum in *Hodgkinson* that the basis upon which the lawyer plans to bill must be disclosed as soon as the work that will be billed begins. The Supreme Court also held, in *Strother v 3464920 Canada Inc.*, that a lawyer "must not…keep the client in the dark about matters he or she knows to be relevant to the retainer."[73] In *McKercher v CN Rail*, the Court quoted this passage approvingly and identified a "duty of candour" as one of three dimensions of the duty of loyalty.[74] Although the duty of candour apparently has been applied only to matters giving rise to potential conflicts of interest, *McKercher* did not limit the duty to that context. The basis upon which the lawyer plans to calculate their fee is "relevant to the retainer," and therefore the duty of candour arguably forbids the lawyer to

70. Anita Balakrishnan, "Former Client Should Pay $100,000 Legal Bill, Judge Says," *Law Times* (13 Jun 2019), online: <https://perma.cc/2QGF-B7N2>.

71. In urgent cases it might be unrealistic to expect an agreement to be finalized before any legal services are provided. In such cases, agreement should be reached as soon as reasonably possible.

72. *Hodgkinson, supra* note 46.

73. *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 55.

74. *McKercher, supra* note 26, at paras 19 and 45. The others are "(1) a duty to avoid conflicting interests" and "(2) a duty of commitment to the client's cause" (at para 19).

keep the client "in the dark" about it. Every client should have the right to a fully disclosed fee.

In some cases, a discretionary success bonus is difficult to distinguish from "skimming"—Duncan Webb's word for increasing one's fees (without client consent) simply because the client's matter involves a large sum of money.[75] Under Webb's definition, skimming occurs when the size of the amount being received by the client cannot reasonably be attributed to any effort or risk on the lawyer's part. For example, in *Law Society of Upper Canada v Silver*, the lawyer received $145,841.16 in trust on behalf of his client from the sale of property. He decided to claim a five per cent "collection fee" (which had never been discussed with the client), instead of the small amount to which his normal hourly rate would have entitled him.[76] The Panel found that this fee was not "fair and reasonable."

II. *Developing rules for time-based billing*

The assessment officer who first heard *Sax v Newell* would have set Sax's fee at $132,000; the Superior Court of Justice would have made it at $22,500, and the Court of Appeal concluded that $100,000 was the right number. This divergence was not the result of any doctrinal disagreement. Each of the three courts that heard this matter cited the nine factors that are relevant to a retrospective evaluation of legal fees in Ontario:

1. The time expended by the solicitor;
2. The legal complexity of the matter dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The reasonable expectation of the client as to the amount of fees.

These are known as the *Cohen* factors, after the 1985 Ontario Court of Appeal case where they originated. They are meant to provide a legal framework for the assessment process for retrospective review of legal fees,[77] which is described in Part 3 of this article. However, the large number of *Cohen* factors, and the absence of any guidance about how to apply them, make the "fair and reasonable" fee for a particular legal service a question of broad discretion for the decision-maker. The same

75. Webb, *supra* note 14 at 49.
76. 2014 ONLSTH 186 (CanLII), [2014] LSDD No 252.
77. *Cohen v Kealey & Blaney*, [1985] OJ No. 160, 10 OAC 344.

is true in other provinces, which have similar lists of factors, both for assessment and for disciplinary decisions about fees.[78]

1. *Standards versus rules*

The "fair and reasonable" test would be classified, in regulatory theory, as a "standard" (or "principle") as opposed to a "rule."[79] Standards are imprecise as enacted. Their application to particular facts can only be determined retrospectively. Standards provide flexibility, at the expense of certainty.

Sometimes there are good reasons for the law to take the form of a standard rather than a rule. If those drafting the rules want the legal status of behaviour to depend on facts of individual cases that are unforeseeable and idiosyncratic, or to depend on subjective interpretation, then rules may constitute an undesirable straitjacket.[80] For example, the lawyer's obligation to provide competent service to the client cannot be reduced to detailed rules because the precise requirements of competence depend so greatly on context. In England and Wales and some other jurisdictions, there has been a trend away from detailed rules toward "principles" (which are akin to standards) as a basis for regulation of legal services.[81]

Even for legal fees, the risk must be acknowledged that excessively detailed rules would stifle innovative professionalism. Legal services are expensive, and the opportunity to use creative, unorthodox fee structures can be the difference between access to justice and the lack thereof.[82] Fee regulation must also avoid undermining altruistic professionalism on the part of lawyers. Many do *pro bono* work, discount bills for impecunious clients, or postpone billing until a client has recovered money from the other side.[83] Other lawyers charge clients less than the retainer obliges them to pay, if the outcome is worse than anticipated. Such practices may be "cross-subsidized" by charging higher rates to clients with better ability to pay.[84] The argument of this paper is *not* that every client must pay the

78. See e.g. *Alberta Rules of Court*, Alta Reg 124/2010, s 10.2.

79. John Braithwaite, "Rules and Principles: A Theory of Legal Certainty" (2002) 27 Austl J Leg Phil 47; Anthony J Casey & Anthony Niblett, "The Death of Rules and Standards" (2017) 92:4 Ind L Rev 1401).

80. Shawn Bayern, "Against Certainty" (2012) 41:1 Hofstra L Rev 53.

81. Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015), at 247-248.

82. Semple, *supra* note 33, Chapter 2.

83. Noel Semple, "The Two Faces of Lawyer Altruism," *Slaw.ca* (1 October 2018), online: <https://perma.cc/JBQ2-QJP7>.

84. Andrew Pilliar, "Exploring A Law Firm Business Model to Improve Access to Justice" (2015) 32:1 Windsor YB Access Just 1, online: <https://perma.cc/5CAM-76WY>; David Stager & HW Arthurs, *Lawyers in Canada* (Toronto: Published in association with Statistics Canada by University of Toronto Press, 1990) at 220.

same amount for a particular service from a particular legal practitioner. That some lawyers cross-subsidize, while others charge the same rates to all clients, is an example of ethical diversity in fee-charging practices which regulation should not seek to stamp out. Integrity in legal practice means leaving room for individual practitioners to make such decisions in accordance with their personal values.[85]

2. *The rules we need*

Nevertheless, where concrete rules can be provided without such problems materializing, lawmakers should create concrete rules.[86] New Brunswick and Ontario have already done so for contingency fee retainers,[87] and the time is now ripe to do likewise for time-based retainers. The following rules would create certainty, help prevent exploitation, and eliminate lawyers' conflicts of interest—without foreclosing any legitimate fee arrangement to which lawyers and clients might agree.

- The number of minutes billed in a docket should not exceed the number of minutes actually worked by more than 3. In other words, the minimum increment should not exceed 0.1, and normal rounding rules—including rounding down—should apply.[88] The lawyer's signature on a bill should constitute an affirmation of this correspondence between minutes docketed and minutes actually worked.
- When a lawyer is not sure how many minutes they spent, the client should receive the benefit of the uncertainty. Lawyers should be strongly encouraged to docket contemporaneously.[89] It might be appropriate to require recording to happen within a specified number of hours after the work was done,[90] or enact an adverse inference regarding dockets created more than a few hours after the work is claimed to have been done.

85. Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9:1 Can JL & Jur at 75.

86. "Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behaviour because they are more certain than principles and lend themselves more easily to uniform and predictable application." Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81:5 Yale LJ 823 at 841.

87. Notes 108 and 109, below, and accompanying text.

88. The practice of billing in tenths of an hour is almost universal, and not inherently ethically problematic. If a lawyer bills by tenths of an hour, they should not add a tenth of an hour (six minutes) to the bill unless they have worked at least three minutes. If they have worked less than three minutes, they should round down to zero.

89. David Bilinsky & Laura Calloway, "A Practice Tip: Docket Time Contemporaneously…" *SlawTips* (11 October 2012), online: <https://perma.cc/4RY6-C6US>.

90. Woolley, *supra* note 2 at 890.

- During a retainer, all decisions or recommendations that are likely to increase the client's legal fees should be made with exclusive regard to the best interests of the client, and no regard to the lawyer's profit.[91] The client would, of course, retain the right to ask for the file to be staffed in a certain way.
- If a disbursement provides any benefit to a lawyer (see section 1.3.d above), the lawyer must subtract from the amount charged to the client a sum equivalent to the benefit received by the lawyer from the disbursement.
- No amount should be billed to or collected from a client unless that fee was explained to the client in writing at the outset of the retainer, and the client agreed to the retainer.[92] Exceptions would be allowed for cases in which urgency would make the provision of a written retainer impracticable or clearly contrary to the client's interests.[93]
- If it is anticipated that a legal fee will be paid by someone other than the client, a lawyer must not charge a higher fee than they would charge to the client themself for the same work. This rule would address situations where the client expects to pass the bill along to a third party and therefore lacks any incentive to negotiate. In *McIntyre v Gowling*, for example, the law firm charged its client the Royal Bank of Canada block fees for mortgage enforcement services. Borrowers were contractually obliged to reimburse RBC for these fees. The assessment officer reduced the law firm's bill from $4,795 to $3,770. The Ontario Superior Court of Justice upheld this result, noting that the client's expectation of passing on the fees to its borrowers distinguished this from the normal case in which a block fee is negotiated.[94] A similar allegation of overbilling, made by a third party threatened with being required to pay a bill from Gowlings, was recently filed.[95]
- Rules should also be drafted regarding (i) the adjustment of quoted hourly rates during the life of a retainer, (ii) the billing

91. As noted above (section 1.3.3), this would not affect the lawyer's right to quote fees at the outset of the retainer, and to take action to secure unpaid fees.

92. Woolley, *supra* note 2 at 866; Alice Woolley, "Evaluating Value: A Historical Case Study of the Capacity of Alternative Billing Methods to Reform Unethical Hourly Billing" (2005) 12:3 Int J Leg Profession 339 at 354 [Evaluating Value].

93. A client who is incarcerated, retaining a lawyer to seek bail, might be one example.

94. *McIntyre v Gowling*, 2017 ONSC 1733 at para 21.

95. Jean-François Parent, "Un Prof de Droit Poursuit Gowling WLG pour 400 Millions!," *Droit-Inc* (5 décembre 2019), online: <https://perma.cc/J62L-CNWX>; "Lawrence David v Gowlings WLG (Canada) LLP (Statement of Claim)," online: <https://perma.cc/KTW3-2EAV>.

of non-lawyer labour to clients,[96] (iii) interest rates on overdue accounts, [97] and (iv) billing for minutes during which the time-keeper's energy was not exclusively dedicated to advancing the client's interests.[98]

If clear rules like these were in place, some lawyers who would otherwise engage in over-billing would stop. Others would still attempt such practices, but their clients would be in a better position to protest and have their bills quickly adjusted downward. Although retrospective fee assessment systems (discussed in Part 3) would not be completely obsolete, they would have less work to do. John Braithwaite argues that rules beat standards when "the type of action to be regulated is simple, stable (not changing unpredictably across time) and does not involve huge economic interests."[99] This is a reasonable description of time-based legal fees.

3. *Fostering healthy competition*

Rules should be drafted with a view to protecting the interests of legal service consumers, but that does not mean that each such rule should be as restrictive as possible. It is not only protection from exploitative practices that benefits consumers, but also legal service markets where providers compete to improve quality, provide more services, and lower prices. Excessively restrictive regulation can increase costs and disrupt healthy competition.[100] Given that lawyers will retain the right to withhold their services or quote higher hourly rates and retainer deposit requirements, maximizing clients' interests requires rules that give lawyers scope to

96. One possibility would be to only allow the billing of work for which some sort of legal training was required. Thus, a staff member with a paralegal or legal-assistant college diploma could be billed out to the client for tasks requiring that training, but not for tasks (e.g. photocopying or delivering documents) which the average employee without that training would have been equally able to do. On the other hand, if a lawyer is allowed to pay a courier $50 to deliver a document and charge that as a disbursement to the client, it might be argued that the lawyer should also be allowed to charge the client a $50 disbursement for having a salaried employee do the same work. The client is no worse off if the latter alternative is used.

97. In New South Wales, the maximum interest rate chargeable on unpaid accounts is two per cent above the "cash rate target" (which is comparable to the prime rate). *Legal Profession Uniform General Rules 2015 (New South Wales)*, s 75, online: <https://perma.cc/8UVX-4N4V>.

98. The last of these four issues is perhaps the most difficult. Woolley would forbid billing two clients for the same period of time: Woolley, *supra* note 2 at 889. It is clear that a lawyer billing client X for a period of time should, if possible, dedicate their exclusive attention to advancing client X's interest during that time. However, if the lawyer must sit in an airplane seat to advance Client X's matter, and it is impossible to do any other work for Client X during the flight, then presumably the lawyer would be entitled to bill Client X even if the lawyer stares out the window or reads a magazine during the flight. If so, and if the lawyer chooses instead to work (at full efficiency) for Client Y during that flight, it is hard to see why Client Y cannot also reasonably be billed.

99. Braithwaite, *supra* note 79. Braithwaite uses the word "principles," rather than "standards."

100. Semple, *supra* note 68.

protect their own financial interests. For example, a rule denying lawyers the right to adjust their hourly rates at all during the course of a multi-year retainer would incentivize lawyers to quote higher initial hourly rates for retainers expected to last many years, or refuse such cases outright. This would not be in the interests of clients. A rule restricting hourly rate increases to a certain percentage per year on open files would prevent exploitation and eliminate a conflict of interest, without distorting the price system.[101]

Likewise, excessively strict regulation of interest rates on unpaid accounts would incentivize lawyers to screen out or quote higher prices to clients whom they consider relatively unlikely to pay promptly. This might, among other baleful effects, lead to discrimination by lawyers against impecunious clients. The rule adopted in New South Wales, which limits interest on unpaid accounts to a certain number of percentage points above the prime rate, seems to balance the relevant interests in a sensible way.[102]

Regulating billing practices would allow hourly rates to serve as more accurate price signals. At present, a lawyer quoting $300/hr might be a more expensive option than a lawyer quoting $350/hr, if the former habitually takes every advantage offered by the current regulatory ambiguity to increase the bill.[103] If those opportunities are foreclosed, the hourly rate quotes will be more helpful to comparison-shopping clients, and the honest $350/hr lawyer will not be unjustly disadvantaged in the competition for clients.

4. *Certainty and flexibility*

New Brunswick's *Law Society Act* requires all contingent fee agreements to be in a form which is established by regulation, unless a court approves a deviation.[104] In Ontario, a new regulation under the *Solicitors Act* will require, in most cases, the use of a standard form contingency fee agreement established by the Law Society of Ontario.[105] A single mandatory retainer

101. The permissible annual rate increase for continuing clients should be calculated based on average annual percentage increases in lawyers' billing rates for new clients. Thus, if the average lawyer in a province increases their quoted hourly rate by five per cent per year, then increases to hourly billing rates for continuing clients should be capped at five per cent. Hourly rates for new clients indicate the prices that clients are willing to pay in a competitive market. It is exploitative to subject continuing clients to a higher rate of increase just because they are unlikely to switch lawyers.

102. Footnote 97, above.

103. Noel Semple, "Mystery Shopping: Demand-Side Phenomena in Markets for Personal Plight Legal Services" (2019) 26:(2-3) Int J Leg Profession 181 at 193-194.

104. *Law Society Act* (New Brunswick), 1996, SNB 1996, c 89, s 83, and Contingency Fee Rules Under s 83 of the *Law Society Act*, 1996.

105. *Contingency Fee Agreements*, O. Reg. 563/20, a regulation under under the *Solicitors Act*,

contract could also be drafted for all time-billed legal services, based on the principles identified above.

A single mandatory contract for all time-based retainers in a jurisdiction might be sufficiently flexible to accommodate the diversity of legitimate needs. So long as the quoted hourly rate and retainer deposit requirements can be changed by the lawyer, a written contract can give effect to *Cohen* factors such as the lawyer's special skill, and the need for special efforts or urgency in some cases.[106] A lawyer who has special skill or is being asked to expedite work can adjust their hourly fee quote accordingly before beginning work, and the client can decide whether to take the offer or leave it. It is unnecessary to give lawyers the right to choose their own fees at the conclusion of the matter, and unnecessary to give reviewing courts the impossible task of applying the *Cohen* factors in a predictable and consistent way.

On the other hand, it is possible that a single mandatory contract might prove to be too much of a constraint. Alternatives that are more flexible (but still provide more certainty than the status quo) include:

- Exempting defined sophisticated clients and their lawyers from regulation of time-based fees. Arguably, retainer contracts with such clients are negotiated at arms-length by experienced parties with comparable bargaining power, meaning that no conflict of interest arises.[107] New South Wales followed this approach in its *Legal Profession Uniform Law*.[108] Ontario's new regulation of contingency fee agreements will do likewise.[109]
- Regulation requiring all time-based retainer contracts to have terms addressing certain issues, but allowing the parties flexibility in addressing those issues.
- Drafting a non-binding "best practices" code for time-based billing.
- A requirement to choose from a menu of approved retainer contracts.
- A single mandatory contract, in which terms can be selected from their own menus. A mandatory "smart contract" could, for example, require that parties choose from a set of permissible

R.S.O. 1990, c. S.15. Section 7(1). This regulation will come into force on 1 July 2021.

106. Regarding the *Cohen* factors see *supra* note 77 and accompanying text.

107. See *supra* note 24.

108. *Legal Profession Uniform Law*, *supra* note 48 at s 170 ("Commercial or government clients").

109. *Contingency Fee Agreements*, O. Reg. 563/20, a regulation under the *Solicitors Act,* R.S.O. 1990, c. S.15, s. 7(3).

> terms regarding the adjustment of hourly rates during the life of a retainer.[110]

Certainty must be balanced with flexibility, but the author's view is that some form of mandatory time-based retainer contract is a realistic goal for regulatory reform.

III. *The assessment procedure*

It is not only the rules regulating time-based legal fees that are problematic, but also the processes by which those rules are meant to be enforced. The requirements that fees be "fair and reasonable" and "disclosed in a timely fashion" are found within the provinces' respective codes of professional conduct. Lawyers can be disciplined for violating them. Upon a finding of professional misconduct related to legal fees, professional discipline committees in some provinces have the power to order refunds to clients,[111] along with suspensions and disbarments. In the most egregious cases of lawyer theft or dishonesty, compensation funds maintained by the law societies may reimburse clients as a last resort. The Law Society of Manitoba offers a free arbitration service for disputes about legal fees.[112]

Nevertheless, the law societies and their disciplinary procedures have played only a limited role in this field. Lawyers are "rarely" disciplined for billing infractions, according to Gavin Mackenzie's leading text.[113] Instead, most client complaints about legal fees are diverted by law society intake staff to the court system.

Provincial legislation creates assessment (also known as "taxation" or "review") procedures for lawyers who want to enforce unpaid bills, and for clients who dispute the bills they have been issued.[114] In most provinces, these hearings are conducted by quasi-judicial assessment officers, unless a matter involves the interpretation of a contract, in which case a judge must hear it.[115] Courts routinely do what law society tribunals generally won't: reduce bills, and order lawyers to repay money they have received from clients based on problematic bills.[116]

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110. Casey and Niblett suggest that predictive and communication technologies will soon allow computer-generated "microdirectives" to effectively regulate contracts without sacrificing any flexibility whatsoever. *Supra* note 79.

111. *Law Society Act*, RSO 1990, c L.8, s 35(1)(13).

112. Law Society of Manitoba, "Lawyer Fee Disputes," online: <https://lawsociety.mb.ca/for-the-public/other-resolutions/lawyer-fee-disputes/>.

113. Gavin Mackenzie, *Lawyers & Ethics: Professional Responsibility and Discipline,* 6th ed (Toronto: Thomson Reuters, 2018), at s 25.5(a). See also Devlin & Heffernan, *supra* note 54 at 180.

114. *Legal Profession Act*, [SBC 1998] c 9, s 70; *Solicitors Act*, RSO 1990, c S15, s 3.

115. *McDonald Crawford v Morrow*, 2002 ABQB 239; *John v MacDonald*, 2015 ONSC 4850.

116. In one random sample of Ontario assessment cases from the late 1990s, it was found that seventy eight per cent were reduced: RW Gramlow & RB Linton, *The Nature of the Process for Assessing*

1. *Inaccessible justice*

Unfortunately, assessment has major problems. Like most adversarial court processes, it is not accessible to inexperienced litigants. Most do not know that the process exists (although, in Ontario, lawyers are required to let them know about it).[117] To initiate the assessment procedure, one must file legal documents and either hire another lawyer, or attend court in person. One must also be prepared to confront one's former lawyer in court. This is a daunting prospect for many self-represented litigants, given the social status of lawyers, and their inherent advantage in litigation processes against the self-represented. Deported and incarcerated people are obviously in a particularly weak position. In Ontario, delays of months or years have plagued the assessment system.[118]

2. *Weak deterrence*

In adversarial litigation processes, unlike administrative disciplinary processes, the complainant can withdraw their complaint at any time and settlements are confidential. This diminishes the system's capacity to deter unethical behaviour. Lawyers who are unethical write exploitative retainer contracts and bills as a matter of course. When and if a client threatens assessment, that client's bill can be discounted to make the complaint disappear. The shady practice can then be tried again with the next client.

If not settled, a legal fee dispute may be heard by an assessment officer or judge. However, if the adjudicator concludes that unethical billing did occur, the only consequence is a reduction in the legal fee owed by the client who challenged the bill. The results of these cases are not forwarded to law societies for disciplinary action, nor are assessment results reported on a consistent basis. Thus, an inexperienced client has no reasonable way of knowing whether the lawyer he is about to hire has had his fees reduced by assessment officers on multiple occasions.

3. *Strategic assessment-seeking by clients*

This system is not only disadvantageous to the victims of *unethical* lawyers, but also unfair to *ethical* lawyers. The complainant's right to withdraw their complaint at any time opens the door for unreasonable clients to extract concessions on perfectly ethical legal bills, by threatening assessment.[119] Some clients with entirely legitimate complaints are deterred by the assessment process but other clients, with illegitimate complaints, are not

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Solicitor & Client Bills (Toronto: RWG Consulting Ltd, 2000) .

117. Law Society of Ontario, *supra* note 29, Rule 3.6-1, Commentary 4.1.

118. Alex Robinson, "Assessments process still marred by delays" *Law Times* (16 April 2018), online: <https://perma.cc/4VW2-88AF>; *Linett v Aird & Berlis LLP*, 2018 ONSC 2144.

119. Semple, *Justitia's Legions, supra* note 81 at 267-268.

deterred by it at all. They may know that, no matter how reasonable a bill is, it can be rational for a lawyer to discount it to avoid the assessment process and its demands on the lawyer's time. In the recent BC case of *Grewal v Jenkins Marzban Logan LLP*, for example, the assessment consumed seven hearing days.[120] The lawyer prevailed, with only minor deductions from his fees. The clients appealed, and lawyer was successful again.[121] Although the lawyer was awarded costs, the cost award was only on a partial indemnity scale and it is not known whether the costs were ever recovered from the client.

Ambiguous regulation makes assessment a risky and expensive proposition, even for a lawyer whose conduct was beyond reproach. This encourages lawyers in this position to "throw money" at disgruntled clients. More detailed regulation would give lawyers a safer harbour from groundless assessments. The *Legal Profession Uniform Law* of New South Wales, which is an admirable model for regulation of legal fees, explicitly establishes a safe harbour:

> s. 172(4) A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if—
> (a) the provisions of Division 3 relating to costs disclosure have been complied with; and
> (b) the costs agreement does not contravene, and was not entered into in contravention of, any provision of Division 4.[122]

4. *Back into the law societies' bailiwick?*

The court-based assessment process is anomalous, given that law societies regulate all other aspects of the lawyer-client relationship. The historical rationale for this arrangement is apparently that law societies, which are led by lawyers, are presumed to be less neutral than judicial officers in making decisions about other lawyers' legal fees. The possibility that lawyers making decisions about complaints against other lawyers will be excessively lenient (or, perhaps, excessively harsh) is certainly a serious critique of self-regulation.[123] However it is unclear that this concern is any more trenchant when fees are the subject of the dispute, as opposed to other forms of alleged lawyer misconduct. The key question is whether, in the context of modern law society disciplinary procedures, lawyers can make just decisions about other lawyers. If they cannot, then the entire

120. 2019 BCSC 1963 at para 33.
121. *Ibid.*
122. *Legal Profession Uniform Law*, *supra* note 48. Division 4 pertains to agreements between lawyers and their clients about fees.
123. Semple, *supra* note 81 at 111-113; Amy Salyzyn, "The Judicial Regulation of Lawyers in Canada" (2014) 37:2 Dalhousie Law Journal 481.

self-regulatory system is in doubt. If they *can* make just decisions (which is the operating premise of the Canadian system), then there is no apparent reason why they should not hear fee-related disputes as well.

Courts will continue to have power over fee disputes through judicial review of law society decisions, and through their inherent jurisdiction over the conduct of lawyers who appear before them.[124] However legislation can be amended to make existing law society procedures, rather than court-based assessments, the front-line response for disputes about legal fees. Doing so would have distinct advantages. Courts—such as those that heard *Newell v Sax*—often ignore lawyers' codes of conduct. Law society tribunals are focused on applying these codes, but they are reluctant to interpret retainer contracts and grant monetary remedies to clients. Disciplining and providing restitution for an unethical billing episode therefore requires two procedures under the *status quo*. Clients, lawyers, and taxpayers all stand to gain efficiencies by uniting them.

As administrative bodies, law society tribunals can adopt more accessible procedures, including easy-to-use intake and ombudsman-style processes such as those of the Legal Ombudsman in England and Wales.[125] Giving law societies responsibility for fee disputes would also allow a lawyer's billing practices to be placed in the context of the lawyer's professional conduct history. Repeated misconduct could produce escalating discipline. The termination of the dispute would no longer be in the client's control, reducing the possibility for strategic abuse of the system by clients and lawyers.

A less dramatic procedural reform would be to create a reporting process, whereby assessment decisions reducing lawyers' bills would be automatically forwarded to the responsible law society. Adverse assessment decisions would, in many cases, justify law society investigations into possible violations of integrity and fair billing rules. So long as responsibility for legal services regulation is shared between courts and law societies, coordination between these institutions is necessary to advance their shared goals of reducing risk to clients and protecting the public interest. Links to adverse assessment decisions should also be included in the directories of licensees maintained by the law societies, which already alert potential clients to licensees' disciplinary records.[126]

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124. Salyzyn, *ibid*, at s IV(2)(c).

125. Legal Ombudsman of England and Wales, "Scheme Rules," online: <https://perma.cc/2C2J-YCRA>. See also the former cost assessment procedure in New South Wales, as described in Mark Brabazon, "Is the Model Broken? Regulation and Assessment of Legal Costs in New South Wales" (Blackstone Legal Costing Lecture, Sydney, Australia), online: <https://perma.cc/P25R-YUR3>.

126. Other options for improving communication between courts and law societies about unethical

Conclusion

We need to put flesh on the bones of "fair and reasonable," and "disclosed in a timely fashion." Until we do, time-based retainers with inexperienced clients will be vulnerable not only to exploitation by the avaricious, but also to unnecessary uncertainty and conflicts of interest affecting all lawyers billing inexperienced clients in this way.

This article has identified unfair practices that should be banned outright by the Model and provincial codes, including inequitable docketing and profit-maximizing file management. It has also identified questions that should be answered in a fair way by a mandatory retainer contract, or at least more detailed rules. Issues such as adjustment of hourly rates, and the billing of non-lawyer labour should be regulated in the best interests of clients after further research into prevailing practices.

The dispute-resolution procedure for legal fees also clearly requires reform. The status quo is inaccessible, vulnerable to strategic abuse by both sides, and irrationally divorced from the lawyer discipline system. These procedural reforms would probably require amendments to provincial legislation.

The reform agenda proposed here would not eradicate outright docket fraud. It would remain possible to pad or simply invent dockets and disbursements.[127] Nor would the proposed reform eliminate the inherent perverse incentive that many have observed in time-based legal fees: the more quickly the work is done, the less lucrative it is for the firm.[128] Eliminating those problems would require invasive monitoring of lawyer work, or a shift to flat, contingent, or "value-based" legal fees.[129]

Nonetheless, the time-based legal fee has its own merits for clients and lawyers relative to the alternatives.[130] It will remain a part of the legal landscape for the foreseeable future. Billing without bilking is entirely

billing are proposed in Woolley, *supra* note 2 at 891.

127. Webb, *supra* note 14 at 47; Lisa G Lerman, "Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers" (1999) 12:2 Ge J Leg Ethics 205; *Raufi (Litigation guardian of) v Jeyaratnarajah*, 2018 ONSC 3524; Alan Shanoff, "Padded legal fees," *Toronto Sun* (31 January 2014), online: <https://perma.cc/JMG2-25HL>.

128. Brooke MacKenzie, "Better Value: Problems with the Billable Hour and the Viability of Value-Based Billing" (2011) 90:3 Can Bar Rev 6752. See also the words of Justice Pepall in *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para 36: "A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features."

129. Mackenzie, *ibid*; Woolley, "Evaluating Value," *supra* note 91.

130. For example, it incentivizes neither premature settlement (like contingency fees) nor shirking (like flat fees). It also ties the price of the service to the labour input, which allows law firms to take on cases despite uncertainty regarding labour requirements.

possible under the time-based approach; tens of thousands of lawyers do it every day. It is time for legal services regulators to clearly establish that *all* lawyers must do so.