

THE SALE OF LAW:
ETHICAL ADVISING AND ADVOCACY IN LIGHT OF
BILLING IN CIVIL LITIGATION

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ABSTRACT

This thesis identifies the financial incentives of litigants and lawyers to behave in certain ways in relation to civil litigation files. By identifying such incentives, this thesis raises questions about the extent to which substantive and procedural private law is capable of being influenced by them. Specifically, this thesis argues that: lawyers have a lawmaking function within the private law system; lawyers have financial incentives distinct from those of their clients; and the costs of retaining lawyers produce observable incentives and effects on the outcomes of civil litigation matters. In addition to the many theoretical materials cited, empirical data have been cited from research observing the legal profession in North America and elsewhere. This thesis argues that external influences--such as financial incentives for non-parties--can affect the way private law applies and develops. This thesis also identifies general regulatory strategies that might limit the influence of external factors on private law.

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DEDICATION

This thesis is dedicated to my current and former clients who I have had the privilege of serving in my role as counsel. I look forward to serving many more over the course of my career.

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1. Introduction

The essence of this thesis is that fees charged by lawyers provide incentives for lawyers and clients to behave in certain ways throughout the course of the files that affect them, and in turn these incentives may not be conducive to the consistent application of laws to the individuals governed by those laws.¹ This thesis assumes that the consistent application of laws is an objective that is desirable. Throughout this thesis, the “rule of law” is a term that is used to mean “the consistent application of laws”, although this term is defined in more detail in **Section 2.1.3 Bureaucrats**; the term “sale of law” will be used to refer to the ways in which lawyers’ fees present a potential external influence on how laws apply to individuals participating in the legal system. An emphasis on the rule of law is the main normative reference point of this thesis, and it is argued that legal fees are obstacles to approaching that normative ideal. This thesis focuses on that problem in the context of civil litigation. Legal fees and the business-oriented nature of the profession hinder the legal profession’s contribution to society’s endeavour towards the rule of law.

In the civil litigation context, the judicial branch of the state assumes the role of adjudicator of disputes between two parties. As such, the rule-of-law principle is engaged in this context. The rule of law requires application of the law to each member of society – including the state itself – with the greatest consistency possible. When the law is enforced or applied in an arbitrary manner, this is inconsistent with the rule of law.²

To show that billing for civil litigation services interferes with the consistent application of the law, consider the following example. Phillip and Bev are plaintiffs with nearly identical claims against very similar defendants. The most important difference between them, in this example, is that Phillip has a lawyer – Fred – who has built a practice

¹ Though incentives do not necessarily strongly correlate to behavior. Empirical research on this point is required before one can make statements about actual lawyer and client behavior in light of billing for legal services.

² The rule of law as it pertains to lawyers is discussed in detail in **Part 5. The “Sale of Law” and Legal Services**, and the lawyer’s role in putting the law into action is discussed in depth in **Part 2. The Lawmaking Function of Lawyers**.

consisting mostly of files for which he charges a contingent-percentage fee of 20% of the settlement or judgment in every case. Bev's lawyer – Shelly – on the other hand, charges Bev by the hour.

Fred has many files in progress right now, and he expects to collect on a number of lucrative files in five or six months. Furthermore, he will need some money in the interim to make payments on loans. This gives Fred an incentive to advise Phillip to settle early even if his prospects at trial may be good.

Shelly, on the other hand, has very few contingent fee arrangements in her practice, and relies on monthly invoices sent to each client based on her hourly rate of \$300 per hour. As with any law practice, not all of Shelly's clients pay those invoices on time or in full. Bev pays each invoice on time. This gives Shelly an incentive to advise Bev to continue into the later stages of litigation even if an early settlement is possible.

Imagine that Shelly and Fred have similar legal education and experience, and that the risks of litigation are relatively clear, with only a few foreseeable variables. Will there be differences in the advice that Phillip and Bev receive? Now imagine that Bev has a large amount of money in Shelly's trust account from which her fees are deducted, instead of paying invoices as they are sent out. Does Bev receive exactly the same advice that she would have received in the first version of this hypothetical? Are the financial aspects of the lawyer-client relationship candidly addressed in the lawyers' advice?

A skeptical reader will astutely point out that the above example is not likely to be replicated in the real world. Clients and lawyers are not similar to one another, each one is unique, and this always allows for differences in tactical decision-making. The skeptical reader will then say that this seriously discredits the value of the thesis.

The lawyers and clients in the above hypothetical can never be perfectly replicated in the real world.³ That is admitted. Furthermore, there is a dearth of empirical research observing the effects of fee structures on lawyer behavior.⁴ However, the hypothetical is used to show that, *prima facie*, differences in billing arrangements are one of many factors that lead to differences in how the law applies to different members of our society. Because different clients will always have unique legal issues, the law will necessarily apply to their situation in a unique way. This is completely appropriate and consistent with the rule of law. What is inappropriate and inconsistent with the rule of law is that legal fees – being a squarely *business-related and non-legal* issue – can become a factor in determining how the law applies – by way of lawyers’ advice – to the unique files of individual members of society.

However, legal fees and the business-oriented nature of the profession are unlikely to go away, due to an ostensible lack of realistic alternatives, and as such this thesis explores some strategies that might be used by the profession to cope with this burden. These strategies are discussed in **Part 6. Regulation to Mitigate the “Sale of Law”**.

This introductory part of this thesis consists of four chapters: **Chapter 1.1 Importance of Billing** is intended to show the reader that billing is an important topic in general, with discussions of the history of billing for legal services and identification of several types of billing arrangements that are common between lawyers and clients; **Chapter 1.2 Why Focus on Civil Litigation?** is a discussion of why this thesis focuses on billing for civil litigation services specifically; **Chapter 1.3 Literature Regarding Billing in General** is a review of some of the significant literature on billing for legal services; and **Chapter 1.4 Analytical Framework** is an overview of the remaining parts of this thesis.

³ For this reason, this thesis assumes a causal link between the different incentives provided by different billing arrangements, and the differences in the services that clients receive. However, the correlation between different billing arrangements and differences in quality of service is not assumed. This correlation is argued in **Part 3. The Conflict of Interests Presented by a Lawyer’s Fee**.

⁴ Some academics hypothesize that lawyer-client confidentiality is the reason for the dearth of research; it is very difficult to accurately observe what happens in a lawyer-client relationship. See for example John Wade, “The Failed Experiment with Legal ‘Equal Parenting’ in Australia – Possible Lessons for Canada?” (Continuing Professional Development Lecture delivered at the University of Saskatchewan, College of Law, February 11, 2014) [unpublished]. Another potential problem with observing lawyer behavior is that the behaviors may change when subjects know researchers are observing them.

1.1 Importance of Billing

Billing for legal services is an important topic to discuss critically; it creates incentives for behaviors that are discussed throughout this thesis. The main reason billing is so important is that without billing, there would be no private practice of law. By definition, billing drives the private practice of law. To further illustrate the importance of billing as a topic for discussion, this chapter discusses two aspects of billing: first, a summary of billing for legal services throughout history; and second, a summary of the types of billing arrangements that are common in the context of modern civil litigation.

1.1.1 History of Billing for Legal Services

A complete history of fees for legal services could easily be the subject of an entire book, but this section describes some highlights of the history of fees for legal services in four cultures: ancient Greece; ancient Rome; Europe and the United Kingdom; and North America. The overview in this section demonstrates that our predecessors in Western civilization were wary of the inherent problems with mixing private business interests with laws in the form of billing for legal services; that said, billing for legal services is not a new phenomenon in Western civilization.

1.1.1.1 Ancient Greece

Ancient Greek culture generally did not approve of the “practice of law”, or in other words an agent’s advocacy before tribunals.⁵ In fact, it would seem that advocacy was a criminal offence at some points in ancient Greece, as Socrates was charged criminally with advising others to seek advocates to assist with their lawsuits.⁶ However, these restrictions were generally seen as quite reasonable, because they were present at a time when all Greek citizens actively participated in political debates, and most were talented and effective public speakers.⁷ By the fifth century CE, though, “orators” became quite

⁵ James A. Brundage, *The Medieval Origins of the Legal Profession* (Chicago: University of Chicago Press, 2008) at 9-10.

⁶ *Ibid.*

⁷ Robert J. Bonner, *Lawyers and Litigants in Ancient Athens* (Chicago: University of Chicago Press, 1927) at 1-5

common as advocates-for-hire in civil litigation.⁸ Even before that, though, litigants were allowed to ask the jury's permission to appoint an orator.⁹ As early as the fourth century CE, the rules prohibiting advocacy were typically ignored.¹⁰

Another pertinent aspect of Greek civil litigation was the common use of private arbitrators for minor disputes. By the fourth century CE, many litigants preferred to use private arbitrators, not because public adjudication was too expensive, but because it required an overwhelming investment of time and effort.¹¹ Interestingly, from time to time an arbitrator's fee became the subject of ridicule, as well. One of Aesop's fables, dating back approximately 2500 years, was about a Greek arbitrator who adjudicated a dispute over an oyster. The arbitrator decided that each litigant was entitled to one half of the oyster's shell, while he kept the pearl as a fee for his arbitration services.¹²

1.1.1.2 Ancient Rome

Advocates were not outlawed in ancient Rome as were their Greek counterparts. However, it was culturally expected that Roman advocates would undertake civil litigation services on behalf of litigants as a gratuitous public service.¹³ In 204 BCE, though, the Roman government passed legislation, called the *Lex Cincia*, which prohibited advocates from accepting fees for their services.¹⁴ While it is unclear whether advocates commonly accepted fees for their services before the *Lex Cincia* was made law, it is clear that advocates commonly charged fees after 204 BCE.¹⁵ Most notably, Cicero was proud of the fact that he collected more income from his fees for advocacy than any other advocate, in spite of the prohibition on monetary fees for advocacy.¹⁶

⁸ *Ibid.*

⁹ *Medieval Origins, supra note 5.*

¹⁰ *Ibid.*

¹¹ Douglas M. MacDowell, *The Law in Classical Athens* (Ithaca: Cornell University Press, 1978) at 203-206.

¹² Macklin Fleming, *Lawyers, Money, and Success: The Consequences of Dollar Obsession* (Westport: Quorum Books, 1997) at 1.

¹³ *Medieval Origins, supra note 5, at 35*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The *Lex Cincia* was amended in 47 CE, so that an advocate could accept up to 10,000 sesterces as compensation for services in relation to a dispute.¹⁷ Advocates were still not allowed to sue for unpaid fees, though, and the limit in the amendment was a cap on the allowable honorarium that an advocate could accept.¹⁸ Any fee above that cap, or a fee negotiated before the closing of a case, was considered extortion.¹⁹

1.1.1.3 Europe and the United Kingdom

A similar system of honoraria was the common form of compensation for English barristers. It is said that barristers would meet their clients in front of the courthouse, and when the meeting was finished, the barrister would turn around, allowing his client to put coins into a pouch at the back of his robes.²⁰ Reportedly, this was standard practice at times in English history,²¹ however it is not clear when this became standard practice or when it fell out of vogue.

At least nominally, English barristers continued to charge their fees in the form of an “honorarium”, although this “transparent fiction” simply meant that barristers had no legal recourse if their fees went unpaid.²² This has recently changed, so that barristers are able to sue the solicitors who refer clients to them in the event that the barristers’ fees remain unpaid.²³ Another significant recent development pertaining to legal fees in the United Kingdom is that non-lawyers are now permitted to own law firms and set the fees charged by lawyers there as “alternative business structures.”²⁴

¹⁷ *Ibid* at 36

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Elizabeth A. Kovachevich & Geri L. Waksler, “The Legal Profession: Edging Closer to Death with Each Passing Hour” (1990-1991) 20 *Stetson L. Rev.* 419 at 420.

²¹ *Ibid.*

²² George Warvelle, *Essays in Legal Ethics* (Chicago: Callaghan & Company, 1902) at 74.

²³ Catherine Baksi, “BSB gives go ahead for barristers to sue solicitors over fees” (5 May 2011) *The Law Society Gazette* online: The Law Society Gazette <<http://www.lawgazette.co.uk/60346.article>>.

²⁴ BBC, “‘Tesco Law’ allows legal services in supermarkets” (28 March 2012) online: BBC News UK <<http://www.bbc.com/news/uk-17538006>>.

1.1.1.4 North America

In North America, the two most significant developments in relation to billing for legal services have been the modern advent of the large law firm and the newly forged popularity of hourly billing. This shift of prevalence from small law firms to large ones originally came about due to the increasing complexity of the legal systems of North America and the need for lawyers to specialize and cooperate with one another in order to work efficiently.²⁵ However, the cost-efficiency of large law firms expired during what is cynically referred to as the “bonanza years” from 1965 to 1990, during which, according to Macklin Fleming, large law firms operated in a market that allowed increasingly large fees, and clients of large law firms often ended up paying more than clients of smaller firms.²⁶ This is particularly so in civil litigation files, on which many lawyers often spend a lot of time collaborating on one file, which, as Fleming points out, is often unnecessary.²⁷

Furthermore, large firms arguably have a far-reaching effect on prices for legal services. For example, a skilled litigator in a small firm might learn that a comparable litigator in a large firm is charging much more for his or her services, allowing the lawyer at the small firm to increase prices accordingly.²⁸ Any time large firms are established, in any industry, not just the legal professional industry, it reduces the number of autonomous competitive actors in the market, thereby determining the price and availability of those services.²⁹ In this way, large law firms are able to set industry standard billing practices.

One billing practice that is quite common in modern North American legal practice is the fee based on an hourly rate, but this was not always so. Across Canada, for example, hourly billing did not become popular until about the 1960s.³⁰ Prior to that, five different types of billing were commonly used: retainer agreements, under which the lawyer was

²⁵ *Lawyers, Money, and Success*, *supra* note 12 at 3-15.

²⁶ *Ibid* at 17-21.

²⁷ *Ibid* at 17-19.

²⁸ *Ibid* at 20-21.

²⁹ Jens Beckert, “Where do prices come from? Sociological approaches to price formation” (2011) 9 *Socio-Economic Review* 757 at 767-768.

³⁰ Alice Woolley, “Evaluating Value: A historical case study of the capacity of alternative billing methods to reform unethical hourly billing” (2005) 12:3 *International Journal of the Legal Profession* 339 at 342.

paid a set monthly or annual amount; flat fee agreements; percentage fee agreements, which differed from today's contingency-percentage agreements in that they were typically negotiated at the closing of a civil litigation file; value-billing; and fees in accordance with a law society tariff.³¹ Because of various changes in the market for legal services, hourly billing gradually became the norm in Canada starting in the 1960s and into the 1970s.³²

However, there are widespread calls in many common law jurisdictions – including Canada – for a return to value-based billing for legal services.³³ This is also true in the United States, as large corporations have observed that they can save money by demanding value-based billing from law firms.³⁴

To a lesser extent than in the United Kingdom, North American jurisdictions have considered the idea of allowing non-lawyers to own and operate law firms.³⁵ This, of course, has the potential to impact the market for legal services, and therefore billing for legal service. This is not the first time North American jurisdictions have considered opening up the market for legal services. In fact, during the 1800s, many Northeastern states in the United States allowed anyone of “good character” to practice law.³⁶ What are the potential effects on lawyer-client relationships if non-lawyers own and operate law firms in the modern North American context? What are the potential effects if such firms engage in value-based billing?

Clearly, the legal profession has departed from the austere rules governing legal billing in the early Western cultures of ancient Greece and Rome. The next section discusses the

³¹ *Ibid* at 343-345.

³² *Ibid* at 345-353.

³³ “Evaluating Value”, *supra* note 30 at 339.

³⁴ Jeff Jeffrey, “Law Firms Embrace Alternative Billing to Limit Legal Costs” (18 May 2010) *The Legal Intelligencer*.

³⁵ See for example Francine Kopun, “Walmart shoppers can now get \$99 wills” (21 April 2014) *Toronto Star* online: The Star

<http://www.thestar.com/business/personal_finance/2014/04/21/walmart_shoppers_can_now_get_99_wills.html>.

³⁶ Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (New York: Cambridge University Press, 2006) at 54-55.

kinds of fee structures that commonly exist between lawyers and their clients in the modern market for legal services.

1.1.2 Types of Billing Arrangements

The types of billing arrangements that could be crafted between a lawyer and client in relation to a civil litigation file are limitless, because there are many variables in such contracts. The endless possibilities in arrangements between lawyers and clients make billing an important topic for critical discussion, because there are surely best practices that can be identified, or other changes that can be made to improve the way billing is carried out in the legal profession.

The purpose of this section is to provide a descriptive summary of several types of possible billing arrangements for civil litigation. This is important because, as will be discussed in **Part 3. The Conflict of Interests Presented by a Lawyer's Fee**, the lawyer's financial interests and the client's interest in a fair resolution of the dispute are not neatly consistent with one another. This cannot be shown without an examination of many different types of billing arrangements. The benefits and drawbacks of each of these types of billing arrangements will be discussed in **Chapter 3.2 The Substantial Risk of Harm to the Client**.

1.1.2.1 Hourly Rates

Billing by the hour is a very common method of billing clients for all sorts of legal services.³⁷ It is also a very simple concept. The lawyer and client agree upon a dollar amount for which the lawyer will charge the client for each hour the lawyer works on that client's file.³⁸ Lawyers in firms record all of the time they spend working on each file each day,³⁹ and periodically the client may be expected to pay the bill if the lawyers in

³⁷ David A.A. Stager & Harry W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at 221-222.

³⁸ *Ibid.*

³⁹ *Ibid.*

the firm are to continue working on that file.⁴⁰ Lawyers frequently require clients to deposit funds in a trust account to which the lawyer has access before work is conducted on a file for an hourly rate.

1.1.2.2 Contingency-Percentage Fees

The contingency-percentage fee is very popular in some types of litigation such as personal injury litigation.⁴¹ The basic concept of this arrangement is that if the plaintiff-client receives a settlement or a judgment, the lawyer will receive a percentage of the total proceeds.⁴² “Reverse contingency” arrangements are also sometimes available for defendant-clients, which require the lawyer and client to agree on the potential liability, with the lawyer collecting a percentage of the difference between the amount of potential liability and the amount of the settlement or judgment.⁴³

However, as with any type of billing arrangement, there are many variables possible in the contingency-percentage model of billing. For example, the client may or may not be expected to provide funds in advance to cover disbursements, being costs incidental to the work done on the file.⁴⁴

One other important factor to consider is that a lawyer could structure his or her contingency-percentage fee agreement so as to collect a higher percentage of the proceeds the more the file progresses. For example, a lawyer might collect 10% of settlement proceeds if settlement is achieved prior to document discovery, 20% if settlement is not achieved until after document discovery, and 35% of the judgment if the matter proceeds to trial. The rationale for this structure is that it provides a plaintiff-client with incentives to settle, and it rewards the lawyer for potentially cumbersome or complex work done on later stages of the file.

⁴⁰ See for example Law Society of Saskatchewan, *Code of Professional Conduct*, Regina: LSS, 2012, ch. 2.07(3), which permits lawyers to withdraw from representation if an account remains unpaid.

⁴¹ *Zipchen v. Bainbridge*, 2005 SKQB 218 at para. 49.

⁴² *Lawyers in Canada*, *supra* note 37 at 223-225.

⁴³ Crowell & Moring, *Guide to Value-Based Billing* (Washington: Association of Corporate Counsel, 2012) online: < <http://www.crowell.com/files/Guide-to-Value-Based-Billing-VBB-Crowell-Moring-ACC.pdf> > at 11-13.

⁴⁴ *Lawyers in Canada*, *supra* note 37 at 226.

In some instances, the inverse of that contingency-percentage structure might be arranged between a lawyer and client. For instance, if a settlement is reached prior to document discovery, a lawyer might collect 40% of the settlement proceeds, 30% if settlement is not achieved until after document discovery, and 20% of the judgment if the matter proceeds to trial. This would make sense for the lawyer and client if they wanted to provide the lawyer with incentives to conduct a large amount of the work soon, and avoid proceeding to later stages of litigation.

Alternatively, a lawyer could structure his or her contingent-percentage fee depending on the dollar amount of the settlement. For example, the lawyer could take 10% of the first \$20,000 of the proceeds, in addition to 15% of amounts above \$20,000 but below \$40,000, and so on.

1.1.2.3 Flat Fees

“Flat fee” refers to the agreement between a lawyer and client for the performance of a task in exchange for a particular, predictable amount of money.⁴⁵ For example, lawyer X might write client Y’s will and advance health care directive for a “flat fee” of \$300. Indeed, wills and advance health care directives are areas of law in which flat fees are quite common,⁴⁶ because it is somewhat predictable how much work goes into drafting a will.

Flat fees seem to be much less common as a billing practice for civil litigation services, presumably because civil litigation can be quite complex and any stage of a file might become highly contentious, depending on the strategy implemented by an opposing party. Every civil litigation file is significantly different. A flat fee to be agreed upon at the commencement of the file would seem inappropriate. However, a flat fee for each step of civil litigation files might be possible.⁴⁷ For example, lawyer X can file client Y’s

⁴⁵ *Ibid* at 217-219.

⁴⁶ *Ibid*.

⁴⁷ See for example “The Legal Profession”, *supra* note 20 at 433.

statement of claim for \$400, and respond to an upcoming chambers application on behalf of client Y for \$1000.

1.1.2.4 Value-Based Billing

Value-based billing is harder to define than other types of billing arrangements, but the common thread in any value-based billing arrangement is that it takes into consideration the “value” of the services that the client has received. Calculation of value can be done in a variety of ways. As such, value-based billing has been accurately described as “more of a philosophy than a method.”⁴⁸ This is because traditional “time-cost” billing assigns a value to the lawyer’s time, rather than being structured around the value from the perspective of the client.⁴⁹

Unfortunately, there is no further consensus on what value-based billing really is, and much of the literature refers to contingency-percentage fees or flat fees as “value-based billing”,⁵⁰ to confuse matters further. However, throughout this thesis, “value-based billing” refers to those arrangements that frame the fee as being based – at least in part – on the value of the services rendered *from the client’s perspective*. A contingency-percentage fee, for example, would not truly be “value-based billing”, because this arrangement does not involve a thoughtful consideration of how much the client benefited from the lawyer’s tactics in representing the client – and from being represented at all – under the unique circumstances of the file.

One way to enhance the ability of the lawyer and client to assess the value of legal services is to assess value in retrospect. Many factors could greatly influence the value of civil litigation services from the client’s perspective, some of which might be difficult or impossible to predict before the commencement of a file. For example, the client could emphasize that a quick resolution is important, but after one year, the client places much more emphasis on the settlement amount. A value-based billing agreement made at the

⁴⁸ Duncan Webb, “Killing Time: A Limited Defence of Time-Cost Billing” (2010) 13:1 Legal Ethics 39 at 44.

⁴⁹ *Ibid* at 44-45.

⁵⁰ See for example *Guide to Value-Based Billing*, *supra* note 43.

outset of the file that gives the lawyer incentives for a quicker resolution is no longer appropriate if the client does not value that aspect any more after time passes. As Duncan Webb points out, though, there is a practical problem in assessing value at the end of a file; specifically, if the lawyer is given contractual power to assess value at the end of the file, this could lead to abuse, and lawyers would seldom enter into a lawyer-client relationship in which the client has the contractual power to determine the value of legal services after they have been completed.⁵¹ It is difficult or impossible to anticipate such changes in a client's priorities throughout a protracted civil litigation file. For that reason, it might only be possible for the lawyer and client to do so in retrospect. This practice may be hard for lawyers to implement, because – as stated on one debt collection company's website – “[a] customer's willingness to pay diminishes rapidly as time passes – no matter how pleased they may initially have been with the quality of the goods or services delivered.”⁵²

Furthermore, it may be comparatively easy to prospectively assess the value of legal services that are of an urgent or acute nature. For example, lawyers and their clients may be able to assess the value of services to be provided in relation to an upcoming chambers motion fairly easily, depending on what is at stake in the chambers motion and how much work is required from the lawyer.

1.2 Why Focus on Civil Litigation?

Fees for legal services present issues for the rule of law pertaining to all areas of law, but lawyers' fees in general is too broad a topic to cover in a thesis. As such, it is helpful to focus on how the market for legal services affects the rule of law in one practice area. Civil litigation is a good practice area to examine, partly because it generates a wide range of billing practices, thereby raising a significant number of questions relevant to this thesis. How is the rule of law affected if one or both parties to a dispute, who have limited knowledge of the law, resolve the dispute on their own because they cannot

⁵¹ See “Killing Time”, *supra* note 48 at 44-45.

⁵² SCJ Inc., “Probability of Collecting vs. Days Past Due” online: SJC Inc. Business Financial Services <<http://www.scjinc.net/curve.html>>.

afford legal services? How is the rule of law affected if one party is more effectively represented than the other party? Beyond these – and other – intuitive questions, the four sections in this chapter explore various reasons why civil litigation is a good focus for this thesis.

1.2.1 Diversity in Types of Billing Arrangements

As discussed in **Section 1.1.2 Types of Billing Arrangements**, there are a wide variety of different billing arrangements in the context of civil litigation. Other types of legal services may be subject to prohibitions on certain types of billing. For example, lawyers may not charge contingency-percentage fees for family litigation services, unless a court has approved such fees.⁵³ There is a great deal of flexibility allowed in fee arrangements between lawyers and clients in civil litigation. For example, even in British Columbia, where regulation stipulates a maximum contingency-percentage that may be charged, lawyers and clients may still enter into an arrangement in which “the lawyer may elect to forego any remuneration based on a proportion of the amount recovered and receive instead an amount equal to any costs awarded to the client by order of a court.”⁵⁴ This would work to the lawyer’s advantage in the event that a client received a lower-than-anticipated award of damages or a higher-than-anticipated award of costs, or some combination of the two. This degree of flexibility in billing arrangements makes civil litigation an excellent practice area within which the effect of billing on the rule of law can be analyzed.

1.2.2 Limited Access to Free Legal Services

Civil litigation services are scarce compared with the demand for such services, and there have been repeated calls to expand the publicly funded or *pro bono* provision of such services.⁵⁵ Canadian legal aid programs typically provide free services pertaining to serious criminal matters and child custody disputes only.⁵⁶ Courts may order costs against

⁵³ Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, R. 1502.

⁵⁴ Law Society of British Columbia, *Law Society Rules*, R. 8-2.

⁵⁵ See for example, Lorne Sossin, “The Public Interest, Professionalism, and Pro Bono Publico” (2008) 46 *Osgoode Hall L.J.* 131.

⁵⁶ *Ibid* at 134-136

a litigant in advance of a trial under extraordinary circumstances, or they may allow lawyers providing pro bono services to avail themselves of an order for costs at the end of trial.⁵⁷ However, Canadians' need for legal advice and representation in civil litigation remains chronically unmet, largely due to financial constraints.⁵⁸ Due to limited access to free or affordable civil litigation services, billing for such services presents itself as an important topic.

1.2.3 Billing Affects Corrective Justice in Private Law

As discussed in much more detail in **Part 4. Corrective Justice**, the very structure of our private law system is intended to pursue “corrective justice”. To describe it simply for the purposes of this introduction, corrective justice is the award of money to the successful plaintiff, to be paid by the unsuccessful defendant, in an amount equal to the harm caused by the defendant’s breach of whatever legal duty is at issue. Fees for legal services present a transaction cost in achieving corrective justice, in that money flows from the parties to the dispute to their lawyers, who are not parties to the dispute. This makes corrective justice difficult to achieve, or even approach.

1.2.4 Civil Litigation is Always a “Legal Service”

“What do lawyers do?’ Within this simple query are two assumptions, namely that lawyers perform certain services that other people do not or cannot perform and that lawyers do not render services that may be rendered by lay people. Neither of these assumptions can withstand close scrutiny. Some of the work that lawyers commonly do can be performed by other people... Conversely, many of the services frequently rendered by lawyers are not uniquely ‘lawyering’ but encompass such widely practiced activities as the giving of advice on financial or family matters, negotiations, or legislative lobbying.”⁵⁹

Civil litigation is unlike much of the other work performed by lawyers. It will almost certainly involve a series of activities involving giving advice on family or financial matters, and negotiations, but each of those activities – when performed in relation to a civil litigation matter – ought to be performed with a detailed understanding of the legal

⁵⁷ *Ibid* at 144-146

⁵⁸ See for example Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A roadmap for change* (Ottawa: Canadian Forum on Civil Justice, 2013).

⁵⁹ *Lawyers in Canada*, *supra* note 37 at 54.

risks to which the client is subject, and the legal rights that the client has at his or her disposal. Indeed, non-lawyers are prohibited from performing nearly all of the activities necessary to conduct any work on a civil litigation file.⁶⁰

1.3 Literature Regarding Billing in General

Many authors who have written about billing for legal services have advocated for or against specific types of billing arrangements. Such discussions, while thoughtful comparisons of billing arrangements, rarely provide much in the way of a commentary on billing for legal services *in general*.⁶¹ This chapter discusses literature that advocates for best practices in billing arrangements, of course; however, this chapter is limited to literature that also includes some useful commentary on billing in general. This chapter discusses four of the most important themes in the literature.

1.3.1 Fees are a Practical Necessity for the Legal Profession

Without some monetary compensation, there would often be limited incentive for an advocate to provide services in relation to a dispute. As such, there may likely be limited access to advocates without fees. Arguments along these lines have been advanced at least as early as Ancient Rome, where one advocate notably said “All we ask for is a reasonable amount, without which there will be no advocates to be had.”⁶²

By 1902, at a time when there was still perhaps a realistic debate about whether legal fees could take the form of an honorarium, George Warvelle defended fees for legal services, essentially, with a simple, pragmatic argument. The first premise in this argument is that trained advocates are necessary in the modern administration of justice.⁶³ The second premise is that in order to sustain the supply and quality of trained advocates, they must

⁶⁰ For example, in Saskatchewan, such activities as appearing in court and rendering legal advice are prohibited for non-lawyers. This prohibition is found at s.30 of *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1.

⁶¹ For descriptions of specific types of billing arrangements, see **Section 1.1.2 Types of Billing Arrangements**; for arguments for and against those types of billing arrangements, refer to **Chapter 3.2 The Substantial Risk of Harm to the Client**.

⁶² *Medieval Origins*, *supra* note 5 at 36.

⁶³ *Essays in Legal Ethics*, *supra* note 22 at 74-75

be paid, either by the state – as judges are paid – or by litigants.⁶⁴ The third and final premise in the argument is that an honorarium-based system would not work in North America, as it does not really work in the United Kingdom either.⁶⁵

More recent literature has touched on this theme, usually by identifying the significant costs associated with providing legal services in the modern market. However, that literature usually goes on to discuss high fees, which is the theme discussed in **Section 1.3.4 High Fees Create Disruptions in Access to Legal Services**, rather than the practical necessity of *any* fee.

1.3.2 Do Fees Create Divergence of Lawyers’ and Clients’ Interests?

Many authors have called for stricter regulation of lawyers’ ethical behavior, competence, and billing. Such calls with direct relevance to this thesis are premised upon the tension between a client’s interest in receiving high quality legal services at the lowest price possible and a lawyer or law firm’s interest in maximizing profits.

Arguments that fees create a divergence between lawyers’ and clients’ respective interests usually rely on examples of unethical billing. This is not a new idea, as Warvelle devoted some time to discussing overcharging for legal services in 1902,⁶⁶ but it is a much more commonly discussed topic since the advent of hourly billing.

Alice Woolley has written two articles with commentary about billing’s effect on the interests of lawyers and their clients: “Time for Change: Unethical Hourly Billing in the Canadian Legal Profession and What Should Be Done About It”;⁶⁷ and “Evaluating Value: A historical case study of the capacity of alternative billing methods to reform unethical hourly billing”.⁶⁸

⁶⁴ *Ibid* at 75

⁶⁵ *Ibid* at 70-75

⁶⁶ *Essays in Legal Ethics, supra* note 22 at 77.

⁶⁷ (2004) 83 Can. Bar Rev. 859.

⁶⁸ *Supra* note 30.

The first article includes a discussion about how current regulation of fees fails to deter unethical billing practices. Specifically, many clients are unlikely to use the mediation, arbitration, or taxation processes available to them for resolving fee disputes; even when clients use them, these processes merely adjust fees downward in a way that fails to deter over-billing.⁶⁹ Furthermore, only particularly egregious over-billing is punished by law societies.⁷⁰

The second of the articles is a historical analysis in which Woolley discusses the advent of hourly billing as the industry standard in fees for legal services. She attributes the shift to hourly billing to three social factors: problems with setting fees between lawyers and clients, such as the time commitment involved in value-billing and the lack of predictability;⁷¹ the “death of professionalism”;⁷² and changes in regulation of the legal profession, particularly in competition and marketing laws.⁷³ She states that there is great potential for harm to clients as a result of unethical hourly billing.⁷⁴ But given that hourly billing is at least somewhat objective and transparent, to replace hourly billing with any other system would be to replace one problem with another.⁷⁵ In this way, Woolley provides a useful perspective on the limitations of any particular type of billing arrangement to solve all of the potential problems in billing. As such, Woolley favours stricter regulation of lawyers’ fees as a solution.

Duncan Webb has expressed support for stricter regulation, similar to that of Woolley, in his article “Killing Time”.⁷⁶ At the outset of the article, he describes a constant tension between lawyers, who generally want to maximize profits, and clients, who generally want to receive quality legal services at the lowest price possible.⁷⁷ Webb argues that perhaps we were once able to rely on the professionalism of lawyers to ease this tension

⁶⁹ “Time for Change”, *supra* note 67, at 886-888

⁷⁰ *Ibid.*

⁷¹ “Evaluating Value”, *supra* note 30, at 346-349.

⁷² *Ibid* at 349-351.

⁷³ *Ibid* at 351-352.

⁷⁴ *Ibid* at 339-341.

⁷⁵ *Ibid* at 340 & 356.

⁷⁶ “Killing Time”, *supra* note 48.

⁷⁷ *Ibid* at 39-40.

in their own lawyer-client relationships, but we can no longer do so, and therefore stricter regulation is in order.⁷⁸

These skeptical comments in “Killing Time” are fairly consistent with an earlier comment made by Morag McDowell and Duncan Webb on billing for legal services:

“Rather than being considered altruists, lawyers are sometimes thought of as a kind of mercenary whose services are for sale to whoever can pay, regardless of the merits of their cause. This view has been compounded by the fact that the practice of law has become very much a matter of business. The suggestion that professional values or altruism underpin a legal practice is hard to sustain. Rather, it is pretty clear that the profit motive is the driving force behind most legal practices.”⁷⁹

However, Webb argues that if appropriate billing practices are selected for each type of legal service provided, lawyers could minimize harm done by billing for legal services.⁸⁰ As an example, Webb suggests that for individuals or small business plaintiff-clients, the fee for civil litigation services should be either a contingent-percentage fee or a fee based on an hourly rate, largely depending on the client’s ability to pay in advance of a settlement or judgment.⁸¹ He also argues that fees based on an hourly rate are often appropriate for civil litigation services, because lawyers are not typically interested in assuming the risk of contingent-percentage fee arrangements, and when they are the prices are higher than clients would ideally like to pay.⁸² Of course, some clients have no other options, and contingent-percentage fees enable them to access the civil justice system.⁸³

Webb expresses optimism about harm-reduction strategies such as stricter regulation and careful selection of appropriate fee arrangements. However, he warns that both lawyers

⁷⁸ *Ibid* at 59-60.

⁷⁹ Morag McDowell & Duncan Webb, *The New Zealand Legal System* (Wellington: Butterworths, 2002) at 287.

⁸⁰ “Killing Time”, *supra* note 48 at 60-64.

⁸¹ *Ibid* at 60-61. It should be noted, though, that Webb writes from the perspective of New Zealand’s legal system, which does not allow contingent-percentage fees, and he describes such arrangements as “US-style” at 45-46. As such, he does express this in different terms than the ones used herein.

⁸² *Ibid* at 60-61.

⁸³ *Ibid*.

and clients should try to avoid the “transaction cost” of spending onerous amounts of time negotiating fee arrangements.⁸⁴

The divergent interests of lawyers and their clients is a theme that is discussed in more depth in **Part 3. The Conflict of Interests Presented by a Lawyer’s Fee.**

1.3.3 Do Fees Create Convergence of Lawyers’ and Clients’ Interests?

While many authors argue that billing creates tension between the lawyer or law firm’s interests and those of clients, some argue the exact opposite; according to Randall Graham, for example, lawyers have little reason to have their clients interests in mind except for the fact that they earn money by representing clients. Therefore, Graham says, fees actually cause lawyers’ and clients’ interests to converge. To what extent could both sides of this debate be correct? Could both happen in relation to the same file?

In his book *Legal Ethics: Theories, Cases, and Professional Regulation*,⁸⁵ Graham’s starting point for this argument is that lawyers can be presumed to be rational agents who behave in a self-interested way.⁸⁶ According to Graham, when lawyers act in the interests of their clients, they are truly furthering one or more of the following four self-interested objectives: “(1) financial gain; (2) professional satisfaction; (3) career advancement or reputational gains that flow from client satisfaction; and (4) fulfillment of a social role the lawyer considers important.”⁸⁷

To illustrate this self-interest, Graham uses the example of a criminal lawyer (Anna), who finds her client’s (Patrick’s) actions distasteful, but still effectively represents that client because she is being paid to do so.⁸⁸ In Graham’s words: “The effect of Anna’s professional engagement (and the associated fees) is to ensure that the pursuit of Patrick’s interest (that is, his interest in being acquitted) is now in Anna’s interest as well – Anna is

⁸⁴ *Ibid* at 60.

⁸⁵ (Toronto: Edmond Montgomery Publications, 2011).

⁸⁶ *Ibid* at 95-96.

⁸⁷ *Ibid* at 96.

⁸⁸ *Ibid* 289-290.

only entitled to payment if she does her job, and her job is to pursue her client's interests."⁸⁹

Graham adjusts the example so that the lawyer has been compelled to represent the client on a *pro bono* basis.⁹⁰ She still represents her client effectively, this time because her reputation and possibly her license to practice law depend on it.⁹¹ Her reputation and her license to practice allow her to attract clients and charge fees in the future, meaning that – in Graham's view – even *pro bono* files are motivated by economic incentives.⁹²

A different perspective on this same theme is that fees offer an incentive for lawyers to capitulate to their clients' demands to behave unethically, especially if that client's payments represent a large portion of the lawyer's or firm's income. For example, this concept appears repeatedly in David Luban's book *Legal Ethics and Human Dignity*.⁹³

1.3.4 High Fees Create Disruptions in Access to Legal Services

Access to justice, including the economic barriers to receiving legal services, is a topic about which there is an abundant amount of literature. This has been an issue for over a century; as Warvelle put it “[m]ercenary and calculating men may have lowered the level of the bar from the old chivalric standard, but they have not destroyed the standard itself, and the cause of the poor, the helpless and the oppressed, remains today as it always was.”⁹⁴

While Warvelle spoke of the poor, helpless, and oppressed in the early 20th century, in the modern Canadian context ordinary individuals are often unable to afford legal

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at 290. In Graham's example, the mandatory representation is in the form of a court appointment, but it may be even more helpful to imagine a junior associate at a firm who has been delegated a *pro bono* file. See for example *ibid* at 95.

⁹¹ *Ibid* at 290.

⁹² *Ibid.*

⁹³ (New York: Cambridge University Press, 2007) at 158-159, 209

⁹⁴ *Essays in Legal Ethics, supra* note 22 at 78-79.

services, and this was the topic of a 2013 report commissioned by the Supreme Court of Canada.⁹⁵

In the abundant literature about access to justice, Gillian Hadfield has written an article that stands out as being of particular importance to this thesis. At the outset of her article, “The Price of Law: How the Market for Lawyers Distorts the Justice System”,⁹⁶ Hadfield argues that legal fees have been justified by the legal profession as being somehow separate from economics, and rather a matter of professionalism. According to Hadfield, the complexity of the law makes it so that it is in the public interest to allow only those with legal training to practice law, and in turn only those with the same legal training can regulate and judge the competence of other lawyers.⁹⁷ Then the obligation falls on lawyers themselves to avoid taking advantage of the freedom of self-regulation, being freedom from both the state and from the market.⁹⁸ In Hadfield’s words: “Lawyers only charge high fees to the extent that they fail at their professional obligation to the public interest... The profession is first conceptualized and then justified as a practice apart from the market economy. But the practice of law is not apart from the economy.”⁹⁹ To paraphrase Hadfield, some lawyers do charge high fees, but this is contrary to the nature of lawyers’ professional responsibilities to the public.

Hadfield then provides a wealth of empirical data to show how legal services are systemically made more available to organizational commercial clients than individual clients.¹⁰⁰ Significantly, the average American lawyer billed \$180 per hour in 1998, big-firm partners billed an averaged of \$250 per hour, and the highest-priced ten percent of lawyers billed over \$385 per hour;¹⁰¹ at that time hourly rates were increasing at a rate of 3.6-7.3% annually.¹⁰² The reason for this state of affairs, states Hadfield, is that in a non-competitive market, prices are determined by the value consumers place on the services,

⁹⁵ *Access to Civil & Family Justice*, *supra* note 58.

⁹⁶ (2000) 98 Mich. L. Rev. 953

⁹⁷ *Ibid* at 955-956.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 957-963.

¹⁰¹ *Ibid* at 957.

¹⁰² *Ibid* at 958.

rather than the cost of the service plus a competitive mark-up for profit.¹⁰³ In turn, organizational clients with abundant resources are better able to afford lawyers' services, a strictly limited resource.¹⁰⁴

Hadfield's framework for discussing high legal fees is to describe six features of the market for legal services that lead to high prices and limit individuals' access to legal services. In this way, Hadfield provides a useful commentary on the interplay between legal fees and the justice system in general.

Firstly, Hadfield points out that training lawyers is expensive, and this leads to a high cost of providing legal services.¹⁰⁵ Furthermore, complexity also increases the adversarial nature of litigation and the effort involved in resolving disputes.¹⁰⁶ This complexity does not seem to be terribly problematic, *per se*, but it certainly allows the remaining five factors to operate to increase the cost of legal fees.¹⁰⁷

Secondly, Hadfield states that legal services are a "credence good", meaning a good or service that the seller advises the buyer how much of it to buy.¹⁰⁸ Due to the complexity of the law, buyers of legal services are unable to accurately assess their needs or the quality of the services they have received, and therefore could be sold too many hours or they could be billed for work that was done poorly or not done at all.¹⁰⁹ While Hadfield uses the example of hourly billing, the concept of credence goods could be applied to other billing arrangements, too. Furthermore, lawyers are able to use the complexity of the law – and the resulting uncertainty – to extract high prices for their services based on prospective clients' beliefs about the quality of those lawyers.¹¹⁰

¹⁰³ *Ibid* at 956.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid* at 964-968.

¹⁰⁶ *Ibid* at 968.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid* at 968-969.

¹⁰⁹ *Ibid* at 968-972.

¹¹⁰ *Ibid* at 971-972.

Thirdly, according to Hadfield, a lawyer's ability to influence the outcome of litigation is based on the lawyer's quality *relative to opposing counsel and the judge(s)*, meaning that clients will strive to retain better counsel than their adversary has retained.¹¹¹

Fourthly, Hadfield says that once clients have retained legal counsel they generally do not fire their lawyer and seek new counsel, because "switching horses in the middle of a stream" carries the costs associated with familiarizing the new lawyer or firm with the progress of the file to date.¹¹²

Fifthly, orders for costs may heighten conflict by adding even more costs onto a losing party, thereby increasing parties' incentives to "win" the case.¹¹³

Sixthly and finally, Hadfield identifies a number of sources of "monopoly" power, which enable lawyers to enjoy a non-competitive market.¹¹⁴

Boiled down to its essence, Hadfield's main concern with legal fees is that organizational clients are able to afford counsel when individual clients are not. The cause of this state of affairs, Hadfield argues, is that the six factors discussed above lead to the price of legal services inflating. Literature about the affordability of legal services, like Hadfield's, is closely linked to the question of price formation in the market for legal services.¹¹⁵

While price formation literature is outside the scope of this literature review, David Luban has a directly applicable comment about the value of legal services. In a humorous passage, Luban tells stories of several people humbly seeking *pro bono* services at a

¹¹¹ *Ibid* at 972-976.

¹¹² *Ibid* at 977-980.

¹¹³ *Ibid* at 980-982. Hadfield glosses over some of the details of orders for costs, such as the effects of settlement offers on orders for costs, probably due to the simplicity of American rules of costs. Specifically, parties usually pay their own lawyers' fees in American civil actions, while only court fees are allocated onto the unsuccessful party. See Mathias Reimann, Ed., *Cost and Fee Allocation in Civil Procedure: A Comparative Study* (New York: Springer, 2012) at 288

¹¹⁴ *Ibid* at 982-994. There are also conflicting definitions of "monopoly" in the literature. Hadfield simply means that lawyers as a class of persons do not compete with non-lawyers in the market for legal services.

¹¹⁵ Those questions are addressed concisely in **Section 5.1.4 The Sources of Prices of Legal Services**.

lawyer's office.¹¹⁶ The lawyer turns each of the clients away, but gives them enough cash to either retain another lawyer or to solve their problems without a lawyer's services.¹¹⁷ For example, one client who needs an immigration lawyer is given enough cash to get to Canada "in style".¹¹⁸ Luban argues that, even though providing cash would enable those people to solve their problems, this still does not promote the dignity of those individuals.¹¹⁹ In other words, faced with the question of whether Luban's hypothetical clients would rather have money or an advocate, they would rather have an advocate. Interpreted outside of the context of pro bono legal services, this means that an advocate can promote the human dignity of a client, and in this way the legal services provided are worth more than the money used to pay for them. But perhaps they are not worth *more*, at all; perhaps they are simply different and incomparable values. "[N]ot all legal woes can be translated into monetary equivalents."¹²⁰

This theme within the literature raises questions that are important to this thesis. Could there be unintended consequences involved in increasing access to legal services? Would increased access to legal services necessarily mean an increase in access to "justice" (or fair outcomes in each matter)? Should every file receive similarly thorough legal service, or is it acceptable to allow market forces to influence the priority placed on different files?

1.4 Analytical Framework

This thesis is divided into six "parts", which are in turn divided into "chapters", which are further divided into "sections" and "subsections". This introductory part provides contextual information for the reader, much of which will be referred to in subsequent parts of this thesis.

¹¹⁶ *Legal Ethics and Human Dignity*, *supra* note 93 at 90-91. As with a great deal of humor, Luban's is enjoyed at the expense of lawyers.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* at 90-92.

¹²⁰ *Ibid* at 92.

Part 2. The Lawmaking Function of Lawyers describes how lawyers play a significant role in creating or influencing law. This part focuses on the lawyer in the course of his or her duty to advise a client to settle a civil claim or to continue litigating that claim. This focused description is relevant and important to the thesis topic, because it highlights the significance of the lawyer's role in a society governed by the rule of law, specifically in the context of handling a civil litigation matter. In other words, Part 2 shows that lawyers are not simply running legal errands for money. Rather, lawyers make legal processes accessible to their clients through the provision of information about laws relevant to the dispute in which their clients are involved and its resolution. Through the provision of such access and advocacy, lawyers also make legal *influence* accessible to their clients. This should serve to show that the lawyer's role as an advisor is very important to the rule of law, but it is in the following part that the reader will see the intersection between legal fees and the advice provided.

Part 3. The Conflict of Interests Presented by a Lawyer's Fee argues for the proposition that there is a potential or actual conflict of interest present in every fee-for-services arrangement between lawyers and clients. This discussion is not intended to show legal grounds for any remedy or regulatory complaint against a lawyer. Rather, it is intended to show that the fees paid by a client for legal services may influence the advice and service provided by some lawyers. In light of the emphasis placed on lawyers' advice in the previous part, readers should consider how this financial influence affects the rule of law. The next part examines the effects of exchanging money for civil litigation services in a more abstract way.

Part 4. Corrective Justice argues for the proposition that transaction costs (including lawyers' fees), while inevitable in the course of private litigation, are inconsistent with the very purpose of private litigation itself. Specifically, that purpose is "corrective justice", a concept explained in detail in Part 4. The purpose of Part 4 is to show that the outcome of a civil litigation file *includes* the transaction costs associated with achieving that outcome, and therefore legal fees are *part of that result*.

Part 5. The “Sale of Law” and Legal Services draws on the concepts and arguments presented in previous parts and synthesizes those concepts to support the main thesis statement herein, specifically that fees for legal services create a state of affairs in which the application of laws depends not solely on the merits of a case, but on a variety of factors, including external influences such as financial incentives present for lawyers. Indeed, the “sale of law” is a term defined therein as the impediment to the consistent application of law due to financial incentives present for lawyers.

The final part of this thesis, **Part 6. Regulation to Mitigate the “Sale of Law”**, explores the possibility of regulating law firms rather than just individual lawyers as one of many possible methods of mitigating the sale of law.

2. The Lawmaking Function of Lawyers

“Rather than function to maintain social order and resolve disputes, as [Thomas] Hobbes suggested was the role of law, combatants will fight to control and use the implements of law as weapons in social, political, religious, and economic disputes. Law will thus generate disputes as much as resolve them. Even when one side prevails, victory will mark only a momentary respite before the battle is resumed... Spiraling conflicts will ensue with no evident halting point or termination short of exhaustion of resources or total conquest by one side.”¹²¹

This part focuses on a kind of law called “lawyer-generated law”, which is some combination of two things: the outward influence on the law that a lawyer exerts while advocating a client’s position; and the information about the rules that apply to the client’s case *as communicated by the lawyer to his or her client*. There are many different kinds of things called “law”.¹²² But given that the focus of this thesis is lawyers’ fees, and that the normative reference point for this thesis is that the “rule of law”¹²³ is a desirable thing, the definition of law for our purposes will focus on the kind of law that lawyers “make” in the course of their day-to-day activities. The *consistency* of the law that is made by different lawyers, on different files, or even different stages of the same files, is a topic of crucial importance to this thesis. For example, could a lawyer render advice that is inconsistent with earlier advice in light of new information? When would such changes be inconsistent with the rule of law? What if a lawyer represents multiple clients arguing dissimilar positions in relation to similar disputes? Given that there are a vast number of variables that make each dispute unique, can the law ever be truly consistent in how it applies to each case? The rule of something-other-than-law begins when external factors such as the billing arrangement between lawyer and client become factors in how the law applies to a dispute.

This discussion has several key parts. Firstly, a discussion of how legislators, judges, and other officials create law, and what kind of “law” they create, is needed as a reference point in order to form an understanding of the kind of law created by lawyers. Secondly, using that reference point, it is necessary to discuss how lawyers create law, and what

¹²¹ *Law as a Means to an End*, *supra* note 36.

¹²² See, for example, Joseph Walter Bingham, “Joseph Walter Bingham” in *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Law Book Co., 1941).

¹²³ The rule of law is defined in detail in **Section 2.1.3 Bureaucrats**.

kind of “law” they produce, with particular focus on advising through the negotiation process. Thirdly, it is important to put this sort of lawyer-generated law in context by examining what kind of law governs situations in which people do not seek the advice of a lawyer. Fourthly, it is necessary to discuss the differences and similarities between lawyers as they generate law through advice and other professionals and trades-people as they advise their clients.¹²⁴ Fifthly and lastly, a sufficient understanding of lawyer-generated law requires a discussion of “legal instrumentalism”, and how it has affected the law and lawyers over the past couple of centuries.

2.1 Legislators, Judges, and Bureaucrats

Lay people and lawyers alike often think of “law” as being the stuff that is written by legislatures, judges, and occasionally other officials who have been delegated the authority to draft policy manuals or interpretation bulletins. Such a view was once popular in academic jurisprudence, as well. For example, John Austin ruled out the possibility that things like local customs or terms of contracts could be considered “law”.¹²⁵ Austin had later been criticized for failing to adequately support this assertion; he only provided the reason that “only public persons make law”.¹²⁶ However, it is easy to understand why Austin made this assumption; it is because public persons represent themselves as having fairly direct authority to change the law. This chapter focuses on the sort of law that is indeed made by public persons, by way of legislation, judicial precedent, and the various mechanisms of authority that are delegated to other officials in the legal system.

2.1.1 Legislators

Legislation is law sourced directly from the government’s establishment of a rule, or a set of rules. Hundreds of years ago, it was popularly believed that governments did not establish rules through legislation at all, but that their aim was to discover and proclaim

¹²⁴ In order to keep the analogy as simple as possible, the example of a plumber advising a homeowner about a leaky pipe is used.

¹²⁵ William L. Morison, *John Austin* (Stanford: Stanford University Press, 1982) at 98-100.

¹²⁶ See for example, *ibid.*

rules that existed naturally.¹²⁷ However, this type of legal theory has not been in vogue for at least a century and a half.¹²⁸ Instead, it is now commonly understood that legislatures create their own laws rather than attempting to accurately portray an independently existing set of laws created by God or natural principles of morality.¹²⁹

Legal theorists disagree as to the nature and importance of legislation. Austin, for example, argued that the “supreme legislature” in a state is the only true source of law.¹³⁰ To Austin, any of the other ostensible sources of law, such as courts, derive their authority from the supreme legislature.¹³¹ However, such an argument assumes that the supreme legislature of a given nation has the ability – but not the propensity – for totalitarianism. If, on the other hand, a supreme legislature lacked the ability for totalitarianism, then an independent judicial branch appears to be imposed upon the state as a condition of its power over the citizens it governs. To say that courts “derive their authority” from supreme legislatures seems to ignore the limitations of many supreme legislatures. In other words, one challenge to Austin’s assertion is that courts do not “derive their authority” from the supreme legislature; more accurately, there exists a large gap in the authoritative reach of the supreme legislatures of many nations, and this gap is filled by an independent judicial branch.

Modern legal theory largely tends to ignore the role of the legislator, leaving such matters to be discussed from the perspective of political sciences or other academic fields. Instead, modern legal theory tends to focus on judges, almost to the exclusion of legislators.¹³² The reason for this is probably that courts may interpret and apply legislation unpredictably, and they often invalidate sections of legislation so as to comply with constitutional requirements. Such judicial invalidation became increasingly common in the 1930s when the Supreme Court of the United States declared a series of economic

¹²⁷ *Law as a Means to an End*, supra note 36 at 16-18.

¹²⁸ *Ibid* at 20-23.

¹²⁹ *Ibid*.

¹³⁰ Robert Campbell, ed, *Austin on Jurisprudence*, 4th ed (Holmes Beach: Gaunt Inc., 1998) at 525-541.

¹³¹ *Ibid*.

¹³² Luc J. Wintgens, *Legisprudence: Practical Reason in Legislation* (Burlington: Ashgate, 2012) at 1-2.

policies to be constitutionally invalid.¹³³ This change brought courts to the forefront of everyone's attention, because those battles that were lost in the context of political lobbies could be won in the courts.¹³⁴ Canadian legislation is also struck down or read down with some frequency under the *Canadian Charter of Rights and Freedoms*. This shift in power in favour of the courts has arguably caused a shift toward what several authors have referred to as "judge-centered jurisprudence".

2.1.2 Judges

Judges make law when they interpret and apply statutes, or when they apply and develop the common law. There are three ways – and arguably others – in which judges can be said to "make" law.

The first way is through the use of "discretion". Whether judges truly have "discretion" in deciding cases is a matter that has been debated throughout generations of jurisprudence scholars.¹³⁵ It is a debate that will never be conclusively resolved, because it is linked to deeper philosophical questions about the nature of law. To put it briefly, if the judge has "discretion" in applying the law, then the law does not exist independently of its application and enforcement in the real world. On the other hand, if the judge does not truly have discretion, then there must be a set of existing legal principles that bind the judge's decision-making authority. If one is willing to believe in true judicial discretion, then this is one way in which judges make law. If not, then there are still two other ways in which judges make law.¹³⁶

The second way in which judges make law is in a realistic sense. If judges apply the law in a certain way, then the practical application can be considered the "law", regardless of whether it is the most logical application of the statutory or common law. This is referred to as a "realistic sense", because it was the view historically held by the group of legal

¹³³ *Law as a Means to an End*, *supra* note 36, at 77-83.

¹³⁴ *Ibid* at 83.

¹³⁵ See for example Ronald Dworkin, "Judicial Discretion" (1963) 60 *The Journal of Philosophy* 624.

¹³⁶ One area in which courts have a great deal of discretion, upon which the outcome of any case depends, is the finding – or "guessing" – of facts. See Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949) at 14-36.

scholars referred to as “legal realists”.¹³⁷ Legal realism, as it is briefly defined here, is conceptually similar but distinct from a belief in judicial discretion. Whether a judge refuses to apply a rule as a matter of discretion, or is bound not to apply the rule in accordance with some legal principle, the realist can still assert that the rule is not law unless a judge actually applies it. If the judge has discretion, the judge is making law by freely choosing an outcome, the realist would say; if the judge does not have discretion, the judge is making law by correctly *or incorrectly* performing his or her task as applier of legal principles.

The third way in which judges make law is by use of legal reasoning, applying legal principles in a way that cannot be considered “discretionary”. Intuitively, this sort of judicial behaviour is not tantamount to “creating” law at all. However, legal reasoning is diverse in nature, and different sorts of judges can produce judgments of equally logical quality that reach different conclusions, or the same conclusion for significantly different reasons. An excellent example of this is found in Lon Fuller’s *The Case of the Speluncean Explorers*, which is a collection of fictional judgments of the justices in an appellate court ruling on a homicide case, the facts of which are loosely based on real events.¹³⁸ The judgments vary greatly in their reasoning, but are all approximately equally logical.¹³⁹ The diversity in legal reasoning is also demonstrated by the decisions of appellate courts, which often include several different judges’ interpretations or applications of laws. The result with which most of the appellate judges agree becomes the final outcome of the case. Of course, greater consensus does not equal greater logical quality.

One might accept that judges generally make law in only one of the ways described above. Alternatively, one could accept that some judgments become law by way of discretion and legal realism, but other judgments might be the application of a set of non-discretionary legal principles. Regardless of one’s conception of how judges generally

¹³⁷ See for example, *Law as a Means to an End*, *supra* note 36 at 66.

¹³⁸ Peter Suber, *The Case of the Speluncean Explorers: Nine New Opinions* (New York: Routledge, 1998) at 1-3.

¹³⁹ *Ibid* at 3-4.

make law, or how a judge made law in one case or another, each decision does indeed make law. Each decision does so by means of contributing another precedent to a reservoir of existing case law available regarding some point of law, often adding to the complexity of the pertinent legal issues.¹⁴⁰ To use the words of Brian Tamanaha, “[t]he law as a whole, furthermore, is not a comprehensive, logically consistent system, but rather is a jumble of various influences, which has never been fully rationalized.”¹⁴¹ Each case that is adjudicated must be adjudicated based on this jumble of various influences; in turn, each case that is adjudicated becomes *part of* this same jumble. Lawyers colloquially refer to some of the judicial precedents within the jumble as “good law” or “bad law”, but never “not law”.

2.1.3 Bureaucrats

But judges are not the only people who interpret and apply laws on a day-to-day basis. There are many government employees whose job it is to enforce various sorts of regulations, such as parking enforcement officials, police officers,¹⁴² and accountants at the Canada Revenue Agency. The decisions of such bureaucrats, like those of judges, serve a lawmaking function. Another similarity between the decisions of judges and those of bureaucrats is that both are subject to appeal or judicial review in various forms.

The citizen who is subject to the decision of such an official initially carries the burden of appealing the decision. Costs may be awarded to successful administrative law applicants in a way that is similar to costs awards in civil litigation.¹⁴³ For this reason, Canadian jurisdictions have put in place officials who scrutinize the conduct of other officials – ombudsmen.¹⁴⁴ Ombudsmen take complaints from persons who feel that an official has

¹⁴⁰ “The Price of Law”, *supra* note 96 at 964-967.

¹⁴¹ *Law as a Means to an End*, *supra* note 36 at 67 & 32. Tamanaha also quotes John Selden, who likened the common law to a ship, each plank of which is replaced during its voyage.

¹⁴² While the focus of this thesis is civil litigation, the purpose of this section is to show that bureaucrats serve a sort of lawmaking function. In turn, the next chapter is a discussion of how lawyers serve a lawmaking function. It is easier to compare the lawmaking function of lawyers to that of bureaucrats than it is to compare the lawmaking function of lawyers with that of judges. As such, police officers and enforcers of quasi-criminal regulations are relevant.

¹⁴³ Sara Blake, *Administrative Law in Canada*, 2nd ed (Markham: Butterworths, 1997) at 161.

¹⁴⁴ *Ibid.*

acted unfairly towards them.¹⁴⁵ After reviewing the complaint and making a pertinent investigation, ombudsmen can make recommendations to correct any problems that are present.¹⁴⁶

In addition to the significant cost of applying for judicial review, many of the decisions these government employees make are subject to review only if they are unreasonable, not if they are merely incorrect.¹⁴⁷ When there is a range of reasonable outcomes in a matter to be disposed of by a bureaucrat, and there is no chance that his or her decision will be judicially reviewed to ensure that the correct decision was made, this allows for inconsistent or arbitrary application of the law.

For example, imagine that Susan and Isabelle both have similar front yards with similar clutter around. Imagine that there is a city by-law prohibiting homeowners from having “unsightly yards”. Susan and Isabelle’s yards are both cluttered enough that it would be reasonable for the bylaw enforcement officer to issue a warning, but it would also be reasonable for him or her to ignore the clutter and not issue any ticket. The bylaw enforcement officer, however, sees Susan’s yard one day when he or she is in a foul mood, and issues Susan a ticket. However, several weeks later the same officer is more cheerful, and decides not to issue Isabelle a ticket after seeing her yard.

One can imagine the above hypothetical actually happening, but this set of circumstances would offend the rule of law.¹⁴⁸ “Rule of law” is a somewhat ambiguous term, in that many authors have provided many different definitions for it. For example, the Supreme Court of Canada has repeatedly remarked that the rule of law is a “textured” principle

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Another type of judicial review is available where the decision-maker used a process that was unfair. See, for example, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 24-26.

¹⁴⁸ It is worth mentioning that most bureaucratic departments have policy manuals dictating the way in which employees should interpret the regulations that they are tasked with enforcing. It is assumed that these policy manuals leave significant room for discretion, and that there are frequently unique real-world scenarios that are simply not anticipated by policy manuals. Judges also have a similar “policy manual” to dictate standard litigation procedure, namely the rules of court in each jurisdiction. The drafting of such policy manuals is a different kind of lawmaking task in its own right.

that encompasses many aspects that are beyond the scope of its decisions.¹⁴⁹ One such remark was made in the decision of *Reference re Secession of Quebec*, which defined the essence of the rule of law as the requirements that: laws necessarily apply both to the citizens and to the government; the establishment and maintenance of an order of laws; and any exercise of government authority must be based in a rule found within that order of laws.¹⁵⁰

Other definitions of the rule of law are consistent with that of the Supreme Court of Canada, but often include other nuances. For example, Neil MacCormick states that the rule of law requires some degree of predictability so that citizens can be relatively certain of a lawful course of action to take in any situation.¹⁵¹ MacCormick points out that a competing interest in most legal systems is the “arguable character” of law, meaning that results are not prejudicial in favour of one person or another – or the government for that matter – but that there are different possible outcomes when disputes arise.¹⁵² This arguable character, though, detracts from the predictability of law.¹⁵³

The working definition of the rule of law, for the purposes of this thesis, is: The principle that requires the state to interact with the citizens it governs based on rules, which must not be arbitrary in their formation, content, or application.¹⁵⁴ The rule of law is a key concept in this thesis, as it will be argued in **Part 5. The “Sale of Law” and Legal Services** that billing for legal services affects the rule of law.

Justices Lebel and Bastarache, writing a majority opinion of the Supreme Court of Canada, have explained that the rule of law is balanced with deference to legislative

¹⁴⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70.

¹⁵⁰ *Ibid* at para 71.

¹⁵¹ Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005) at 12-16.

¹⁵² *Ibid*.

¹⁵³ *Ibid*. Bear in mind that MacCormick’s detailed discussion of reconciling these two competing interests is tangential to this discussion.

¹⁵⁴ For the purpose of this thesis, this requirement also applies to the state in its role as enforcer of private law and adjudicator of disputes arising from the alleged breach of private law duties. This definition will be relied upon in **Part 5. The “Sale of Law” and Legal Services**, as well as in the next chapter.

authority in deciding administrative law cases.¹⁵⁵ Courts may reverse decisions of tribunals or bureaucrats if and only if they have made decisions that exceed the authority that was properly delegated to them by the legislature.¹⁵⁶ Ostensibly, Justices Lebel and Bastarache meant that legislatures never authorize administrative decision-makers to make unreasonable or arbitrary decisions. As such, any decision that is unreasonable or arbitrary will be beyond the decision-maker's jurisdiction, and "[a] decision maker may not exercise authority not specifically assigned to him or her."¹⁵⁷ Given this statement from the Supreme Court of Canada, it might seem odd that a bureaucrat could ever be said to "make law".

Assuming, however, that the bylaw enforcement officer in the above example strives to be consistent in his or her work, he or she might determine some rules of thumb to decide whether to issue a ticket to homeowners such as Susan and Isabelle. For instance, the officer might decide that if any clutter is arranged into piles, and there are no more than three piles of clutter on the front lawn, no ticket will be issued. When the officer is about ready to retire, he or she might train the new bylaw enforcement officer to follow the same procedure – and in turn the new officer might or might not implement that procedure in the future.

As described in the last section, legal realism is the view that a legal rule – including a city by-law – does not become "law" until the officials tasked with enforcing it actually apply it. Legal realists would say that the bylaw enforcement officer's "three-pile rule" is part of the law prohibiting unsightly yards, as long as it is the method used by the bylaw enforcement officer for deciding hard cases.¹⁵⁸ This is the way in which bureaucrats make law.

¹⁵⁵ *Dunsmuir*, *supra* note 147 at paras 27-33.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at para. 29.

¹⁵⁸ See for example Karl Llewellyn, *The Bramble Bush: On Our Law and its Study* (New York: Oceana Publications, 1930) at 12-13.

2.2 Lawyer-Generated Law

It is comparatively easy to understand what sort of law legislators, judges, and officials make and how they make it when viewed alongside “lawyer-generated law”. Lawyers’ ability to generate law is context-specific, and the law they generate may expire after certain events occur. In some contexts, lawyers cannot generate law; they can only generate mistakes of law. Furthermore, a lawyer’s advice ceases to be law once it is reviewed and accepted or rejected by a court.¹⁵⁹ Timing and context are closely connected here, though, because the contexts in which lawyers can only generate mistakes of law are the same contexts in which it is quite likely that a court or official will review the lawyer’s position, accepting or rejecting what the lawyer has to say.

An example of a lawyer-generated mistake of law is found in the case of *La Souveraine, Compagnie d’assurance générale v. Autorité des marchés financiers*,¹⁶⁰ in which the Supreme Court of Canada ruled on the issue of – among other things – mistake of law in a complex regulatory context. Quebec’s insurance regulatory body, the “AMF”, had charged an insurance company, “La Souveraine”, with 56 counts of the offence of selling insurance through an unlicensed broker, “Flanders”.¹⁶¹ Flanders, not La Souveraine, had sought a legal opinion from a law firm based in Manitoba, and shared a copy of that legal opinion with La Souveraine.¹⁶² The opinion stated, to put it simply, that Flanders would not require a particular licence in each province to sell the type of insurance policies being offered by La Souveraine.¹⁶³ The regulators in other provinces behaved just as Flanders’ lawyers predicted, without raising any issue, but the AMF in Quebec failed to reply to La Souveraine’s correspondence and laid 56 charges several months after receiving the correspondence.¹⁶⁴

¹⁵⁹ This is true in the sense that it ceases to be law as between that lawyer and that client. However, the lawyer’s advice does live on as a precedent for other lawyers advising clients on similar matters. Those other lawyers will seek to advise their clients competently, and they may recall how their colleagues, bosses, or principals advised clients with similar files in the past. This will be discussed further below.

¹⁶⁰ 2013 SCC 63, [2013] 3 SCR 756

¹⁶¹ *Ibid* at paras 1-11.

¹⁶² *Ibid* at para 79.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid* at paras 132-138.

The majority held that La Souveraine had not taken adequate steps to apprise itself of the law, and therefore could not avail itself of the excuse of “reasonable mistake of law”.¹⁶⁵ In *obiter*, the majority suggests that if La Souveraine had sought its own legal opinion from a practicing member of the Barreau de Quebec, it might be able to avail itself of that excuse.¹⁶⁶ Justice Abella dissented on this point, holding that the regulators in other provinces also misled La Souveraine as to the appropriate course of action.¹⁶⁷ However, both the majority and Justice Abella seem to agree that seeking a legal opinion can constitute a reasonable effort to apprise oneself of the law for the purposes of being acquitted of regulatory offences.

However, when a lawyer is rendering advice regarding regulatory compliance, such legal opinions are just that—opinions, rather than positive statements of law. The same is true when a lawyer advises his or her client to continue further with litigation. This is because, under those circumstances, a bureaucrat or a judge with legal authority will likely have a chance to review the lawyer’s opinion – albeit in a different form than the opinion presented to the client – and substitute his or her own opinion backed by coercive legal authority. However, when a lawyer advises a client to settle a civil claim early, this advice is usually confidential, and therefore shielded from the scrutiny of judges or public officials.¹⁶⁸

Empirical research has shown that many lawyers dominate their clients in the context of settlement negotiations, particularly in personal injury litigation, imposing settlements on them rather than requesting instructions.¹⁶⁹ That being said, this tendency does not seem to evenly apply to lawyers practicing in different areas of law,¹⁷⁰ but varies among

¹⁶⁵ *Ibid* at paras 68-82.

¹⁶⁶ *Ibid* at para 79.

¹⁶⁷ *Ibid* at para 137.

¹⁶⁸ Bear in mind, some situations call for court approval of some settlements, such as class actions or settlements made on behalf of children or people lacking mental capacity. See for example, *Ormrod v. Goodall*, 2002 NSSC 243.

¹⁶⁹ For an overview of pertinent empirical studies, see Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004) at 124-126.

¹⁷⁰ *Ibid*.

lawyers and firms.¹⁷¹ Assuming that enough lawyers engage in this sort of dominant dynamic with their clients, their advice crystallizes as “law” in a permanent way as soon as the client agrees to the recommended settlement. Occasionally, these clients change their minds later; however, courts do not allow litigants to reopen an action after it has been settled by means of a valid settlement agreement, even when it is the product of poor legal advice.¹⁷²

The concept of lawyer-generated law is not a groundbreaking one.¹⁷³ It is implicitly recognized by many law societies in Canada, albeit subtly. Upon admission to the legal profession, lawyers are required to swear an oath – or make an equivalent affirmation – to the effect that they will conduct themselves in a manner generally consistent with the ideals of the profession. Among these ideals included in a lawyer’s mandatory oath is that he or she “shall not pervert the law to favour or prejudice any one.”¹⁷⁴ Notice, especially the use of the verb “pervert”, and not another verb such as “misrepresent” or “falsify”. The verb “pervert” carries a connotation of causing an actual change, rather than an illusion. If lawyers must swear that they will not pervert the law, this must mean that the profession implicitly recognizes that the lawyer could pervert the law. The lawyer’s ability to pervert the law is necessarily a product of the lawyer’s law-making function.

David Luban has written about the lawyer’s lawmaking function in his or her role as advisor, not to be confused with the lawyer’s role as advocate.¹⁷⁵ Ostensibly, Luban would classify the negotiator as an advocate even when advising clients to settle or continue litigation. However, Luban’s discussion is closely related to this one, in that one of the major premises of his argument is that very few disputes are ever adjudicated, and as such the lawyer’s advice is “the primary point of intersection between ‘The Law’ and

¹⁷¹ *Ibid.*

¹⁷² This is true even if the litigant has received “poor advice” from his or her lawyer. This was stated in *obiter* in *Robertson v. Walwyn Stodgell Cochrane Murray Ltd.*, [1988] 4 WWR 283, 24 BCLR (2d) 385 at paras 5-6.

¹⁷³ Notable discussions of lawyer-generated law include Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law, Tentative Edition* (Cambridge: Harvard University Press, 1958) at 210-232; and *Legal Ethics and Human Dignity*, *supra* note 93 at 131-160, both of which draw on earlier materials that discuss lawyer-generated law.

¹⁷⁴ *Legal Ethics*, *supra* note 85 at 73-75.

¹⁷⁵ *Legal Ethics and Human Dignity*, *supra* note 93 at 131-132.

the people it governs, the point at which the law in the books becomes the law in action”.¹⁷⁶

Although Luban’s discussion focuses on the lawyer as advisor, he also comments on the lawyer’s role as advocate. He says that advocates must explain to their clients how the courts are likely to resolve the dispute in the event that the matter is adjudicated.¹⁷⁷ Generally, in the course of a civil litigation matter, this would entail the lawyer explaining the most likely outcome of litigation, the worst possible outcome, the best possible outcome, as well as risks and costs associated with litigation. At various checkpoints throughout the course of the file – such as upon receipt of a settlement offer from the other party – the lawyer may render one of two types of advice – advice to settle the claim at a given amount or advice to continue litigation.¹⁷⁸ The lawmaking implications of each type of advice are discussed briefly below.

The courts, of course, are public entities that are tasked with adjudicating private disputes between both public and private entities. And lawyers are the individuals who are authorized by the state to render advice to the disputants in relation to the manner in which they should resolve disputes that are within the jurisdiction of those courts. It is for this reason – as a matter of the “rule of law” – that we are concerned with lawyers’ advice in the alternative resolution of civil litigation disputes.

2.2.1 Lawyers’ Advice to Settle a Claim

One way in which a lawyer’s settlement advice makes law is in its precedent-setting function. The word “precedent” is ambiguous in legal practice, but the two common meanings are related. A legal “precedent” is typically a judicial or quasi-judicial decision on a case that is analogous to a matter that is currently in progress; a document saved on a

¹⁷⁶ *Ibid* at 131.

¹⁷⁷ *Ibid* at 131-133. At 133, Luban quotes Oliver Wendell Holmes, a legal realist, who described the law as being the “prophecies” of what courts would do.

¹⁷⁸ A third kind of advice is the “risk analysis”, discussed at **Section 5.1.3 Lawyers Who Capitulate and Lawyers Who Dominate**, among other places herein. However, if the client requests more specific advice from the lawyer recommending a course of action, the lawyer will most likely be limited to recommending settlement or recommending further litigation.

computer in a law office may also be referred to as a “precedent” if its format is similar to that of a document that the lawyer must frequently draft. A cursory Google search of the words “precedent for a settlement agreement” yields hundreds – if not thousands – of documents providing formats for settlement agreements. These sample agreements include terms that are treated as standard terms in settlement agreements, such as an “entire agreement” clause that precludes the parties from relying on terms that were verbally agreed upon but not incorporated into writing. Should a lawyer search for a precedent online when drafting a settlement agreement, this could easily influence the peripheral details of the final agreement that his or her client enters into.

However, settlement agreements can also have an even more subtle way of setting legal precedents. Lawyers learn from one another while articling, practicing together,¹⁷⁹ or through continuing professional development activities,¹⁸⁰ meaning that their experiences with certain files have a certain sort of precedential value, even if these experiences cannot be cited as authority. Randall Kiser observes that, because there are fewer and fewer civil trials, much of the decision-making in contemporary settlement negotiation is based on similar settlements rather than similar reported case law.¹⁸¹

Aside from setting precedents for future cases, lawyers make law in the immediate case in a purely legal-realistic sense. Many clients may be easily persuaded to follow their lawyers’ advice regardless of the quality of that advice, on account of a lack of knowledge of the law and a corresponding inability to judge the quality of their lawyers’ advice. Recall that above-cited empirical evidence has shown that personal injury plaintiffs have settlements imposed upon them by their lawyers with some frequency.¹⁸² However, depending on circumstances of unique cases, organizational clients might also be suggestible. Imagine a corporate officer who is assigned the task of handling a litigation matter. The first task for that officer is to retain a law firm. He or she will often

¹⁷⁹ See *Pandi v. Fieldofwebs.com Ltd.*, 2007 CanLII 34433 (ON SC) at para 18.

¹⁸⁰ See for example, Law Society of Saskatchewan, *CPD Program*, online: <<http://www.lawsociety.sk.ca/continuing-professional-development/cpd-program.aspx>>.

¹⁸¹ Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (New York: Springer, 2010) at 189.

¹⁸² *Risks, Reputations, and Rewards*, *supra* note 169 at 124-126.

seek a highly prestigious firm in order to avoid the scrutiny of other officers in the corporation, among other reasons.¹⁸³ Does the high price paid for legal advice, at the request of that corporate officer, gives that individual some corporate-political incentive to follow the advice of the lawyer he or she decided to retain?

2.2.2 Lawyers' Advice to Proceed Further with Litigation

As described above, there are two legal-realistic ways in which a lawyer's advice to settle a claim creates law: one sense in which the lawyer creates a sort of practical precedent that will influence the future professional conduct of lawyers who observed the settlement; and one sense in which the lawyer creates the law as it is ostensible to his or her client in the immediate case. When a lawyer advises a client to proceed further with litigation, the lawyer is creating law in a slightly different way. First, the lawyer is passively creating law by establishing that whatever potential settlement is available is not acceptable, where accepting or advancing an offer actively creates law. Second, in continuing the litigation and negotiation process, the lawyer necessarily creates some procedural norms, which to the legal realist are tantamount to procedural law – as opposed to the substantive law made by advice to settle – as long as lawyers commonly accept and practice these norms.

For example, many lawyers might be reluctant to settle claims before discovery of documents. In fact, the discovery rules were introduced in order to encourage settlement by way of reducing information asymmetry between parties to litigation. Whether or not mandatory disclosure of documents is an effective way to encourage settlement is open to debate,¹⁸⁴ but the discovery process produces an obvious disincentive to settling before that stage.

¹⁸³ Jens Beckert, "Where do prices come from? Sociological approaches to price formation" (2011) 9 *Socio-Economic Review* 757 at 764.

¹⁸⁴ George Lowenstein and Don A. Moore, "When Ignorance is Bliss: Information Exchange and Inefficiency in Bargaining" (2004) 33 *J. Legal Stud.* 37.

2.2.3 Lawyers as Litigators

Once litigation proceeds to trial or crucial chambers motions, the lawyer ceases to be the primary lawmaker. It is no longer the lawyer, but the judge, who is the primary communicator of laws to the client. The content of the communication may or may not be very similar. Perhaps Marshall McLuhan's theory that "the medium is the message"¹⁸⁵ might be a helpful way to conceptualize the difference between lawyer-generated law and judge-generated law. Imagine a litigant whose case has failed dismally at court. The losing party's lawyer communicated to him or her exactly the same legal rules applied by the judge, and consequently discouraged the losing party from proceeding with litigation. Surely for the losing party, then, the experience of having a lawyer communicate the law was much different than having the judge communicate the same content.¹⁸⁶

In the example above, it may look as though both lawyer and judge are communicating an independently existing set of rules to the client-litigant. However, when the lawyer communicated that legal content to his or her client, he or she was merely prophesizing about what the judge might do. In the same way, the judge is – at least in part – prophesizing about what the appellate courts might agree with should the losing party appeal his or her decision. The potential for – or likelihood of – inaccuracy in these prophesies means that the lawyer and judge are actively developing the laws that govern the individuals with whom they come into professional contact. As discussed in **Section 2.1.2 Judges**, as well as this section, judges are the primary communicators of law in the adjudication context, meaning that it is their inaccuracies or clarifications that cause developments in the law in this context.

However, just because judges are the primary communicators of law when they render a decision does not mean that lawyers cease to have a lawmaking function in the litigation context. To be sure, lawyers are the ones who advocate for one interpretation of the law

¹⁸⁵ Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: Mentor, 1964).

¹⁸⁶ This dichotomy can also be observed in the context of mediation. Lawyers generally perceive judges as very effective in their role as mediators, compared with non-judges. This perception exists in spite of the ostensible friction between the judge's roles as adjudicator and mediator. See Michaela Keet & Brent Cotter, "Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking About Judicial Ethics", (2012) 91 Can. Bar Rev. 363.

or another, and they influence judge-made law in this way. Of the various points of law argued by each lawyer, the judge will accept some and reject others, leading to a decision on at least one dispositive issue comprising a set of sub-issues. Regardless of whether one accepts the notion that judges have “discretion” to create law in some cases,¹⁸⁷ it cannot be denied that lawyers advance arguments with a view to influencing judges to decide cases in particular ways.¹⁸⁸

Many clients might not fully appreciate the complexity of this process, and instead attribute the results obtained to a lawyer’s quality relative to the quality of the opposing lawyer and that of the judge.¹⁸⁹ As such, a lawyer who wins at trial will be viewed as better than the opposing lawyer, meaning that lawyers have a reputational incentive to bring only strong cases to court. This may limit a risk-averse lawyer’s ability or inclination to advance novel arguments at court, thereby limiting the lawyer’s lawmaking function. However, notoriously few disputes are adjudicated at civil trials; as elaborated upon in the following chapter, the law that governs our daily conduct is markedly different than the law that is enforced by the state from time to time.

2.3 Everyday Law

In the absence of lawyers, individuals establish rules and procedures to govern their dealings with one another in all contexts of life. Roderick A. MacDonald discusses such rules and procedures at various points in his book *Lessons of Everyday Law*.¹⁹⁰ In particular, MacDonald tells the story of his time as a boy-scout leader, during which he observed the scouts’ interactions while playing team sports, including various systems of choosing teams.¹⁹¹ The children developed sophisticated systems of choosing teams so as to avoid attaching stigma to anyone for being the last player picked.¹⁹² One example of this included captains of teams selecting each other’s team members so that the least

¹⁸⁷ “Judicial Discretion”, *supra* note 135.

¹⁸⁸ This idea is revisited in **Section 5.1.2 Ambiguity and the Opportunity to Influence**.

¹⁸⁹ “The Price of Law”, *supra* note 96 at 972-976.

¹⁹⁰ (Montreal & Kingston: McGill-Queen’s University Press, 2002).

¹⁹¹ *Ibid* at 38-42.

¹⁹² *Ibid* at 39-40.

talented players were the first ones chosen to be on a team.¹⁹³ MacDonald then states that those rules and procedures resemble some of the rules and procedures found in our lives as adults, such as voting procedures in organizational settings.¹⁹⁴ That being said, those voting procedures are frequently, but not always, established through the drafting of formal documents by corporate counsel. MacDonald recognizes the tendency to formalize all interactions as adults, and states that some relationships are best left fluid and informal.¹⁹⁵

One example of a more structured set of everyday procedural law discussed by MacDonald is the division of assets. He describes a childhood memory in which he and his brother received a number of gifts, but were left to decide amongst each other how to divide those gifts.¹⁹⁶ The result was that one child divided the gifts into two piles, and the other child picked a pile.¹⁹⁷ However, there were some rules established between MacDonald and his brother, such as the process for identifying gifts that necessarily complement each other, such as chess pieces and a checkerboard.¹⁹⁸ Needless to say, MacDonald and his brother never consulted a lawyer to ascertain their rights in those circumstances.

Anecdotally, it is easy for anyone to recall a relationship during which he or she had a dispute that was resolved – without lawyers – by means of a structured or fluid process. Not every dispute is financially worth consulting a lawyer, and many disputes that are financially significant are still resolved through informal mechanisms for intangible reasons. This is what “everyday law” means; it is the kind of law that fills in the gaps left by the other sorts of law. It offers to individuals a degree of certainty that they have resolved their disputes amongst themselves in a manner that is fair, without resorting to lawyer-generated law – and potentially even judge-generated law – and all of the uncertainties inherent in those sorts of law. “The key is to understand how all these

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid* at 40-42.

¹⁹⁵ *Ibid* at 38-42.

¹⁹⁶ *Ibid* at 19-20.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

formal and informal processes work together, and when it is most effective and most just to deploy one or the other in regulating a field of social life.”¹⁹⁹

2.4 Lawyers and Plumbers

The importance of billing and the importance of a particular focus on civil litigation were discussed in **Chapter 1.1 Importance of Billing** and **Chapter 1.2 Why Focus on Civil Litigation?**, respectively. However, those discussions presumed that lawyers’ advice is distinguishable from advice rendered by other professionals and trades-people. In **Chapter 2.2 Lawyer-Generated Law**, it was argued that the advice rendered by lawyers is “the law”, but what does that mean for people in other professions and trades who render advice?

Consider the example of a plumber advising a homeowner. The homeowner has consulted the plumber regarding leaking water, the source of which is not known to the homeowner. The homeowner is also not familiar with the plumber, and has no knowledge of plumbing in general. The plumber hypothesizes that the leak is sourced from one pipe, referred to as “Pipe A”, *and* that fixing Pipe A will resolve the leak. In forming that hypothesis, though, the plumber is also hypothesizing that Pipe B and Pipe C are *not* leaking, and that the water is not coming from condensation or leaks in the exterior of the house.

There are three stages in the homeowner’s problem: the period during which the homeowner notices a leak, but before consulting with the plumber; the period after having consulted the plumber, but before the plumber has repaired the problem; and period after the plumber has repaired the problem, during which the homeowner can observe whether or not the plumber’s work was effective. Until the third stage, the homeowner lacks the information required to know the source of the leaking water. This lack of information creates a state of affairs in which any or all of the possible sources are almost equally likely from the perspective of the homeowner. Homeowners typically are able to observe the effectiveness of their plumbers’ work after the fact.

¹⁹⁹ *Ibid* at 42.

One difference between lawyers and plumbers, then, is that a significant part of the lawyer's role is to advise the client as to an appropriate course of action in relation to the client's problem, while the plumber's role is almost exclusively to *fix the problem*. This is true because, when homeowners seek the services of a plumber, presumably almost all of those homeowners follow through to the final stages of the plumbing process, in which plumbers replace or patch the leaky pipes, and the homeowners are able to observe whether or not the plumbers' prophecies were correct. However, very few clients follow through to the final stages of civil litigation. Many clients, then, will never have an opportunity to observe whether their lawyers' risk analysis and advice was accurate, because they will settle their claims long before it is adjudicated.

This further supports the proposition that lawyers are fulfilling a lawmaking function when they provide their clients with risk analyses, advice to litigate further, or advice to settle.²⁰⁰ No one would say that their plumber serves a "leak-making function", unless they are making a joke about an incompetent or dishonest plumber. However, this is only because individuals have the ability to observe the accuracy of the plumber's prophecies more often than not. Lawyers, on the other hand, rarely have their prophecies examined through the full litigation process, as discussed above in **Chapter 2.2 Lawyer-Generated Law**. This is the essence of how lawyers' advice in relation to civil litigation is different than the advice of other professionals and trades-people.²⁰¹

2.5 Law as a Means to an End

In the previous chapters in this part, a variety of different sorts of law were described. There are many different sorts of law, including very formal legislation and judicial interpretations of that legislation, bureaucratic policies of varying degrees of formality,

²⁰⁰ Erwin Schrödinger's thought experiment provides a useful analogy for this. It is unnecessary to reproduce the details of his thought experiment here. Schrödinger theorized, in relation to quantum physics, that a particle exists in more than one state until and unless it is observed. See for example John Gribbin, *In Search of Schrödinger's Cat* (New York: Bantam Books, 1984) at 203-208. Similarly, from the perspective of non-lawyers, liability arising from disputes in society exists with multiple outcomes until that liability is observed. Lawyers are the objects used for observing liability.

²⁰¹ This is probably also a way in which lawyers' advice in the context of civil litigation differs from lawyers' advice in other contexts. That question is beyond the scope of this thesis.

lawyers' advice to clients as to conduct that will comply with legal rules, lawyer's advice to clients regarding how to resolve disputes that are before the courts, and informal sets of rules agreed upon between private persons in the absence of lawyers. Roderick MacDonald was quoted above, at the end of **Chapter 2.3 Everyday Law**, for the proposition that these formal and informal types of law can operate together to regulate different aspects of life.

These types of law have something in common. In modern times, they are used as means to accomplish various objectives.²⁰² For the purpose of this thesis, lawyers' advice to clients regarding how to resolve disputes is the relevant type of law that is used as a means to an end; the "end", for the lawyer, is to earn money in exchange for this advice. Presumably, this discussion can appropriately focus on privately practicing lawyers, as the main focus of this discussion is fees charged in relation to civil litigation services. To be sure, many privately practicing lawyers do their jobs as salaried employees, and many receive incentives for bringing more income into their firms regardless of whether they are partners or employees in their firms. As such, this thesis relies heavily on the premise that lawyers not only create law while advising clients, but that one of their major objectives while performing that task is to yield greater total income for their firms.

Before one can fully understand the issue of using the law to render a profit, one must also understand that society used to view law in a non-instrumental way. This means that as late as the 19th century, societies – at least those found in the British Commonwealth – understood law to be created by God or otherwise naturally existing, and that legislatures and courts merely proclaimed the law.²⁰³ This changed in the late 19th century during the "aftermath" of the Enlightenment, as experts and laypeople alike began to think about law from a more social-scientific perspective, realizing that law was primarily a tool for ordering society, rather than a set of moral facts.²⁰⁴ Brian Tamanaha discusses several

²⁰² This is a major premise in *Law as a Means to an End*, *supra* note 36.

²⁰³ *Ibid* at 11-20.

²⁰⁴ *Ibid* at 20-23.

sources of legal instrumentalism, but this thesis is concerned primarily with that of the legal profession.²⁰⁵

There are several types of legal instrumentalism exhibited by the legal profession, according to Tamanaha, including “cause litigation”, which includes for example human rights advocates who argue for one cause or another.²⁰⁶ More specifically, Tamanaha identifies three ways in which the business of legal practice fosters instrumentalism in the legal profession: first, “from the standpoint of the lawyer, the practice of law is a job like any other, a means to their own financial gain”; second, lawyers’ role itself is to serve their clients’ interests; and third, in fulfilling the duties associated with that role, lawyers will incidentally argue for interpretations of the law that are instrumental for clients, and in many instances – such as cause litigation – lawyers argue interpretations of the law that are instrumental for themselves.²⁰⁷

Indeed, Tamanaha’s book, *Law as a Means to an End*, has an entire chapter discussing instrumentalism in the modern American legal profession.²⁰⁸ This chapter focuses on clients’ instrumental use of legal counsel and legal counsel’s instrumental use of legal doctrines; but these are closely linked to lawyers’ instrumental use of their role for profit. This can be gleaned from Tamanaha’s discussion of the steadily increasing number of lawyers per capita in the U.S.²⁰⁹ In 1951, there was 1 lawyer per 695 persons, compared with 1 lawyer per 264 persons in 2001.²¹⁰ This has led to an increase in the number of lawyers competing for jobs at firms and in turn an increase in competition between firms for high-paying clients.²¹¹ According to Tamanaha, this means that firms that are unwilling to adjust their ethical standards to their clients’ demands will lose their clients, thereby compromising the firm’s income.²¹²

²⁰⁵ Tamanaha sees legal instrumentalist thinking in general as corrosive to the rule of law. This concept is addressed in **Part 5. The “Sale of Law” and Legal Services**. This part merely explains the instrumentalism of the legal profession. See *ibid* at 215-245.

²⁰⁶ *Ibid* at 156-171.

²⁰⁷ *Ibid* at 55.

²⁰⁸ *Ibid* at 133-155.

²⁰⁹ *Ibid* at 136-138.

²¹⁰ *Ibid*.

²¹¹ *Ibid*.

²¹² *Ibid*.

While Tamanaha focuses heavily on the issue of the client's instrumental use of the lawyer, he does not ignore the issue of the lawyer's instrumental use of clients, namely profit. For instance, he states that padding of time sheets²¹³ and suboptimal settlements of contingent-billed matters²¹⁴ are commonplace in the American legal profession. Both of those issues, among others, are discussed in the next Part, which focuses on the conflict of interests between lawyers and clients that arises as a result of any fee arrangement.

²¹³ *Ibid* at 134.

²¹⁴ *Ibid* at 147-148.

3. The Conflict of Interests Presented by a Lawyer's Fee

“While in every lawyer-client relationship there is inherent tension between the interests of the lawyer – for example, in the financial success of his or her law practice – and those of the client, the issue of ‘lawyer-clients’ conflict deals only with more extreme cases. It deals with those conflicts of interest which have the potential to undermine the lawyer’s ability to represent the client properly and, as well, to create the perception that the client’s interests have not been properly represented.”²¹⁵

As mentioned in **Chapter 1.3 Literature Regarding Billing in General**, much of the literature pertaining to fees for legal services argues that one type of billing arrangement has advantages or disadvantages compared to all other types. In the course of these discussions, some authors, such as Duncan Webb, acknowledge that there is an inevitable tension between lawyer and client in any fee-for-services arrangement.²¹⁶ Alice Woolley, arguing for more effective regulation of legal fees, states that simply encouraging or requiring lawyers to rely on alternatives to hourly billing would only be as effective as a “rearrangement of deck chairs on the Titanic”, because other types of billing arrangements are also open to abuse.²¹⁷ The contrast between these points is that Webb’s focuses on an inherent and inevitable problem in the lawyer’s role, while Woolley’s focuses only on the professional misconduct of some lawyers. This part, and this thesis in general, tends to focus on the inherent problems of the private lawyer’s role, while clearly unethical billing practices provide unambiguous examples of those problems.

In other words, this thesis argues that the fiduciary-for-hire relationship presents an atmosphere in which the lawyer’s financial interest could potentially affect the way in which that lawyer advises and represents his or her client. Unethical billing practices – such as spending unnecessary hours on a task or performing unnecessary tasks in order to collect a higher fee – are unambiguous examples of the way in which a client might potentially suffer as a result.

²¹⁵ Alice Woolley, et al, eds., *Lawyers’ Ethics and Professional Regulation* (Markham: Lexis Nexis, 2008) at 332.

²¹⁶ “Killing Time”, *supra* note 48 at 39-40.

²¹⁷ “Evaluating Value”, *supra* note 30 at 340.

The purpose of this part is *not* to argue that lawyers could ever be disqualified or disciplined for a conflict of interests as a result of accepting fees, *per se*. Indeed, the profession recognizes this conflict of interest and law societies see this as allowable.²¹⁸ Some regulators, such as the Nova Scotia Barristers' Society, have gone so far as to *explicitly allow lawyers to charge clients for their services*, by way of deeming clauses in their respective codes of professional conduct that state that the exchange of money for legal services is not a conflict of interests.²¹⁹ This part of this thesis will show that such clauses create a legal fiction. Understanding the nature of this legal fiction is important for those tasked with regulating legal fees, and crucial for readers of this thesis.

As mentioned above, Alice Woolley has suggested changes to the regulation of legal fees in order to more effectively regulate unethical billing. The conflict of interests presented by billing described in this part – and the associated problems discussed throughout this thesis – is the context in which law societies regulate fees for civil litigation services. If and when law societies make changes to regulations of legal fees, they would be wise to avoid painting all legal services with the same proverbial brush. Thus, an understanding of the unique issues affecting civil litigation services is important when making changes to such regulations.

This part consists of two chapters: the first provides a working definition of conflicts of interest by distinguishing between broad and narrow definitions provided in other literature, and explains that the broader definition would necessarily include every commercial transaction and would therefore not provide a useful tool for analyzing legal fees in particular; the second identifies ways in which common forms of billing arrangements can potentially harm clients, which is one requirement of the working definition of conflicts of interest provided in the first chapter of this part.

²¹⁸ M. Deborah MacNair, *Conflicts of Interest: Principles for the Legal Profession* (Toronto: Canada Law Book, 2013) at 14C-3-14C-5.

²¹⁹ *Ibid.*

3.1 Defining “Conflicts of Interest”

There are different ways to define the term “conflicts of interest”. The broader definitions include those situations in which two parties have distinct interests, creating a risk of prioritization of one over the other. The narrower definitions are limited to situations in which a principal’s interests are inconsistent with those of his or her agent in such a way that undermines the agent’s ability – or perceived ability – to execute his or her duties. Ultimately, the Canadian legal definition of conflicts of interest will be used, even though this discussion is not intended to describe grounds for a legal challenge; lawyers are obviously allowed to charge fees despite the conflict of interests described herein. To illustrate the conflicting interests of lawyer and client, the third section of this chapter shows that every market transaction involves a conflict of interest, but not all of them are legally significant ones.

3.1.1 Broad and Narrow Definitions of Conflicts of Interest

The first way to define “conflicts of interests” is broadly, including all sorts of situations in which an agent has more than one consideration at play when acting for a principal, potentially affecting his or her objectivity. These definitions are not always useful because, in the words of Samuel Isacharoff, “[p]itched so broadly, the more difficult enterprise may be identifying nonconflicted settings”.²²⁰

The second way to define “conflicts of interests” is using a narrow definition. The current Canadian legal definition for conflicts of interests is a narrow definition, as will be explained in the next section of this thesis. Narrower definitions exclude situations in which the risk of harm is remote; they include only situations in which opportunism or loss of objectivity is likely and potentially serious.²²¹

²²⁰ Samuel Issacharoff, “Legal Responses to Conflicts of Interest”, in Don A. Moore, et al., eds, *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (New York: Cambridge University Press, 2005) 189 at 191.

²²¹ *Ibid.*

Ultimately, then, the definition that will be used herein is the current Canadian legal definition of lawyer and client conflicts of interest. That definition is described in the next section of this thesis.

There are two apparent advantages to this choice. First, this is the standard to which lawyers are held when determining whether or not they have a conflict of interest in contexts other than billing. The consistent use of one definition shows that there is a discrepancy between how lawyers treat billing as opposed to other sources of conflicts of interest. The use of a different definition might show that there is some problem, but only if the reader accepts the different definition as a legitimate one.

Second, readers will be at least somewhat familiar with the Canadian legal definition of conflicts of interest. As such, using that definition avoids confusing readers, and provides generally useful information to readers. Furthermore, the use of any other definition would require a justification for deviating from the commonly used legal definition.

3.1.2 The Canadian Legal Definition of Conflicts of Interest

The rule prohibiting lawyers from acting for a client in the presence of conflicting interests is rooted in professional ethical rules found partly in common law and partly in the codes of professional conduct in jurisdictions around the world.²²² Arguably, such rules were institutionalized based on values found in Matthew 6:24 of the King James Bible.²²³ That verse reads: “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.” To be sure, “mammon” means money or wealth. However, it is only a coincidence that the second part of Matthew 6:24 has to do with the pursuit of profit, which is also a major theme of this thesis. It is the first part of that verse which is cited in discussions of conflicts of interest.²²⁴

²²² See *Conflicts of Interest*, *supra* note 218 at 3-1 – 3-15.

²²³ *Ibid* at 3-3.

²²⁴ See, for example Charles W. Wolfram, *Modern Legal Ethics* (St. Paul: West Publishing Co., 1986) at 312. Wolfram does not mention any overlap between legal conflicts of interest and the tension between virtue and money. It is this tension that is the subject of the second part of Matthew 6:24.

For the purposes of this thesis, the most suitable test is the common law test of fiduciary duty. From time to time, clients sue their lawyers for breach of fiduciary duties, including the duty to avoid conflicts of interest. As such, the first subsection in this section discusses the fiduciary duty that binds lawyers to act towards their clients with loyalty; the second subsection discusses the duty to avoid conflicts subsumed under the duty of loyalty; and the third subsection discusses the test for establishing what constitutes a lawyer-client conflict of interest.

3.1.2.1 The Fiduciary Duty of Loyalty

The general problem of billing for legal services is not best conceptualized as only an inconsistency between the interests of the lawyer and the client, but also as an inconsistency in the lawyer's role as a fiduciary. A fiduciary is bound to act with the beneficiary's interests at heart, not his or her own interests;²²⁵ a person who has been hired to do something, on the other hand, is seeking a profit. In this way, the idea of a fiduciary-for-hire contradicts itself.

Consider, for example, *Strother v. 3464920 Canada Inc.*,²²⁶ in which a tax lawyer acted for two companies that were in direct competition with each other, and eventually began sharing in the profits of one of those companies.²²⁷ Both companies profited by means of entering into contracts with American film companies that could benefit from Canadian tax laws as a result of such contracts.²²⁸ While Strother was representing the companies, there was a change in Canadian tax laws that seemingly made this kind of tax shelter business impossible; however, Strother became aware of a way to continue operating tax shelter businesses in the film industry.²²⁹ Strother informed his client that shared profits with him, "Sentinel", of this way to continue doing business largely as usual; but he did

²²⁵ See for example Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83 Can Bar Rev 35.

²²⁶ [2007] 2 SCR 177, 2007 SCC 24 (CanLII).

²²⁷ *Ibid* at paras 2-21.

²²⁸ *Ibid*.

²²⁹ *Ibid*.

not inform his client, “Monarch”, of the same strategy.²³⁰ The majority of the Supreme Court of Canada held that Strother, in developing a business interest in Sentinel, had breached the fiduciary duty it owed to Monarch; in part, this was inferred from the fact that Strother had failed to inform Monarch of a tax strategy that would have helped it profit (and compete with Sentinel, from which Strother received a share of the profits).²³¹ The majority also annunciated the principle that the use of a client’s confidential information for the lawyer’s own benefit or for the benefit of another client would also be a breach of fiduciary duty, but held that Strother had not actually used any of Monarch’s confidential information for his own benefit.²³²

In contrast, consider the benefit a lawyer derives from billing a client on terms set by the lawyer or the firm. Lawyers generally have access to confidential information regarding their clients’ ability to pay and the degree of importance the clients attribute to their matters. Are lawyers not able to use this information to prioritize some files over others? Is this sort of prioritization not, in fact, part of making a law firm a successful business endeavour? Clearly, the benefit derived from billing and file prioritization is a practical necessity for the legal profession to exist. However, this benefit is conceptually inconsistent with the nature of a fiduciary duty.

Strother, supra, and the contrasting example of billing, illustrate problems within the “loyalty” aspect of the lawyer’s fiduciary duty.²³³ The content of the duty of loyalty is sometimes compared with the content of the abstract expectations placed on a friend; specifically, that a friend will place a friend’s interests first, before those of his or her own, and before those of third parties.²³⁴ But does billing really constitute a departure from the lawyer’s duty of loyalty? After all, the privately practicing lawyer is only loyal *because* the client pays that lawyer. As will be discussed in **Subsection 3.1.2.3 What Constitutes a Lawyer-Client Conflict of Interest?**, this is permitted by law. However, as

²³⁰ *Ibid.*

²³¹ *Ibid* at paras 66-70.

²³² *Ibid* at 109-111.

²³³ Loyalty is, of course, a very important aspect of the fiduciary duty, and the two have been described as “intertwined”. See *R. v. Neil*, [2002] 3 SCR 631, 2002 SCC 70 at para 16.

²³⁴ *Lawyer’s Ethics and Professional Regulation, supra* note 215 at 15-17.

explained in the opening paragraphs of this part, the purpose herein is not to outline grounds for a *legal* challenge to lawyers' fees based in the law of conflicts of interest, but rather an explanation of the *conceptual* way in which lawyers' interests are at odds with those of their clients when it comes to billing, using the Canadian legal definition of conflicts of interest as context. For example, if Fred pays Joseph to be his friend, they are not really friends, even if they live in a jurisdiction that has passed a law called the *Hired Friends Act*, and even if Fred and Joseph are in full compliance with that piece of legislation. The reader may or may not be skeptical about the proposition that the lawyer uses a client's confidential information for billing purposes; after all, that information is often only shared for the purpose of collecting a fee from the client. As will be shown in the following subsection, the loyalty aspect of a lawyer's fiduciary duty not only requires a lawyer to avoid misusing the client's confidential information, but also a duty to avoid conflicts of interest.

3.1.2.2 The Duty to Avoid Conflicts of Interest

The duty to avoid conflicts of interest had long been a fundamental aspect of the legal profession. For a very long time, it was unclear whether or how the law of conflicts of interest related to the duty of loyalty and fiduciary duties in general. However, in 2002 when the Supreme Court of Canada issued its decision in *R. v. Neil*,²³⁵ it became very clear that the duty to avoid conflicts is one of three pillars of the lawyer's duty of loyalty – the other two being the duty of candour and a duty of zealous advocacy.²³⁶

Neil, supra, involved a conflict between two current clients of a law firm. As such, that judgment says a lot about what constitutes a client-client conflict of interest. The type of conflict with which this thesis concerns itself, though, is lawyer-client conflicts of interest. The topic of billing is about – among other things – the tension between the lawyer's financial interests and the client's legal interests. As such, the next subsection discusses what constitutes a lawyer-client conflict of interest.

²³⁵ *R. v. Neil, supra* note 233.

²³⁶ *Ibid* at para 19; Brent Cotter, Richard Devlin, & Colin Jackson, "Locating Magnetic North: Incorporating the Duty of Loyalty Into Canadian Codes of Professional Conduct" 93 *Can Bar Rev* [forthcoming in 2015].

3.1.2.3 What Constitutes a Lawyer-Client Conflict of Interest?

Some client-client conflict cases are helpful in determining what constitutes a conflict of interest between lawyer and client. One such example of a client-client conflict case is *Canadian National Railway Co. v. McKercher LLP*.²³⁷ McKercher LLP had acted for Canadian National Railway Co. in relation to many files over a period of time, but McKercher LLP had been approached by a representative plaintiff in a pending class action lawsuit against CNR, which was potentially worth 1.75 billion dollars. The partners of McKercher LLP terminated the firm's retainers with CNR, and pursued the much more potentially lucrative contingency fee to be earned by acting against CNR.²³⁸ For the purposes of this subsection, the Supreme Court of Canada identified three particularly relevant principles in the law of conflicts of interest.

First, there are two kinds of prejudice that a client may suffer as a result of a legally significant conflict of interests: the misuse of confidential information; and the failure to effectively represent a client.²³⁹ The first of those concerns “reinforces the lawyer’s duty of confidentiality – which is a distinct duty – by preventing situations that carry a heightened risk of a breach of confidentiality.”²⁴⁰ The second of those concerns is also distinct from the duty to avoid conflicts of interest, but it is another aspect of the lawyer’s duty of loyalty.²⁴¹ Misuse of confidential information was briefly discussed in **Subsection 3.1.2.1 The Fiduciary Duty of Loyalty**. This discussion has extended from the assumption that billing, *per se*, is a completely appropriate use of the client’s confidential information. As such, something more must form the basis of the conflict of interests argued herein. Indeed, it is argued in **Chapter 3.2 The Substantial Risk of**

²³⁷ [2013] 2 SCR 649, 2013 SCC 39.

²³⁸ *Ibid*. While this case does raise some interesting implications for this thesis in the way of selling effective legal representation to the highest bidder, it is not the quintessential example of tension between lawyer and client in terms of establishing fees and performing work. The reason for introducing this case into this discussion is that the Saskatchewan Queen’s Bench and the Saskatchewan Court of Appeal erred in their statements of the law on conflicts of interest, and the Supreme Court of Canada clarified the relevant principles, referring the case back to the Queen’s Bench.

²³⁹ *Ibid* at paras 23-25.

²⁴⁰ *Ibid* at para 24.

²⁴¹ *Neil, supra* note 235 at para 19.

Harm to the Client that there is a substantial risk that some clients' confidential information will be used inappropriately, and that some clients may be ineffectively represented. The substantial risk principle is discussed below, following a brief discussion of the "bright-line rule".

Second, in many situations of client-client conflicts, a lawyer is simply not permitted to concurrently represent two clients with adverse interests. This is called the "bright-line rule". The bright-line rule only applies in circumstances where: the "immediate interests of clients are *directly* adverse in the matters on which the lawyer is acting";²⁴² the conflicted interests are legal in nature, rather than strategic or commercial;²⁴³ the firm has been *genuinely* retained by the client complaining of a conflict of interest, rather than tactically retained in order to preclude the firm from representing an adverse party;²⁴⁴ and the client must realistically expect that a firm will not act against it in unrelated matters, excluding some "professional litigants" from the benefit of the bright-line rule.²⁴⁵ These qualifications do not require lengthy elaboration herein, because the bright-line rule does not apply to the sort of conflicts of interest that concerns this thesis, namely lawyer-client conflicts.

Third, where the bright-line rule does not apply – such as in lawyer-client conflicts – "the question becomes whether the [conflicting interests create] a substantial risk that the representation of the client would be materially and adversely affected."²⁴⁶ The applicability of this test to lawyer-client conflicts is confirmed in the commentary to Rule 2.04(1) of Saskatchewan's *Code of Professional Conduct*.²⁴⁷ "Materially and adversely affected" means the misuse of confidential information or the failure to effectively represent a client, as these are the two sorts of prejudice with which the law of conflicts of interests is concerned.

²⁴² *McKercher, supra* note 237 at para 33.

²⁴³ *Ibid* at para. 35.

²⁴⁴ *Ibid* at para. 36.

²⁴⁵ *Ibid* at para. 37.

²⁴⁶ *Ibid* at para. 38.

²⁴⁷ *Code of Professional Conduct, supra* note 40.

There is a legal problem in applying the substantial risk principle to billing for legal services. Specifically, Saskatchewan’s *Code of Professional Conduct* contains a legal fiction, within the commentary to Rule 2.04(28) – the rule that governs business transactions with clients – which states that “[t]he remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.”²⁴⁸ Unfair or unreasonable legal fees are prohibited by a separate rule within the *Code*.²⁴⁹ Without this clarification, all legal fees would often fit squarely within the *Code*’s definition of conflicting interests.

Recall from the opening paragraphs of this part that a major objective of this part is to show that deeming clauses that specifically allow lawyers to charge their clients fees without those fees being subject to the rules against conflicts of interest *is indeed a legal fiction*. This can be done by way of a two-part process. First, the following section will show the way in which a lawyer’s interests are at odds with those of his or her client in the course of charging a fee for legal services.

Second, **Chapter 3.2 The Substantial Risk of Harm to the Client** is a discussion of the substantial risk of harm to clients arising from various kinds of billing arrangements. This discussion has broad importance to this thesis; juxtaposing the nature of the risks posed by different kinds of billing arrangements will show the reader that *different billing arrangements* amount to systems of incentives that encourage providing *different advice to clients*. How might those incentives influence a lawyer’s advice – or risk analysis – in a civil litigation matter? For that matter, how can that influence be measured or observed? Can a risk analysis be “correct”, or is it accurately called a “legal opinion”? Do financial incentives sometimes create bias in forming opinions? When financial incentives vary between different actors, will this be a factor in the formation of their differing opinions?²⁵⁰ This thesis is concerned with the rule of law, and unevenness is the crux of the problem identified by it. In turn, that unevenness cannot be fully appreciated

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid* R. 2.06.

²⁵⁰ It is assumed that their opinions will not be identical. Could various lawyers form extremely similar risk analyses? These sorts of questions regarding the correctness or incorrectness of legal opinions relate back to the concepts discussed in **Part 2. The Lawmaking Function of Lawyers**.

without an appreciation for the friction between co-transactors in the marketplace; this friction will be described in the following section.

3.1.3 The Conflicting Interests of Lawyers and Their Paying Clients

Establishing and collecting prices in exchange for goods and services involves a conflict of interests that has been observed and discussed by sociologists over the past century. One of the earlier and best-known statements of this is attributed to Max Weber, who wrote:

Money prices are the product of conflicts of interest and of compromises; they thus result from power constellations. Money is not a mere “voucher for unspecified utilities,” which could be altered at will without any fundamental effect on the character of the price system as a struggle of man against man. “Money” is, rather, primarily a weapon in this struggle, and prices are expressions of the struggle; they are instruments of calculation only as estimated quantifications of relative chances in this struggle of interests.²⁵¹

When Weber says this, he means that purchasers and sellers of goods and services are in a conflict of interest inasmuch as the immediate price of those goods and services is concerned. In the longer term, the purchasers and sellers will also want to be able to consistently negotiate favorable – but sustainable – prices from their counterparts in these transactions. Presumably, the interests of purchasers will conflict with the interests of sellers as to price in every sort of market. There are, however, special characteristics of clients as purchasers and lawyers as sellers that must be examined to understand the special ways in which their interests conflict during the formation of the price of legal services.

Gillian Hadfield describes the difference between two types of markets in price formation: competitive and non-competitive.²⁵² In competitive markets, prices will generally be formed by way of a formula that calculates the cost of providing a good or service, plus a markup for profit.²⁵³ Here, the “conflict of interests” described by Weber presumably works in favor of the purchaser, because the purchaser can find another seller for similar goods, thus giving the purchaser leverage to negotiate a better price.

²⁵¹ Max Weber, *Economy and Society* (New York: Bedminster Press, 1968) at 108.

²⁵² “The Price of Law”, *supra* note 96 at 956, 963.

²⁵³ *Ibid.*

Anecdotally, a familiar example of this is a local grocery store that sells milk and eggs “at cost” in order to draw in customers, who will hopefully also purchase other merchandise on which the store can turn a profit. Prices in non-competitive markets, though, are typically formed through the seller’s estimate of how much they can possibly charge before purchasers simply choose to do without the good or service offered.²⁵⁴ As long as the negotiable price exceeds the cost of providing the goods or services, this state of affairs weighs in favor of the seller. To be sure, Hadfield describes the market for legal services as a non-competitive market.²⁵⁵

The non-competitive market for legal services forms prices by means of a “Weberian” conflict of interests that is different from that of many other non-competitive markets. What makes the formation of prices for legal services²⁵⁶ unusual is that when the client retains the lawyer, thereby “purchasing” the services, there is never – nor can there ever be – a complete agreement as to the approximate amount of money to be exchanged for the approximate amount of input from the lawyer. The lawyer and client merely agree upon a formula for calculating fees, such as a function of the number of hours the lawyer spends on the file, or a function of the total settlement proceeds received by the plaintiff. Even when a flat fee is negotiated, as will be discussed in the next chapter, the amount of work provided by the lawyer is still a variable that is not conclusively settled in the formation of the contract. This is especially significant since legal services are a “credence good”, meaning that the seller of legal services also advises the purchaser as to how many units of legal services the purchaser should buy. The implication of this state of affairs is that the lawyer may manipulate the quality or quantity of work done on the client’s file for a reason – namely profit – other than serving the client’s best interests. As was discussed in **Chapter 2.2 Lawyer-Generated Law**, the lawyer advises to clients to do things like proceed further with litigation or to settle early; and, as will be discussed in the next chapter, differences in the financial aspects of relationships between lawyers and clients provide lawyers with financial incentives to provide different advice. If such

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid* at 956, 963, 999.

²⁵⁶ Bear in mind that this thesis pertains to civil litigation services only, but this statement may also apply to other types of legal services.

advice is rendered without full consideration of the client's best interests, or if it is coloured with the lawyer's self-interest, then the client can suffer a great deal of harm as a result.

For example, many clients exhaust their budgets midway through a file and must self-represent into the later stages of litigation. Presumably, many clients are aware of their lawyers' hourly rates at the outset, but are unaware of just how many hours their lawyers will spend on a file. This inference can be made if one accepts the results of one study, which shows that 53% of self-represented litigants had retained a lawyer at the outset of their file.²⁵⁷ While there are other reasons that represented parties might become self-represented parties, Julie Macfarlane – being the principal researcher responsible for the above-mentioned study – explains that this usually happens because clients have limited access to funds, especially after borrowing money to deposit into the trust accounts of their respective lawyers.²⁵⁸

The interests of professionals and clients come into conflict even in situations where a third party insurer is paying for the services of an insured client. For example, in China, doctors stand to earn a greater profit where they prescribe more expensive medications.²⁵⁹ Research has shown that they do in fact prescribe more expensive medications to insured patients, without regard to the patient's needs.²⁶⁰ Here, a factor – namely the type of medication prescribed – affects the doctor's profit and the quality of care received by the patient, and doctors commonly manipulate that factor in favor of their own profit.

To concisely state the conflicting interests of the client and the professional, the client wishes to receive excellent service, while the professional wishes to earn money in return for his or her services. At a glance, these interests do not appear to be in conflict.

However, consider that the professional's profit is a function of certain factors; these

²⁵⁷ Julie Macfarlane, "Now You See Them, Now You Don't: Your clients are just loaned to you by VISA, you do not own them" (2 February 2014) online: <<http://drjuliemacfarlane.wordpress.com/>>.

²⁵⁸ *Ibid.*

²⁵⁹ Fangwen Lu, "Insurance Coverage and Agency Problems in Doctor Prescriptions: Evidence From a Field Experiment in China" (March 2011) online: <<http://ecnr.berkeley.edu/vfs/PPs/Lu-Fan/web/lu.jmp.pdf>>.

²⁶⁰ *Ibid.*

same factors that affect the professional's profit also affect the quality of services rendered. For simplicity's sake, consider hours spent on a file as one example of a factor that affects the professional's profit. The more time for which the professional can bill the client, the more the professional can profit. However, if the lawyer spends too much time working on the file, and corresponding with the client, this could become time-consuming and frustrating for the client. While reading the following chapter, consider the other factors that affect both the lawyer's profit and the quality of service, such as the amount of settlement proceeds, time-efficiency, and – in the case of value-based billing – the air of “value”.

3.2 The Substantial Risk of Harm to the Client

Lawyers' advice will, at least potentially, be influenced by the lawyer's financial self-interest. For example, clients subject to an hourly billing arrangement who have more resources immediately available to them are intuitively more likely to receive the lawyer's advice to proceed with litigation. Lawyers with clients who fail to pay their interim invoices will likely withdraw from representation of those clients.²⁶¹ Each type of billing, though, poses its own problems for the lawyer's objectivity or quality of service. The unique problems of each type of billing arrangement are discussed below; where possible, these problems are framed in terms of the “substantial risks” of misuse of confidential information or ineffective representation, in accordance with the language used in the Canadian conflicts of interest jurisprudence.

The empirical data cited throughout this discussion can form the basis for inferences about lawyers' financial motives for advising clients as they do. However, there are no statistically significant studies observing the effects of lawyers' fee arrangements on their advice; such data would be very difficult to collect.²⁶²

²⁶¹ This is permitted under Saskatchewan's *Code of Professional Conduct*, *supra* note 40, R. 2.07(3).

²⁶² Elaborate research methods have been implemented in the past to observe relationships between different variables within the lawyer-client relationship. See for example Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (New York: Russell Sage Foundation, 1974). Rosenthal used a panel of personal injury experts to retroactively assess the value of a sample of claims, and compared those values with the actual results of the claims in order to determine factors that led to better or worse outcomes.

3.2.1 Hourly Billing

Hourly billing for legal services has been the target of a disproportionate amount of academic criticism compared with the potential problems with other types of billing arrangements. This is most likely because hourly billing is such a common form of billing in the modern market for legal services. Another reason for the abundance of criticism is that it is easy to see the potential problems with hourly billing.

Hourly billing for legal services does not reward efficiency of lawyers. The complexity of the law often makes it so that the number of hours spent on a file is beyond the lawyer's control, to some extent at least. That being said, the lawyer is actually being *rewarded for inefficiency* through hourly billing.²⁶³ The more hours a lawyer is able to spend on a file, the more hours he or she is able to bill for that same file.

Alice Woolley states that there are three categories of ethical problems with hourly billing that are identified in the relevant American literature: (i) performing futile tasks on files, thereby inflating the number of hours worked, colloquially known as “churning” files; (ii) failing to record hours contemporaneously with doing work, which sometimes leads to an inflation of the number of recorded hours; and (iii) intentionally recording hours that were not worked, colloquially known as “padding” of time sheets.²⁶⁴

According to Woolley, similar problems exist in Canada. This can be inferred from one study, which was a review of 100 randomly selected decisions regarding taxation of solicitors' accounts. It found that 78 percent of the decisions reviewed resulted in a reduction of the solicitor's account.²⁶⁵ Nineteen percent of the decisions were resolved with a reduction of 50 percent or more of the fee.²⁶⁶ It is important to note that taxation of

Similar research could be conducted to observe the effects of lawyers' potential for profit on the advice they give.

²⁶³ This depends on firm structure, and the contractual relationship between associates and firms. At the very least, the law firm is being rewarded for the lawyer's inefficiency through hourly billing.

²⁶⁴ “Time for Change”, *supra* note 67 at 864.

²⁶⁵ *Ibid* at 871.

²⁶⁶ *Ibid*.

a solicitor's account is not limited to hourly billing. However, Woolley discussed some specific abuses of hourly billing that are found in the relevant jurisprudence, including: overstaffing of files and intra-office conferences;²⁶⁷ excessive research;²⁶⁸ and failure to delegate clerical tasks.²⁶⁹

Problems with hourly billing are compounded by the fact that many firms expect each of their associates to bill a minimum number of hours in each year. Such minimum billable hour expectations can lead to associates who are chronically sleep-deprived and therefore inefficient.²⁷⁰ This leads to more hours being spent on files than necessary and in turn, a higher than necessary fee.²⁷¹ In other words, “a client who is paying a lawyer to work at 3 a.m. is simply not getting the cognitive bang for its buck.”²⁷²

Duncan Webb is one of very few academic proponents of hourly billing. He admits that hourly billing gives lawyers an incentive to over-service their clients,²⁷³ or even to bill for work or hours that were never completed.²⁷⁴ Furthermore, Webb admits that hourly billing is often based on inaccurate recordings of time, given that many lawyers do not record their time *while* working, and given that time sheets must also account for “micro-breaks”, rounding up or down to the nearest unit of time, and non-billable time.²⁷⁵ Furthermore, Webb is aware that such abuses are likely to occur more frequently where a client is either vulnerable or trusts the lawyer, and is therefore unlikely to complain about excessive fees.²⁷⁶

Webb defends hourly billing in spite of its flaws, stating that “[t]ime-based billing is transparent, can be communicated up-front, and clients can compare the pricing of

²⁶⁷ *Ibid* at 874, 876-877.

²⁶⁸ *Ibid* at 875.

²⁶⁹ *Ibid* at 876.

²⁷⁰ Theresa M. Beiner, “Theorizing Billable Hours” (2014) 75 *Montana L. Rev.* 67 at 80-85

²⁷¹ *Ibid* at 97-99.

²⁷² *Ibid* at 99. The harm done by minimum billable hour expectations is not limited to clients, as minimum billable hour expectations arguably put female lawyers at a disadvantage, as they tend to have more family obligations than their male counterparts. See *ibid* at 73.

²⁷³ “Killing Time”, *supra* note 48 at 50-51.

²⁷⁴ *Ibid* at 47-48.

²⁷⁵ *Ibid*.

²⁷⁶ *Ibid* at 48-49.

lawyers... Of course, given its prevalence, both lawyers and clients understand how it works.”²⁷⁷ Webb also bases his support for hourly billing with a lack of alternatives – at least in many situations – that are mutually agreeable between lawyers and clients that would improve upon the current predominant practice of hourly billing.²⁷⁸

Confusion around what constitutes billable time, the potential for over-service, and various forms of “time-padding” are common threads through the literature on hourly billing. Where Webb supports hourly billing by saying that lawyers and clients alike understand how it works, this probably gives too much credit to hourly billing. There are significant uncertainties involved in hourly billing for clients and lawyers alike.

In summary, hourly billing presents a substantial risk of harm to clients in several ways. Confidential information regarding the client’s funds in trust or ability to pay can be misused in two ways: clients with funds in trust or access to resources might have their files “churned” or their time sheets “padded”; and clients without immediate access to resources might have their files placed on low priority chronically, regardless of the status of that file. Given the analysis of Canadian taxation cases referred to above, the first of these is an empirically observable risk. The second of these is anecdotal, but it is reasonable to assume that it frequently occurs in firms everywhere. Both of those concerns also relate to the effective representation of a client subject to an hourly billing arrangement. Doing unnecessary work on a file could have unanticipated consequences, and a lawyer might not be inclined to advise acceptance of an advantageous settlement on a lucrative file that is billed on an hourly basis. On the other end of the spectrum, clients whose files receive low priority are subject to an obvious risk of receiving poor service as a result. Furthermore, as mentioned above, firms with minimum hourly billing targets might be providing their clients with the service of sleep-deprived and chronically ineffective lawyers. All that being said, Webb is correct in stating that the other alternatives are not necessarily better, as will be discussed in the following sections.

²⁷⁷ *Ibid* at 43.

²⁷⁸ *Ibid* at 63-64.

3.2.2 Contingency-Percentage Fees

Contingency-percentage fees have been seen as immoral by many, at least since the Romans were first debating fees for legal services.²⁷⁹ The generally accepted reason that contingency-percentage fees are now allowed is that such arrangements allow many plaintiff-clients to retain counsel when they would otherwise not be able to afford it.²⁸⁰

There are two categories of criticisms of contingency-percentage fees. The first category consists of the potential problems between counsel and the administration of justice often referred to in terms of “champerty” and “maintenance”, both of which are explained below. The second category is the potential problems between lawyer and client, presenting a substantial risk of harm to the client. These two categories are discussed below.

3.2.2.1 Problems Between Lawyers and the Administration of Justice

Oddly, the reason that contingency-percentage fee arrangements are allowed is the same reason that they are criticized - the contingency-percentage fee’s contribution to increased access to the civil litigation system. On one hand, litigants who would otherwise be unable to retain counsel can do so by finding a lawyer who will enter into a contingency-percentage fee agreement.²⁸¹ On the other hand, there is a perception that there is quite a lot of frivolous litigation burdening the courts because of this very same increased access to the courts.²⁸² According to Herbert Kritzer, though, most lawyers who build a practice around contingency-percentage fee arrangements tend to accept and decline files in a fashion that is similar to the “portfolio-building” of an investor in the stock market.²⁸³ Indeed, approximately 47% of cases that are declined by such lawyers are declined due to a perceived lack of liability.²⁸⁴ As such, it may be the case that other types of billing encourage frivolous litigation moreso than contingency-percentage billing. This does not necessarily mean that lawyers do not commonly advance frivolous actions on behalf of clients with whom they have entered into a contingency-percentage

²⁷⁹ *Medieval Origins*, *supra* note 5 at 38.

²⁸⁰ *Legal Ethics*, *supra* note 85 at 378-379.

²⁸¹ *Risks, Reputations, and Rewards*, *supra* note 169 at 1-2.

²⁸² *Ibid.*

²⁸³ *Ibid* at 10-16.

²⁸⁴ *Ibid* at 85.

fee agreement. However, it stands to reason that a lawyer, who is acting rationally, would want to avoid wasting his or her time on such a file and therefore exclude that file from his or her “portfolio”.

Another, related concern is that if the lawyer becomes too closely interested in the litigation, by way of having a contingent stake in it, he or she could become less inclined to be candid with the court and live up to other ethical obligations in relation to the administration of justice.²⁸⁵ This seems like a much more realistic concern than that of completely frivolous litigation. If a lawyer is paid only in the event of successful litigation, it follows that there is a greater incentive for the lawyer to engage in unethical tactics during litigation.

3.2.2.2 Problems Between Lawyers and Their Clients

Lawyers who can collect their fees when and only when a settlement or judgment is obtained may have a strong incentive to encourage an early, low settlement. For example, a lawyer who has entered into a contingency-percentage fee agreement might be very inclined to advise his or her client to settle early if that lawyer is in immediate need of money.²⁸⁶ A similar inclination might exist where a plaintiff’s lawyer receives a lower-than-optimal offer to settle after sending only the initial demand letter.²⁸⁷

One study found that lawyers who had entered into a contingency fee agreement worked for more hours than those who engaged in hourly billing, *if the stakes were high enough*.²⁸⁸ This study was published in 1985, and at that time, hourly billing and contingency-percentage billing resulted in a similar number of hours being spent on the file if there was approximately \$30,000 at stake.²⁸⁹ If the stakes were lower, the lawyer working pursuant to a contingency-percentage agreement would spend less time than his

²⁸⁵ *Essays in Legal Ethics*, *supra* note 22 at 91.

²⁸⁶ *Legal Ethics*, *supra* note 85 at 378-379.

²⁸⁷ “Killing Time”, *supra* note 48 at 52.

²⁸⁸ Herbert M. Kritzer, et al, “The Impact of Fee Arrangement on Lawyer Effort” (1985) 19 *Law & Soc’y Rev.* 251 at 267.

²⁸⁹ *Ibid.*

or her counterpart charging an hourly rate; if the stakes were higher than that, the opposite was true.²⁹⁰

However, the real nature of the potential harm to clients who have entered into a contingency-percentage fee arrangement is not that their lawyers will not pay enough *attention* to the file; the potential harm is in the incentive for the lawyer to give *advice* to settle before even more time is spent on the file, thereby collecting a fee sooner rather than later. As such, even if a lawyer invests a great deal of time on a highly valuable contingency-percentage file, there are still many kinds of circumstances that could arise in which it would be economically advantageous – perhaps *very* economically advantageous – for a lawyer to collect a lower fee sooner rather than invest more time in the file and collect a higher fee later. Depending on the client’s circumstances, the lawyer’s interest in settling early might not be consistent with the client’s best interests. Given that such advice may be the product of very complex reasoning, and that it is therefore very difficult to scrutinize such advice to settle as being incompetent advice, this presents a substantial risk that some clients will receive ineffective representation.

A related problem is that of cases which proceed to trial when a more favorable settlement offer was available prior to trial. Indeed, Randall Kiser has observed that, among cases that proceed to trial, those in which clients and lawyers have entered into a contingency-percentage billing arrangement more frequently produce this sort of “decision error”.²⁹¹ In a study of cases observed in California, the average cost of such decision errors was \$73,400 for plaintiffs.²⁹² One likely explanation – but not the only possible explanation – for the higher rate of decision errors when a contingency-percentage billing arrangement is present is that the lawyer offers strong advice to proceed to trial based on the belief that a case has some – but not much – potential to yield a very high award – and therefore a very high profit – at trial. Another, more cynical explanation for some of these data is that some contingency-percentage arrangements might reward a lawyer at a higher rate after trial.

²⁹⁰ *Ibid.*

²⁹¹ *Beyond Right and Wrong, supra* note 181 at 55-58

²⁹² *Ibid* at 42.

As such, recall from **Subsection 1.1.2.2 Contingency-Percentage Fees** of this thesis that lawyers could alleviate some of the tension in such a relationship by including built-in incentives to invest more work or achieve better results for the client. Such built-in incentives could alleviate the lawyer's temptation to advise early settlement. However, these types of fee structures are also open to abuse. Imagine a lawyer who receives an acceptable settlement offer after sending only one letter, but will receive double the compensation if he or she waits until after the document discovery stage.²⁹³ He or she might have concerns about settling without reviewing the defendant's documents anyway, but the lawyer now has a built-in financial incentive to strongly discourage his or her client to settle before document discovery. This means that the lawyer now also has an incentive to ignore all other factors at play, such as the client's interest in receiving proceeds from an early settlement – not to mention the benefits of the lower legal fee – and the risk of the settlement offer being withdrawn altogether.

Furthermore, plaintiffs in personal injury cases – a context in which contingent billing is common – commonly follow the settlement advice of their lawyers; it is also questionable whether or not many clients in other contexts make autonomous choices, or if they obediently follow the advice of their counsel.²⁹⁴ Another closely related concern is that the lawyer and client involved in a contingency-percentage billing scheme are thus involved in an awkward partnership in which the lawyer is less of an agent and more of a co-principal, inclined to give a vote rather than advice.²⁹⁵ As discussed earlier, sometimes the lawyer's interests are very much distinct from those of the client in relation to

²⁹³ Or, for that matter, imagine a lawyer who has entered into a “decreasing contingency” arrangement with his or her client, in which the percentage of the settlement paid to the lawyer decreases as the file progresses into further stages of litigation. Such arrangements were mentioned in **Subsection 1.1.2.2 Contingency-Percentage Fees**. The risk that the client faces in this type of billing scenario is that the lawyer has incentives to advise settlement earlier than the optimal time for the client to settle.

²⁹⁴ For an overview of the pertinent empirical research, see *Risks, Reputations, and Rewards*, *supra* note 169 at 124-126. See also William H. Simon, “Lawyer Advice and Client Autonomy: Mrs. Jones’s Case” (1991) 50 Md. L. Rev. 213. Admittedly, Simon’s article is based on a story rather than scientific research. However, Simon’s story about Mrs. Jones, a former client, likely rings true for many clients who have received a lawyer’s advice.

²⁹⁵ Warvelle expresses a concern similar to this in *Essays in Legal Ethics*, *supra* note 22 at 91.

collecting a settlement. It follows that some clients are left vulnerable by this state of affairs, to the point of constituting a substantial risk.

3.2.3 Flat Fees

One common form of flat fees for civil litigation is referred to as “task-based billing”, which means that a lawyer is entitled to charge a flat fee for each part of the file.²⁹⁶ For example, initial written opinions, preparation and filing of pleadings, and various types of chambers motions might all have different set prices. Another form of flat fee for civil litigation is a large-scale contract “to perform, for example, all the personal injury defense work that a large corporation has”.²⁹⁷ Only large organizational clients can obtain large-scale contracts such as this, though. These powerful clients are not subject to the same lack of information about the appropriate selection of lawyers as individual and smaller business clients.²⁹⁸ Furthermore, in this type of arrangement, a client knows exactly how much it will pay in a time period, and the organizational client will have the resources at its disposal to assess – with some degree of accuracy – the quantity and quality of the work done.

In either case, there is a risk that the client will receive poor quality services because the lawyer is being paid by the task rather than by the amount of time spent on the file.²⁹⁹ Admittedly, the provision of incompetent legal services is sometimes – though rarely – addressed through disciplinary process of law societies, and there are other checks on the risk of under-service.³⁰⁰ Task-based flat fees, however, also create incentives for lawyers to simultaneously over-service and under-service clients, in that lawyers could perform unnecessary tasks without investing much time in each task.

²⁹⁶ “The Price of Law”, *supra* note 96 at 958.

²⁹⁷ *Ibid.*

²⁹⁸ See for example Michael J. Trebilcock, “Regulating the Market for Legal Services” (2008) 45 *Alta. L. Rev.* 215 at 218.

²⁹⁹ “Killing Time”, *supra* note 48 at 61.

³⁰⁰ *Ibid.*

Regulation of lawyers provides a check on under-servicing. For this reason, among others, task-based billing or flat fees might be a better alternative than hourly billing.³⁰¹ That being said, it is still true that if a lawyer can do an immense number of tasks in exchange for flat fees, he or she can make more money than if those tasks are done carefully and meticulously. The financial incentive for doing business in this way could, for some lawyers, outweigh the risks of being disciplined. Of course, this presents a substantial risk that the lawyer will soft-peddle his or her representation of the client in order to save time. This risk is – at a glance – much more problematic for individual or small business clients than it is for powerful organizational clients, as firms will probably want to attract returning business from these large clients.

3.2.4 Value-Based Billing

Value-based billing has been held out as a better alternative to other forms of billing for legal services. This is because other forms of billing are based on set criteria that have little to do with what the client receives *from the lawyer*. In contrast, value-based billing in its many forms is supposedly based on value from the client’s perspective.

Value, however, is a nebulous concept; hours, percentages, and numbers at least appear to be quite transparent. Those lawyers who take advantage of their clients in relation to other forms of billing would also easily manipulate value-based billing to reap an unfair profit.³⁰² As such, a shift to value-based billing, without other safeguards in place, would not be an effective way to reduce unethical billing.³⁰³ Furthermore, it is likely that only smaller firms that are very familiar with their clients are able to accurately assess the true value of their services for that client, as this assessment would involve a lot of subjective factors such as the importance of the matter to the client.³⁰⁴ An intuitive way to solve that

³⁰¹ For a discussion arguing in favour of task-based billing, among other alternatives to hourly fees, see Elizabeth A. Kovachevich & Geri L. Waksler, “The Legal Profession: Edging closer to death with each passing hour” (1991) 20 Stetson L. Rev. 419

³⁰² “Evaluating Value”, *supra* note 30 at 339-340.

³⁰³ *Ibid.* One example is found in *Berge Horn v. Hewson*, 2013 BCCA 532, which involved a firm trying to avail itself of the potential advantages of value-based billing after agreeing to bill its client on a hourly basis.

³⁰⁴ “Killing Time”, *supra* note 48 at 40.

problem is to disclose to the client the time spent on the file and the results obtained, and then to use those as factors in assessing value. But that would only amount to a hybrid form of other billing arrangements. Assuming that “value-based billing” is more than a euphemism for a hybrid between other types of billing, true value-based billing creates a dilemma: it is either very inefficient; or lawyers who bill in this manner cannot execute their duty of candour.

The substantial risks that the client faces in a value-based billing arrangement with a lawyer are similar to the corresponding risks in an hourly billing arrangement. On one end of the spectrum, if a lawyer anticipates that the terms of a value-based billing arrangement will not be very profitable, this presents an incentive for the lawyer to assign low priority to that file, leading to a risk of ineffective representation.

On the other end of the spectrum, value-based billing faces a problem of lending itself to the use of clients’ confidential information for the profit of lawyers. For example, Alana discloses to her lawyer that her civil litigation matter is of very high importance to her for reasons that exceed the monetary value of that claim. The importance of this matter to Alana, and her reasons for finding it so important, is obviously information that is subject to rules of lawyer-client confidentiality. Cathy, Alana’s lawyer, drafts a value-based billing arrangement that reflects the importance of this matter to Alana, thereby providing Cathy with a financial incentive to give this matter high priority. To be sure, this sort of negotiation of legal fees is allowed by ethical rules; “importance of the matter to the client” is a factor used to determine fair and reasonable fees mentioned in the commentary to Rule 2.06(1) of Saskatchewan’s *Code of Professional Conduct*.³⁰⁵ However, this is another example of how the *Code* makes pragmatic allowances in the context of billing for activities that would otherwise contradict the duty of loyalty. Clearly, in the example above, Cathy has used Alana’s confidential information in order to charge a higher fee, thereby reaping a benefit from the use of that information. To relate the example of Alana and Cathy to the essence of this thesis, Alana is willing to pay more money for Cathy’s priority. Presumably, Alana hopes that this has a realistic

³⁰⁵ *Supra*, note 40.

influence on the outcome of her file in the form of Cathy's zealous advocacy leading to a better result.³⁰⁶

³⁰⁶ See Section 5.1.4 The Sources of Prices of Legal Services.

4. Corrective Justice and Net Results in Litigation

Corrective justice is widely regarded as one of the major aims of private law. Corrective justice can more accurately be described as the very structure of private law relationships. It is the payment of damages from an unsuccessful defendant to a successful plaintiff in an amount equal to the value of the harm done; in tort cases, for example, corrective justice requires that the successful plaintiff is put back to a position equal to his or her position before the tort occurred, usually by assigning a monetary value to injuries and other losses suffered.

This part of this thesis is an argument intended to show that the exchange of money for legal representation in civil actions hinders the pursuit of corrective justice. Such transaction costs vary, as do the value of dollar amounts at stake, in various cases; this creates a set of circumstances in which compensation (and the defendant's corresponding liability) for private law breaches cannot be achieved consistently in different kinds of situations. Specifically, the ratio of transaction cost to value of claim may vary greatly in different kinds of cases. As such, lawyers' fees are a transaction cost involved in resolving disputes, which place some kinds of disputes outside of the domain of lawyers.³⁰⁷ That ratio, total litigation costs to value of claim, is the measure by which lawyers' fees and other litigation expenses impacts corrective justice in each case.

The transaction costs of participating in our civil justice system, including lawyers' fees, are inconsistent with corrective justice. One or both parties to a dispute end up bearing costs that are not directly related to the harm done by the private law breach.

Furthermore, orders for costs do not usually fully compensate a successful plaintiff or defendant for his or her costs incurred in a civil action.³⁰⁸

³⁰⁷ Assuming circumstances in which *pro bono* or publicly funded services are not available.

³⁰⁸ See for example, *Rances v. Scaplen*, 2009 ABQB 390 at paras 4 & 60. However, courts sometimes do take into consideration the circumstances of litigation in making orders for costs that indemnify successful litigants for most or all of their costs. See Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure Law, Second Edition* (Markham: LexisNexis Inc., 2010) at 1426-1430. Estimated comparisons of average costs awards to average actual costs in Canadian courts vary greatly, from 30% to 75%; see Law

Significant costs in relation to litigation are accepted and expected in our civil justice system. However, courts have repeatedly referred to corrective justice as a guiding principle in difficult cases. This presents some internal tension for our civil justice system, which should be alleviated or resolved to whatever extent possible.

This part has four chapters. The first provides a working definition of corrective justice. This is no easy task, as there are many nuanced definitions of “corrective justice”, and the brevity of the discussion makes the task even harder. As such, only a *working* definition of corrective justice is provided herein. The second chapter of this part explains why corrective justice is linked to the very purpose of private law. The third chapter of this part lists common features of our civil justice system that depart from corrective justice, when and why it is justifiable to depart from corrective justice, and – the essence of this part – why billing for civil litigation services constitutes a departure from corrective justice. Most significantly, **Section 4.3.3 Billing as a Departure from Corrective Justice**, not only describes how billing constitutes a departure, but also whether that departure is justifiable. The fourth and final chapter of this part explains the struggle for cost-efficiency in resolving private law disputes in terms of an economic analysis of law, which is a school of thought not commonly reconciled with corrective justice theory.

4.1 Defining Corrective Justice

A definition of corrective justice is necessary before one can discuss how legal fees are a departure from corrective justice. There are many definitions for corrective justice; this definition is a nuanced academic debate.

Reform Commission of Saskatchewan, *Awards of Costs and Access to Justice Research Paper* (Saskatoon: Law Reform Commission of Saskatchewan, 2011) online: <<http://lawreformcommission.sk.ca/AwardsofCosts&AccesstoJustice-FINAL.pdf>> at 6-7. Even if orders for costs did compensate successful litigants for their litigation-related expenses, this might still be considered problematic for corrective justice, as orders for costs are a form of liability that arise independently of the private law wrongs that brought the parties before the courts in the first place.

4.1.1 Corrective Justice and Distributive Justice

Identifying what corrective justice is *not* (namely, distributive justice) is a useful starting point in defining corrective justice. Then, one can move on to describe the features of corrective justice. A useful distinction between corrective and distributive justice is found in one of Jules L. Coleman's earlier discussions on this topic, in his book *Risks and Wrongs*.³⁰⁹

Distributive justice theories prescribe criteria for, as the name suggests, distributing certain commodities amongst members of a group. Utilitarianism, for example, has as its core principle that any rules or actions should have the goal of maximizing the total happiness of all members of society.³¹⁰ Of course, the moral limits of pursuing this goal and the most effective means of achieving it are heavily debated in utilitarian literature. Utilitarianism, for the purposes of this thesis, is just one example of a distributive justice theory.

To illustrate the difference between corrective justice theories and distributive justice theories, Coleman asks his reader to imagine a situation in which the reader is unjustly wealthy and Coleman is unjustly poor.³¹¹ That is to say, the reader is fantastically wealthy, to the point where no reasonable distributive justice could justify how wealthy the reader is; conversely, Coleman is so poor so as to offend any reasonable theory of distributive justice.

An event occurs in which the reader's wealth is reduced and Coleman's wealth is increased. However, this event is that Coleman has defrauded the reader of his or her money.³¹² The reader, in this example is entitled to sue and recover money from Coleman, thereby restoring the extremely unjust distribution of wealth that existed before Coleman defrauded his reader of his or her money. Coleman explains, "endorsing

³⁰⁹ (Cambridge: Cambridge University Press, 1992).

³¹⁰ See, for example, Roger Crisp, *Routledge Philosophy GuideBook to Mill on Utilitarianism* (London: Routledge, 1997).

³¹¹ *Risks and Wrongs*, *supra* note 309 at 303-305.

³¹² *Ibid.*

distributive justice is not part of the point of corrective justice”.³¹³ In abstract terms, as described by Ernest Weinrib, corrective justice only examines the relationship between the two parties as “doer and sufferer” of the same injustice.³¹⁴

While important, the distinction between corrective and distributive justice leaves many questions unanswered. The reader now knows that corrective justice is not distributive justice, but not much else. The next section explores a more thorough definition of what corrective justice actually *is*.

4.1.2 Corrective Justice as Defined in This Thesis

Imagine two line segments that are of equal length. These line segments represent two individuals. To be clear, the length of the lines is not representative of the individuals’ wealth or status. A wrongful act – such as a tort or a breach of a contractual duty – committed by one of the individuals represented by the line segments against the other individual breaks a piece away from one of the line segments and adds it onto the other line segment.³¹⁵ Again, the length of the lines does not represent the status or wealth of the individuals, as many torts do not produce a financial or other gain for the tortfeasor.³¹⁶ Furthermore, many torts do produce a financial gain for the tortfeasor that is not equal to the loss suffered by the plaintiff, such as cost-cutting for businesses that do not maintain safe premises for their patrons. The initial equality of the line segments only represents that, relative to each other, the parties had not yet had any of their lawful rights breached, nor had either party failed to execute any of their lawful duties in relation to each other.³¹⁷

³¹³ *Ibid* at 305.

³¹⁴ Ernest J. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 18-19. Weinrib is considerably more concise, but also more abstract than Coleman in his description of this point. He explains that distributive justice compares many individuals based on a set of criteria – different criteria in different distributive justice theories – and prescribe what benefits or burdens each individual should receive; corrective justice, on the other hand, examines a relationship between only two people and an injustice that exists between them and only them.

³¹⁵ Line segments of equal length are an illustration originally used by Aristotle, and explained in detail by Weinrib. *Ibid* at 16.

³¹⁶ The same is true for contractual breaches, many contractual breaches do not produce a gain that is comparable to the loss suffered by the other party or parties to the contract.

³¹⁷ *Corrective Justice*, *supra* note 314 at 16-18.

Corrective justice is the process of returning both lines to equal length, by returning the piece from one line segment to the other.³¹⁸ In less abstract terms, corrective justice is the process of holding a wrongdoer accountable to pay damages to his or her victim in an amount that is equal to the harm done by the injustice at issue.³¹⁹

The concept of corrective justice has given rise to a lot of academic debate, with contributions from many authors. Only a basic understanding of corrective justice is required for readers of this thesis.³²⁰ As such, only two topics will be covered in this definition section of this thesis: the definition of “injustices” that are to be corrected by corrective justice; and the structural, relational conception of corrective justice.

Corrective justice does not determine the content of private law rights and the corresponding duties. The violation of these rights – and corresponding breach of duties – gives rise to a situation that calls for the implementation of corrective justice. Though, as will be shown later in this part, our current private law system frequently strays from the structure of corrective justice.³²¹ That said, the “positive law”³²² confers private law rights and duties upon citizens, and the content of these rights and duties is outside the scope of corrective justice theory. This proposition is contentious in the literature. Jules Coleman, for example, once wrote that “[o]nly wrongful losses (and gains) fall within the ambit of corrective justice. Therefore, any conception of corrective justice will require a substantive account of wrongfulness.”³²³

³¹⁸ *Ibid.*

³¹⁹ *Ibid.* Sometimes damages are assessed in relation to the gains enjoyed by the doer of an injustice. The topic of gain-based damages and corrective justice is not discussed herein for simplicity’s sake.

³²⁰ Corrective justice is a very complex topic in contemporary private law theory, and interested readers are encouraged to read the pertinent material by Ernest Weinrib, Jules Coleman, Stephen Perry, Peter Benson, Dennis Klimchuk, Richard Epstein, and Martin Stone, among many others.

³²¹ It is not highly contentious that our private law system departs from corrective justice principles. See *ibid* at 8.

³²² This is the term used by Dennis Klimchuk in his article “On the Autonomy of Corrective Justice” (2003) 23 *Oxford J Legal Studies* 49. Ostensibly, Klimchuk uses this term meaning the laws in force in the relevant jurisdiction, and it is used as such in this part.

³²³ *Risks and Wrongs*, *supra* note 309 at 306.

Coleman’s conception of harm, though, is based on failure to adhere to generally accepted social norms;³²⁴ this can be understood to mean the same thing as the “reasonable person test”, which is part of the positive law in common law jurisdictions.³²⁵ However, other authors, such as Peter Benson and Stephen Perry, have argued more extreme positions arguing that corrective justice theories require a conception of harm or entitlement.³²⁶

This tendency to insert a conception of harm into corrective justice reflects the first of two common misconceptions about corrective justice identified by Weinrib. “The first misconception is that corrective justice is a substantive rather than a structural principle.”³²⁷ Corrective justice *is* a structural principle – that operates with the substantive rights, duties, and measures of harm prescribed by positive law – about which there is a second common misconception. The second misconception identified by Weinrib is that corrective justice is so abstract that it cannot tell us anything about substantive private law.³²⁸ To the contrary, courts have referred to corrective justice as a guiding principle when deciding troubling cases.

For example, in the case of *Fiala v. MacDonald*,³²⁹ the Alberta Court of Appeal dealt with the appeal of a judgment relating to injuries suffered by two women at the hands of a man who was having a dissociative episode as a result of his bipolar disorder. The trial judge found that Mr. MacDonald did not have the requisite mental capacity to be held liable.³³⁰ While the Court of Appeal appeared sympathetic to the plaintiffs, the trial judgment was ultimately upheld with explicit reference to corrective justice.³³¹

³²⁴ *Ibid* at 359-360.

³²⁵ In civil law jurisdictions, an analogous test exists, being the standard of *bonus pater familias*, or “a good family father”.

³²⁶ Dennis Klimchuk summarizes and responds to these arguments, concluding that our legal system can and should use distributive justice principles rather than – or in conjunction with – corrective justice ones in some instances, and that this is the source of confusion for authors such as Benson and Perry, but that this does not mean that corrective justice lacks conceptual autonomy in relation to distributive justice. See “Autonomy”, *supra* note 322.

³²⁷ *Corrective Justice*, *supra* note 314 at 10.

³²⁸ *Ibid*.

³²⁹ *Sub nom Fiala v Cechmanek*, 2001 ABCA 169, 281 AR 248.

³³⁰ *Ibid* at para 1.

³³¹ *Ibid* at para 31.

Specifically, the Court of Appeal stated that the trial judge was right to resist the urge to hold the defendant liable simply because of the great misfortune suffered by the plaintiffs.³³² The Court also stated, in obiter, that legislatures could eventually realize the shortcomings in our system when it comes to compensating victims of similar incidents,³³³ in other words, implementing a distributive justice policy where corrective justice cannot meet the needs of some citizens.

Fiala illustrates what Weinrib calls “personality”, which is one of “the two interlocking foundation stones of a theory of liability”, the other being “correlativity”.³³⁴ For the relatively brief period of time that Mr. MacDonald lacked mental capacity, he did not have a duty to behave or refrain from behaving in any particular way. The incident that left the Fialas injured took place during this time. Personality, or the “capacity for purposiveness” is also observable from the perspective of a plaintiff,³³⁵ especially if a plaintiff is alleged to have waived rights or voluntarily assumed a risk. In order to waive rights or voluntarily assume a risk, a plaintiff must have the mental capacity to do so.³³⁶

Correlativity, the other “interlocking foundation stone” of Weinrib’s theory of liability, is where the injustice – the subject of a private law dispute – occurs.³³⁷ Simply put, correlativity in corrective justice means that the reason for compensating the victim is the same reason for holding the defendant liable; it is the same event that brings the two parties into the private law dispute.³³⁸

A working definition of corrective justice for the purpose of this thesis is thus as follows: Corrective justice is the process of holding each doer of injustice accountable to pay – regardless of actual ability to pay – each victim of injustice in an amount equal to the harm caused by the injustice, where “injustice” is defined by the rights and duties conferred by the positive laws in force in each jurisdiction.

³³² *Ibid* at paras 31-32.

³³³ *Ibid* at para. 31.

³³⁴ *Corrective Justice*, *supra* note 314 at 15-29.

³³⁵ *Ibid* at 23.

³³⁶ See for example *Crocker v. Sundance Northwestern Resorts Ltd.*, [1988] 1 SCR 1186, 51 DLR (4th) 321.

³³⁷ *Corrective Justice*, *supra* note 314 at 15-21.

³³⁸ *Ibid* at 36.

4.2 The Purpose of Private Law?

The purposes of various doctrinal areas of private law are not the topic of this chapter. That is not the domain of corrective justice. There is, no doubt, a wealth of literature about the purpose of tort, contract, unjust enrichment, and so on. Such doctrines connect the “generality” of private law to the “particularity” of actual events.³³⁹ This brief chapter examines the purpose of the private law in all its generality.

Weinrib provides a convincing, but frustrating, argument for the purpose of private law. It is frustrating because his conclusion is that the goal of private law is to be private law.³⁴⁰ The most compelling reason provided for this argument is that other accounts of the purpose of private law point to some purpose external to the parties – such as deterrence of negligent behaviour or compensation of victims – but these sorts of public objectives fail to account for the “private” nature of private law.³⁴¹ This admittedly circular argument makes more sense in light of one basic feature of private law that makes it “private”.

That basic feature is that a plaintiff may sue a defendant to get relief to remedy wrongs committed by the defendant against the plaintiff.³⁴² That is to say, there is a *simultaneous* compensation of the plaintiff *and* the allocation of the expense of that compensation to the defendant, which is representative of the earlier injustice committed by the defendant at the plaintiff’s expense. This is what makes private law private law, but it is also the essence of corrective justice. In other words, “[c]orrective justice is the form of private law.”³⁴³ Corrective justice – and therefore private law – focuses on the relationship between the parties, and any goals that are conceptually external to that relationship might be goals of the various doctrinal areas in private law, but they are not goals of private law. Bearing this simple structure and purpose in mind, the reader can now

³³⁹ Ernest Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995) at 218.

³⁴⁰ *Ibid* at 21.

³⁴¹ *Ibid* at 7-11.

³⁴² *Ibid* at 8-9.

³⁴³ *Ibid* at 75-76.

examine some common departures from corrective justice in our current “private law” system.

4.3 Departures from Corrective Justice

This chapter is an argument for the proposition that billing constitutes a departure from corrective justice. Furthermore, this chapter includes a hypothesis as to whether and when this departure from corrective justice is justified. In order to do so, the first section discusses when and why departures from corrective justice are justifiable, the second section examines a few common departures from corrective justice that occur in our private law system, and the third section examines billing as a departure from corrective justice.

4.3.1 Justifiable Departures from Corrective Justice

“[C]orrelativity is the organizing structural feature of the relationship between the parties. Corrective justice works out the normative implications of the most general and pervasive characteristic of liability, that the liability of a particular defendant is always a liability to a particular plaintiff. ... For if those reasons are non-correlative, in that their normative force does not link the particular defendant who commits the injustice to the particular plaintiff who suffers it, then the law has no coherent basis for tying the defendant's liability to the plaintiff's entitlement.”³⁴⁴

The above quote stands for the proposition that reasons for holding one person liable to another are only suitable if they conform to corrective justice principles. This section explores exceptions to that rule, as well as other circumstances in which distributive justice principles are better equipped to deal with the injustice at hand. Such circumstances are thoroughly examined by Coleman, and this section comprises a summary of his discussion under the heading of “Justifiable departures from corrective justice”.³⁴⁵ Coleman identifies three categories of circumstances in which it is permissible for lawmakers to set aside a corrective justice approach in favour of other sorts of justice:

³⁴⁴ *Corrective Justice*, *supra* note 314 at 338.

³⁴⁵ *Risks and Wrongs*, *supra* note 309 at 386-406.

“liability and recovery without justice”; assignment of liability to the “cheapest cost-avoider”; and liability pools.

In relation to the first category, “liability and recovery without justice”, Coleman asks us to consider the example of a person who is injured while using a product with a deficient warning label.³⁴⁶ The deficiencies of the warning label amount to negligence, and this apparently is the only negligent aspect of the relationship between the consumer and manufacturer.³⁴⁷ The injured consumer did not read the warning label, and as such the negligence did not *cause* the consumer’s injury.³⁴⁸ In such instances, Coleman argues, the plaintiff could act as a sort of “private prosecutor” in order to provide an added incentive to the manufacturer-defendant to put adequate warning labels on its products.³⁴⁹ This offends corrective justice in that it simply looks to the conduct of one party as a reason for imposing liability without rationally linking that conduct to the injuries suffered by the other. According to Coleman, this is justifiable in that it provides members of society with an added incentive – in the form of fewer opportunities to escape liability – not to act below an acceptable standard of care.³⁵⁰ Unlike the remaining two categories, this one could probably be adapted for use in all areas of private law, rather than just tort law.

Coleman calls the second category “the lowest cost avoider”, a term coined by Guido Calabresi, meaning the person for whom it would have been cheapest to reduce the risk of an accident before it occurred.³⁵¹ Coleman argues that it is justifiable to place liability on the lowest cost avoider, because this would provide incentives for the lowest cost avoider to prevent accidents on a day-to-day basis.³⁵² Here, Coleman advances the view that the state is right to administer a program deviating from corrective justice as long as it has a good reason for doing so, and it can efficiently implement that program.³⁵³

³⁴⁶ *Ibid* at 387-388.

³⁴⁷ *Ibid*.

³⁴⁸ *Ibid*.

³⁴⁹ *Ibid*.

³⁵⁰ *Ibid*.

³⁵¹ *Ibid* at 245, 388-389.

³⁵² *Ibid* at 391.

³⁵³ *Ibid* at 390-395.

The third category can actually be split into two subcategories, being no-fault pools and at-fault pools. A no-fault pool is one in which members of a class make mandatory contributions to a pool of money, from which accident victims can be compensated for their injuries.³⁵⁴ An at-fault pool is similar, with one distinction, in that membership in the contributing class is contingent upon having done a relevant wrongful act; a tangible example of an at-fault pool is “market share liability”, in which liability for injuries is apportioned to all manufacturers of products identical or perhaps similar to the one that injured the plaintiff, based on their respective contribution of those goods to the marketplace.³⁵⁵

Coleman distinguishes liability pools from cases in which there is more than one negligent defendant, but only one has caused the injury.³⁵⁶ In such cases, specifically when the defendants are better situated to know the particulars pertaining to the issue of causation, courts impose joint and several liability combined with a reverse onus on the defendants to show that it is another defendant who caused the plaintiff’s injury.³⁵⁷

Coleman says that these sorts of cases implement corrective justice in difficult contexts in which a plaintiff knows that several people acted negligently toward him or her, but does not know which specific defendant caused his or her injuries.³⁵⁸ Joint and several liability, combined with a reverse onus, provides defendants with a strong incentive to identify the person who is actually responsible for causing harm, thereby allowing a court to implement corrective justice as between the injured party and the one who injured him or her.³⁵⁹

³⁵⁴ *Ibid* at 401-402.

³⁵⁵ *Ibid* at 397-406. Coleman also criticizes the reasoning found in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P. 2d 924, 163 Cal. Rptr. 132 (1980), in favour of the reasoning in *Hymowitz v. Eli Lilly and Co.*, 73 N.Y. 2d 487, 539 N.E. 2d 941 (1989), cert. denied sub nom *Rexall Drug Co. v. Tigue*, 110 S. Ct. 350 (1989), because *Sindell* included an exemption for drug companies that could show that their product could not have injured the plaintiff. This creates an ineffective hybrid between corrective justice principles and at-fault-pools, according to Coleman. While Coleman’s explanation for this does not seem entirely satisfying, that question is beyond the scope of this thesis.

³⁵⁶ *Ibid.*, at 395-399

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.* Coleman cites *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) as an example of a case in which reverse onus was used to promote corrective justice between an injured plaintiff and one of two hunters who negligently shot at the plaintiff.

³⁵⁹ *Ibid.*

Coleman's reasons why at-fault or no-fault pools might be justified are somewhat cryptic. He simply says that corrective justice is contingent upon the dominant political and legal practices, and suggests that corrective justice has no priority or supremacy as a system over other possible systems of compensation.³⁶⁰ That being said, at-fault pools might as well be included in Coleman's first category, as they would be effective deterrents for wrongdoing. No-fault pools, on the other hand, might be justifiable in situations in which quick and adequate compensation is necessary for a class of accident victims. The next section examines some common departures from corrective justice, with Coleman's categories of justifiable departures in mind.

4.3.2 Common Departures from Corrective Justice in Private Law

There are many features in our private law system that allow or require someone other than a wrongdoer to compensate a victim, as well as features that make it so that the compensation paid is not accurately representative of the harm actually suffered by the victim. The subsections herein are several examples – not an exhaustive list – of such departures from corrective justice.

4.3.2.1 Liability Insurance

Liability insurance is a simple example of a departure from corrective justice. Indeed, the very purpose of liability insurance is to depart from corrective justice. The insurer provides a service in which it assumes significant portions of liability of the insured in relation to certain activities, such as driving. This means that a third party – the insurer – is held effectively liable in private law for the wrongdoing of the insured, thereby departing from corrective justice.

Liability insurance is only commonly available for activities that legally require it. For instance, employers are required to pay workers' compensation premiums that protect the employer from liability for workplace injuries,³⁶¹ drivers are usually required to have

³⁶⁰ *Ibid* at 404.

³⁶¹ *The Workers' Compensation Act*, 2013, SS 2013, c W-17.11, s 3 & 43.

liability insurance,³⁶² and many professions require insurance for professional negligence.³⁶³ Establishing a liability insurance system, of course, requires that system to be based on a political objective.³⁶⁴ As such, each insurance system is only justifiable if it effectively serves a good purpose. A “good purpose” might be the quick compensation of members of a class of particularly vulnerable accident victims.

Another purpose for an insurance system might be augmenting the licensing requirements for regulated activities, thereby adding an extra layer of protection for the public against incompetent drivers, dentists, doctors, *et cetera*. An individual might be able to pass the basic licensing requirements to take part in an activity, but if insuring that individual is particularly risky, insurance companies might decline the coverage that the individual must legally have in order to take part in the activity.

4.3.2.2 Punitive Damages

Nominal damages and punitive damages share the character of compensating a plaintiff in an amount that exceeds the actual loss suffered by that plaintiff. Punitive damages do this by considering egregious conduct on the part of the defendant in the course of the defendant’s breach of the plaintiff’s right, and determining an amount of money to add onto the award of damages for the purpose of – as the name suggests – punishing the defendant.³⁶⁵ Nominal damages, on the other hand, are awarded where a defendant has breached a right of the plaintiff without causing any harm.³⁶⁶ Nominal damages are still consistent with corrective justice, because they represent a value assigned to the private law right that was infringed, and compensate the victim based on the violation of that right *per se*.³⁶⁷

³⁶² *The Traffic Safety Act*, SS 2004, c T-18.1, s.125-126.

³⁶³ See for example *The Legal Profession Act*, *supra* note 60.

³⁶⁴ *Idea of Private Law*, *supra* note 339 at 210.

³⁶⁵ See for example *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, 58 DLR (4th) 193.

³⁶⁶ See for example, *Vancouver (City) v. Ward*, [2010] 2 SCR 28, 2010 SCC 27 at paras 74-80.

³⁶⁷ *Corrective Justice*, *supra* note 314 at 95.

Punitive damages, on the other hand, are not consistent with corrective justice, because they focus on the non-relational objective of punishing one party, being the defendant, rather than the objective of setting right the tainted relationship between the parties.³⁶⁸ The effect of this is that one of the parties ends up receiving a “windfall” gain, rather than simply being made whole through private law processes.³⁶⁹ In other words, the reason for imposing liability in the form of punitive damages is tangential to any right or duty that exists between the parties in private law. Weinrib argues that the proper domain for the objective of punishing one party – as opposed to restoring justice in a relationship between two parties – is criminal law rather than private law.³⁷⁰

4.3.2.3 Vicarious Liability

Vicarious liability, in particular the liability of corporations for the actions of its employees or officers, constitutes a departure from corrective justice. This is simply because the individual who committed a wrongful act is not ultimately the one held accountable for it.

Weinrib has argued that vicarious liability does not offend corrective justice, as long as we can accept that the actions of an employee are “so closely associated with the employer that responsibility for the [acts] can be imputed to the [employer].”³⁷¹ Furthermore, Weinrib argues that the doctrine of *respondeat superior* only allows vicarious liability for torts committed by employees – not independent contractors – whose actions are squarely within the scope of employment, and therefore vicarious liability through that doctrine does not deviate from the principles of corrective justice.³⁷² Whether or not one accepts this argument, it does not neatly apply to corporate liability.

To Catharine Pierce Wells, Weinrib’s argument does not apply to corporate liability for two reasons. First, corporations lack moral agency, and therefore cannot be said to have

³⁶⁸ *Ibid* at 96-98.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *The Idea of Private Law*, *supra* note 339 at 185-187.

³⁷² *Ibid.*

committed a wrong.³⁷³ Recall from **Section 4.1.2 Corrective Justice as Defined in This Thesis** that the “capacity for purposiveness” is a requirement for being one of the parties involved in a corrective justice relationship. Corporations lack the capacity for purposiveness, and as such, assigning liability to them constitutes a departure from corrective justice.

The second reason Wells provides also shows that Weinrib’s argument does not apply to corporate liability, but argues this point from what she calls a “pragmatic” point of view, examining real world circumstances rather than theory. Specifically, Wells suggests that a broad range of individuals end up paying the price of judgments against a corporation; these individuals are the stakeholders in the corporation, including its customers, employees, creditors, and shareholders.³⁷⁴ Given that the cost of a judgment is indirectly borne by other individuals, many of whom have no connection to the wrong that is the subject of the judgment, it is easy to see how corporate liability tangibly deviates from corrective justice principles.

Regardless of whether an employer is an individual or a corporation, that employer is probably in a good position to prevent a great deal of wrongdoing from within its own ranks. Harm reduction could be achieved through training, rigorous hiring processes, or changes in day-to-day operations, or any combination of these that may be appropriate for a variety of employers in different industries. To use Coleman’s logic here, imposing vicarious liability on employers may be justifiable because they are the lowest cost avoiders. Whether or not imposing liability on corporations provides sufficient incentives for those in command to reduce risk is another question, and it depends on the structure of the corporations involved and the consciences of the individuals involved.

4.3.3 Billing as a Departure from Corrective Justice

Recall that the working definition of corrective justice provided in **Section 4.1.2 Corrective Justice as Defined in This Thesis** was: Corrective justice is the process of

³⁷³ Catharine P. Wells, “Corrective Justice and Corporate Tort Liability” (1997) 69 Southern Cal. L. Rev. 1769 at 1775-1776.

³⁷⁴ *Ibid* at 1779.

holding each doer of injustice accountable to pay – regardless of actual ability to pay – each victim of injustice in an amount equal to the harm caused by the injustice, where “injustice” is defined by the rights and duties conferred by the positive laws in force in each jurisdiction. Are the costs associated with litigation part of the harm caused by an injustice? What about cases in which a court finds that there has been no breach of a private law duty, and therefore no injustice, but still awards costs? What does the fact that awards of costs usually only partially indemnify the recipient for their litigation costs³⁷⁵ suggest about the way the justice system views these expenses? What about the fact that unsuccessful litigants are often awarded costs if they have made a formal offer to settle?³⁷⁶

The court processes through which doers of injustices are held accountable include significant transaction costs, including court fees and of course lawyers’ fees. Indeed, one party’s legal fees for a simple, two-day civil trial is likely to cost a minimum of \$13,561; a somewhat complex, seven-day trial can cost a party up to \$124,574.³⁷⁷ Orders for costs can serve to alleviate the transaction costs of obtaining a judgment *from the perspective of one party*. But given the correlative structure of corrective justice, is there such a thing as bringing only one party closer to corrective justice?

If one accepts the proposition that transaction costs are not part of the harm caused by an injustice, then transaction costs present a practical problem for the parties in that they cannot achieve a perfectly just result. And if one accepts the proposition that one party can only achieve corrective justice to the extent that the other party achieves it, then orders for costs cannot alleviate the impact of transaction costs on corrective justice. No amount of spreading these costs will make a perfect result from a corrective justice point of view, as one or both of the following circumstances would arise: the doer of the injustice would end up paying an amount that exceeds the value of the harm caused by the injustice; or the sufferer of the injustice would receive a net amount of compensation less than the value of the harm suffered.

³⁷⁵ *Awards of Costs and Access to Justice*, *supra* note 308 at 6-7.

³⁷⁶ Saskatchewan, *Queen’s Bench Rules*, R.4-31.

³⁷⁷ *Access to Civil & Family Justice*, *supra* note 58 at 4.

Arthur Ripstein also discusses transaction costs such as lawyers' fees as an issue in implementing corrective justice. Referring to the problem of transaction costs involved in implementing corrective justice, Arthur Ripstein asks readers to imagine a system under which a victim of injustice could simply report a wrongdoer to the authorities, and arrange for them to coerce the wrongdoer to compensate his or her victim.³⁷⁸ Clearly, this would implement corrective justice with much lower transaction costs. However, Ripstein warns us that the level of discretion these bureaucrats enjoy could lead to other serious problems in implementing corrective justice.³⁷⁹ One easily anticipated problem is that some of these bureaucrats might get the law wrong, thereby implementing an illusion of corrective justice based on rights and duties that are nonexistent or exaggerated, or even failing to recognize the existing rights and duties of parties. Does that problem exist to a lesser extent in our current system?

There are at least two objections to the proposition that lawyers' fees constitute a departure from corrective justice. The first is that these transaction costs must be seen as distinct from corrective justice. This objection rests on the fact that there are costs associated with every transaction, and the proposition that these costs must be thought of as distinct from – but related to – the transaction itself.

One can distinguish between lawyers' fees as a transaction cost in obtaining corrective justice and other types of transaction costs in a way that shows that lawyers' fees are not just separate but related transaction costs; they are inextricable from the transaction in that lawyers' services greatly impact the corrective justice product received (the judgment or settlement). Canadian litigants have been empirically shown to achieve better results at trial than those who represent themselves.³⁸⁰

³⁷⁸ Arthur Ripstein, *Equality, Responsibility, and the Law*, (New York: Cambridge University Press, 1999), at 19-20.

³⁷⁹ *Ibid.*

³⁸⁰ *Access to Civil & Family Justice*, *supra* note 58 at 4.

The second objection is that perhaps lawyer's fees, even significant ones, actually allow members of society to reduce the cost of resolving disputes. Consider, for example qualitative study of self-represented litigants that found that many of the respondents experienced symptoms similar to post-traumatic stress after their matters were resolved.³⁸¹ For many individuals, this is true; hiring a lawyer is indeed less costly than taking the time to learn the procedural and substantive rules applicable to their disputes, and possibly suffering health-related or other consequences as a result. This is linked to the first objection, discussed above, in that self-representing in a civil litigation dispute is a highly undesirable – even unsafe – option for many people, and therefore lawyers' fees should not be thought of as separate from the corrective justice transaction. Even if lawyers' fees may often be less onerous transaction costs than those involved in self-representation, they still have an impact on the implementation of corrective justice in that they are indeed a transaction cost. As such, efficiency is crucial to corrective justice; this is the topic discussed in the next chapter.

4.4 Billing, Corrective Justice, and Economic Analysis of Law

Striving for efficiency in the lawyer-client relationship in the course of resolving civil litigation matters is a topic that can best be discussed through the theoretical lens of “economic analysis of law”. Economic analysis of law is sometimes thought of as being inconsistent with corrective justice theory, but this is likely due to a very narrow conception of what economic analysis of law actually is. Weinrib, for example, explains that economic analysis of law is based on the premise that economic efficiency is the goal of law.³⁸² According to Weinrib, this leads to inconsistency between the two theories because holding defendants liable based on their inefficient conduct would necessarily mean that defendants' liability to pay is based different reasons than the justification for a plaintiff's receipt of that money.³⁸³ However, Weinrib has only described optimal

³⁸¹ Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report” (May 2013), online: The Law Society of Upper Canada, <http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf> at 108-109.

³⁸² *The Idea of Private Law*, *supra* note 339 at 46-48.

³⁸³ *Ibid.*

deterrence theory, which is a widely discussed theme in economic analysis of law, but they are not interchangeable terms. While optimal deterrence theory is indeed incompatible with corrective justice,³⁸⁴ economic analysis of law intersects neatly with corrective justice when one considers the lawyer-client relationship in the course of resolving a private law dispute.

Economic analysis of law is the use of economic theory to explain legal phenomena or to recommend a course of action in the interest of efficiency.³⁸⁵ The theory does not typically assign a normative value to ends in law.³⁸⁶ To use Richard Posner's example, economic analysis of law cannot prescribe whether or not the deterrence of theft is a desirable goal for lawmakers to pursue.³⁸⁷ Economic analysis can show that the pursuit of other goals will be hindered if theft is not deterred; it can also show efficient and inefficient means of deterring theft.³⁸⁸ Corrective justice can show that reducing litigation cost is a desirable goal, and economic analysis can show how that can be pursued.

But this thesis is not about corrective justice, it is simply a lens through which one can view litigation costs in order to observe their effect on the rule of law; in turn, the rule of law requires the consistent application of laws under similar circumstances. Imagine two civil claims, one with an estimated value of \$100,000, the other with an estimated value of \$25,000. In both claims, the legal issues and evidence are fairly simple. In each claim, each litigant incurs litigation costs, including lawyers' fees, of \$20,000. In each claim, the plaintiff is successful in obtaining a judgment equal to the estimated value of the claim, plus an order for costs in the amount of \$10,000. Can this be described as a "consistent" application of the law? The rule-of-law principle can show that legal fees should be proportional – to the extent that the complexity of the case allows – to the value of a claim; again, economic analysis can show how that can be pursued. For instance,

³⁸⁴ Recall, for example, Jules Coleman's proposition that assigning liability to the "lowest cost avoider" is a justifiable departure from corrective justice, summarized herein at **Section 4.3.1 Justifiable Departures from Corrective Justice**. See also *Risks and Wrongs*, *supra* note 309 at 386-406.

³⁸⁵ Richard Posner, *Economic Analysis of Law, Seventh Edition*, (New York: Aspen Publishers, 2007) at 23-26.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

economists might predict that expanding the jurisdiction of small claims courts (currently limited to claims under \$20,000)³⁸⁹ and simplified procedure rules (currently limited to claims under \$100,000 and trials to be less than 3 days long)³⁹⁰ would reduce costs in claims of smaller values, thereby promoting proportionality.³⁹¹

Undoubtedly, many lawyers already do endeavour to bill their clients in an amount that reflects the value of a claim. However, as discussed in **Chapter 3.2 The Substantial Risk of Harm to the Client**, some do not, and some billing arrangements lead to fees that are on average higher or lower than others. Unethical billing practices provide clear examples of lawyers who have not endeavoured to bill their clients proportionally to the value of a claim (or at least the value of the services rendered). What about cases in which clients place very high priority on a file, and want to pay significant amounts of money to advance detailed arguments (to which adverse parties must respond)? To what extent is the lawyer ethically required to avoid waging a war of attrition on adverse parties?

Is the objective of reducing costs of litigation, or that of promoting costs that are *proportional* to the value of a claim more important? Intuitively, rational litigants should want to invest money in forming arguments in order to win their cases; as such, proportionality might be the more realistic objective. **Part 6. Regulation to Mitigate the “Sale of Law”** advances a hypothesis that the best way to promote this objective is to regulate law firms, rather than just individual lawyers, as firm policies often dictate the billing procedures used by lawyers.³⁹² The next part expands on the ideas presented in this part and earlier parts, examining in more depth how billing – a factor that is external

³⁸⁹ *Small Claims Regulations*, 1998, RRS c S-50.11 Reg 1, R.3. It is also important to note that orders for costs under s.31 of the *Small Claims Act*, 1997, SS 1997 c S-50.11 do not include any portion of lawyers’ fees.

³⁹⁰ Saskatchewan, *Queen’s Bench Rules*, *supra* note 376, Part 8.

³⁹¹ Indeed, a committee chaired by Justice Thomas Cromwell of the Supreme Court of Canada has recommended expanding small claims courts, simplified procedure rules, and administrative tribunals in Canada. See *Access to Civil & Family Justice*, *supra* note 58.

³⁹² While the taxation process also provides a check on fees that are not proportional to the value of a claim, many clients are unlikely to use the taxation process. See “Time for Change”, *supra* note 67 at 886-888.

to the law – can affect the application of the law to clients in a way that does not impact all litigants evenly.

5. The “Sale of Law” and Legal Services

“As is typical of non- competitive markets, the legal market results in prices being determined by the value placed on them by consumers, not the cost of providing the service. The allocation of lawyers' efforts are thereby skewed to those who place high monetary value on legal services and are able to pay these large sums: generally, commercial clients. The most troubling feature of these market incentives is not merely that the fees lawyers charge are high. It is that they are high because the market is fundamentally characterized by a bidding competition between commercial actors and individuals for access to scarce legal resources. [...] The distribution of legal services produced by the market for lawyers is thus quite disturbing: organized as a self-regulating profession with guardianship of the public justice system, a system that lies at the heart of democratic social structure, the profession is propelled by market forces to devote itself disproportionately to the management of the economic relationships of commerce and not the management of just relations among individuals and the state.”³⁹³

The above quote articulates one problem with what is referred to herein as the “sale of law”. The “sale of law” is a play on words, parodying the phrase the “rule of law”. As one might expect, this play-on-words is intended to draw attention to ways in which the market for legal services obstructs society’s implementation of the rule of law. Recall from **Section 2.1.3 Bureaucrats** that the working definition of “rule of law” herein is: The principle that requires the state to interact with the citizens it governs based on rules, which must not be arbitrary in their formation, content, or application. This definition applies to the private law context, because the state assumes the role of adjudicator of disputes and enforcer of judgments in that context.

This part of this thesis is an examination of the sale of law in two chapters. The first identifies some features of our civil justice system that illustrate the sale of law. The second examines what is wrong with the sale of law.

5.1 Examples of the Sale of Law

There are many ways in which money has an impact on the law; not all of which exemplify the sale of law. For example, the judicial election process in the United States is frequently criticized for the strong correlation between campaign contributions and

³⁹³ “The Price of Law”, *supra* note 96 at 956-957.

judgments that are consistent with the interests of the donors.³⁹⁴ However, this correlation cannot truly be said to be an example of the “sale of law”, because, as Tamanaha points out, donors typically contribute to those judicial candidates who are most likely to make favorable judgments in the future; and it is unlikely that judges are making their judgments for the purpose of reciprocation.³⁹⁵

The problem discussed in this part is not merely a correlation between access to resources and opportunity to influence the law. Rather, it is the direct exchange of money for services that *do* influence the law. This process of exchanging money for such services interferes with the consistency of the day-to-day application of the law, in that only those individuals with the resources to pay for legal services – and the will to allocate those resources to legal services – have the opportunity to influence the law in their immediate dispute. This is demonstrated by the fact that represented parties are consistently more successful in civil litigation matters than their unrepresented counterparts.³⁹⁶

This chapter specifically focuses on showing that the expenditure of resources on legal services allows some members of society to obtain better legal outcomes, or more advantageous procedures, than others in similar cases. This is shown in four sections: the first examines the different stages of the civil litigation process, from settlement negotiations to appellate review, and shows that the precedential value of a case correlates with the amount of money spent on it; the second shows that in “hard cases”, being cases in which the law is unsettled, diligent lawyers can have a lasting impact on the way similar disputes are resolved in the future; the third shows that some types of clients, namely organizational clients with access to vast resources, can more effectively ensure that their lawyers will serve their interests diligently, while individual clients may be ill-equipped to ensure that their lawyers fully consider their interests and tailor a course of action to fit their needs; and the fourth briefly describes the economic-sociological sources of prices for legal services, and explains why these sources of prices are consistent with the “sale of law”.

³⁹⁴ *Law as a Means to an End*, *supra* note 36 at 187-188.

³⁹⁵ *Ibid.*

³⁹⁶ *Access to Civil & Family Justice*, *supra* note 58 at 4.

5.1.1 Gradations of Precedent-Setting Activities

The simplest explanation of the way in which lawyers sell law is that they sell the only realistic means by which many citizens can participate in the legal system in a meaningful way. The sale is not direct; no one can offer or accept money in consideration for making particular changes to the law, as that would constitute criminal bribery.³⁹⁷

Lawyers do not have the ability or legal authority to directly change the law in exchange for money, but a litigant who retains a skillful advocate will have more chance to advance a legal argument in court that successfully influences the law than a litigant who represents himself or herself. Further, of the litigants who retain counsel, there is a hierarchy in which those who are willing to spend more money have better odds of creating a lasting legal precedent.

This hierarchy exists for two reasons. First, resolutions to legal disputes are arranged into a hierarchy of precedential value, which correlates to the time, effort, and financial expense of pursuing a resolution at that level. Specifically, an out-of-court settlement has subtle – but real – precedential value,³⁹⁸ and is cheap compared to running a full trial. A trial judgment, while expensive to obtain, is a noticeable and publicly available precedent for similar cases to be argued in the future. Appellate decisions create binding authority that lower courts must follow when deciding future cases, but access to appellate courts costs money in addition to that spent in the course of a trial; one study estimates that legal fees at only the appeal stage of litigation usually fall within the range of \$12,333 - \$36,750.³⁹⁹ Second, the individuals who are able and willing to pay their lawyers more money have a better opportunity to develop and advance a novel or complex legal argument in court or negotiations. This second reason is better discussed in the next section, which deals with “hard” cases, which require a novel or complex legal argument in their resolution. Are trial judgments involving novel or unsettled points of law more

³⁹⁷ *Criminal Code*, RSC 1985, c C-46, s.119(1).

³⁹⁸ See **Section 2.2.1 Lawyers’ Advice to Settle a Claim.**

³⁹⁹ *Access to Civil & Family Justice*, supra note 58 at 4.

likely to be appealed than those involving well-settled legal rules and principles? If so, how might the prospective costs associated with an uncertain outcome at trial and a likely appeal affect a litigant's behaviour during settlement negotiations? Does this impact vary for different litigants based partly on their access to funds?

Recall, though, that the heart of the problem with the sale of law is that it undermines the rule of law. It seems self-contradictory to say that the setting of precedents that are likely to be followed in future cases impedes the rule of law. After all, the following of precedents creates more consistency in the application of the law in similar cases. However, the problem described in this section is not that the substantive law becomes unpredictable from one case to the next. The problem is that the *procedural* laws in place to create a fair opportunity to utilize and influence the substantive law may not be consistently accessible to each litigant in one case; furthermore, as explained in the next section, the factors that affect each litigant's opportunity to utilize and influence substantive law *includes how much money they are able and willing to pay nonparties*, namely their own lawyers.

5.1.2 Ambiguity and the Opportunity to Influence

There is an epistemological problem in law, at play every time a case is adjudicated; namely, is there a "correct" characterization of a point of law in every – or any – given case?⁴⁰⁰ This problem becomes much more complex when one considers that laws also prescribe the method of determining what the facts of a case are. This thesis defers questions of whether there is a correct legal rule or principle to be applied in any or every case, whether there is a correct way to apply it, and whether one can possess the ability to know with certainty the answers to those questions. Instead, this section extends from the pragmatic premise that there are some points of law that are settled, and very difficult to change, and some points of law that are unsettled or novel, within which a lawyer has more room to craft a legal argument.

⁴⁰⁰ See, for example, Ronald Dworkin, *A Matter of Principle*, (Cambridge: Harvard University Press, 1985) at 119-145.

In cases that involve ambiguous or unsettled points of law, a lawyer has the ability to craft a complex legal argument, or a novel one based on related legal principles. With the legal training and expertise that lawyers have, most of them are able to craft such arguments at a level that most non-lawyers cannot.⁴⁰¹ Furthermore, clients with the ability and desire to pay a lawyer to skillfully craft a complex legal argument will have more opportunity to change settled law and settle new points of law than those clients who are only able and willing to pay a lawyer for a simple argument. This demonstrates the sale of law in that there are points of law that are simply off-limits for those who cannot or will not pay for an advocate to competently argue those points of law.

This section is similar to the last one in two ways. The last section dealt with the activity of creating more certainty on a point of law by way of the creation of binding authority through the appellate courts. This section deals with the activity of finding and using *uncertainty* in the existing jurisprudence in order to create legal arguments for litigants to hang their proverbial hats on. The first similarity is that these activities take place in many of the same files; most appellate cases involve finding and using uncertainty in the existing jurisprudence in order to argue in favour of a litigant's position. The second similarity is that both activities are time-consuming for lawyers, and the more financial reward there is for a lawyer, the more opportunity to influence the law a litigant can receive.

That is not to say that there is necessarily a direct correlation between the time investment of the lawyer and the money paid by the client. Indeed, financial incentives for the lawyer might not come in the form of a payment from the client at all. Tamanaha says that many "interest groups" might file *amicus curiae* briefs in highly publicized court cases in order to help fundraising campaigns for those organizations.⁴⁰² Tamanaha provides readers with two pieces of evidence for that claim. First, there has been a rapid increase in *amicus curiae* briefs in recent decades: "[I]n 13% of the [Supreme Court of the United States] cases in 1953, compared with 92% in 1993. In the 1993 term, 550

⁴⁰¹ See for example "Price of Law", *supra* note 96 at 969.

⁴⁰² *Law as a Means to an End*, *supra* note 36 at 164.

briefs were filed in 92 cases, averaging almost 6 per case.”⁴⁰³ Second, arguments are frequently duplicated in briefs filed by different interest groups.⁴⁰⁴ There are several possible explanations for duplication of arguments, including interest groups’ failure to coordinate or efficiently divide labour amongst themselves, but Tamanaha states that a likely explanation is that interest groups file more and longer briefs in order to attract support and donations. Regardless of whether Tamanaha is correct in making that statement, interest groups sell law to classes of third-party donors in the same way privately practicing lawyers sell law to their individual or organizational clients.⁴⁰⁵

Perhaps law societies have addressed one obvious problem stemming from the sale of ambiguous points of law by requiring that lawyers swear, upon their admission to the bar, an oath that they will not “pervert the law”.⁴⁰⁶ However, that oath is not commonly taught in laws schools, there are few academic commentaries on the content of this oath, and there are no reported Canadian cases in which a lawyer has been disciplined for its breach. Also, it is unclear what it means to pervert the law. Advocates can and should argue unsettled points of law – or sometimes argue that the court change settled points of law – on behalf of their clients. As such, this oath is open to a great deal of interpretation for the lawyers who must swear it.

Courts have also addressed the sale of ambiguous law through the application of the principle of *stare decisis*, making decisions that are consistent with earlier judicial decisions. However, courts have limited ability to conserve the existing state of points of law when a civil dispute is settled before adjudication. Presumably, the legal arguments advanced during settlement negotiations will be at least *credibly* consistent with the existing law, but is it not more likely that lawyers will advance unconventional legal arguments in negotiations than in open court? This relates to the discussion in the last section, in that a well-heeled litigant could give an opposing party who cannot afford to

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ However, the extent to which Tamanaha’s statement is true for any given interest group correlates with the extent to which that interest group is selling law in a “nightmarish” way. “Nightmare” is a term, used by David Luban, which will be explained in the next section.

⁴⁰⁶ *Legal Ethics*, *supra* note 85 at 73.

go to trial the following unattractive options: (1) accept my settlement offer (which is based on unconventional legal arguments); (2) invest your lawyer's time in crafting a counterargument (to said unconventional legal arguments); or (3) appear as though you are unreasonably rejecting a settlement offer and bear the risk and financial burden of going to trial.

Drawing on the ideas discussed in **Section 4.3.3 Billing as a Departure from Corrective Justice** and **Chapter 4.4 Billing, Corrective Justice, and Economic Analysis of Law**, could a fair net result be inaccessible for a litigant who does not have access to funds in a dispute involving unsettled points of law? Could a fair net result be inaccessible for a litigant in a dispute involving settled points of law if the adverse party raises unconventional legal arguments? Do the answers to these questions depend – in part – on the availability of a lawyer who is willing to enter into a contingency-percentage billing arrangement?

5.1.3 Lawyers Who Capitulate and Lawyers Who Dominate

Lawyers, in their role as legal advisors, have relationships with their clients in which one of the parties is likely to hold a great deal of power over the other. The difference between three types of legal advising is demonstrative of the sale of law. Luban describes those three types of legal advising in his book *Legal Ethics and Human Dignity*.⁴⁰⁷

The first of these three types of legal advising is the gold standard, so to speak, which Luban describes as the “Noble Dream” of ethical legal advising. According to Luban, this is a relationship in which the lawyer acts as an intermediary between the client's private interests and the law's public function.⁴⁰⁸ In this type of relationship, the lawyer researches laws that pertain to the client's legal issues, and accurately explains those legal rules to the client.⁴⁰⁹ In the course of a civil litigation file, this sort of explanation takes the form of a risk analysis, in which the lawyer explains to the client all of the strengths

⁴⁰⁷ *Supra*, note 93 at 158-161.

⁴⁰⁸ *Ibid* at 159-160.

⁴⁰⁹ *Ibid*.

and weaknesses in the client's case, and the corresponding, fact-specific, risks of proceeding with litigation.

The second type of legal advising takes place within a lawyer-client relationship in which the lawyer “dominate[s] and manipulate[s] clients, either to advance their own agenda or to line their own pockets”, and this is referred to as one version of “the Nightmare” of ethical legal advising.⁴¹⁰ Recall the thought experiment explained at the beginning of this thesis in which two similar lawyers and their respective clients are engaged in nearly identical files, with one important difference. One of the lawyers bills hourly and one expects to collect a contingency fee.⁴¹¹ If the two lawyers give dissimilar advice to their clients, there is a good chance that at least one of them is advising in a way that is consistent with this version of the Nightmare; bear in mind, though, that this is true if and only if the lawyers' respective advice complements their own billing arrangements, thereby providing them with potential benefits.⁴¹²

The first version of the Nightmare can also involve interests other than fees. John Wade described one anecdotal example of that during a session for the Law Society of Saskatchewan's Continuing Professional Development program.⁴¹³ He explained that there are many reasons why lawyers do not commonly provide written risk analyses to their clients, and among those, some lawyers choose not to so that there is no risk that they will later be disciplined for having made mistakes in their risk analyses.⁴¹⁴ Simply put, a written risk analysis could serve as evidence against the lawyer at a later time.

Luban also refers to “a second version of the Nightmare”, which is the third type of legal advising discussed in this section.⁴¹⁵ This type of legal advising takes place within a

⁴¹⁰ *Ibid* at 158-159.

⁴¹¹ Refer to **Chapter 3.2 The Substantial Risk of Harm to the Client** for a detailed explanation of how these different billing types are open to different types of self-interested behavior on the lawyer's part.

⁴¹² For example, the lawyer billing by the hour advises his or her client to continue to advanced stages of litigation, while the lawyer who is billing by contingency fee advises in favour of an early settlement before he or she has to invest much time in the file.

⁴¹³ John Wade, “Systemic Risk Analysis for Litigators, Negotiators, and Mediators” (Breakfast Series on Negotiation, delivered at the Saskatoon Club, November 5, 2013) [unpublished].

⁴¹⁴ *Ibid*.

⁴¹⁵ *Legal Ethics and Human Dignity*, *supra* note 93 at 159.

relationship in which the lawyer capitulates to a powerful client, doing whatever the client demands, without regard for the lawyer's ethical duties to the administration of justice.⁴¹⁶

Luban points to two specific examples of lawyers apparently capitulating to the demand of their powerful clients in the context of civil litigation. The first of these tactics is commonly referred to as “dirty questions”; defendant organizations ask plaintiffs remotely relevant questions about their medical or sexual histories in an attempt to deter other potential plaintiffs from providing evidence at trial.⁴¹⁷ The second of these tactics is referred to as “SLAPP suits”, SLAPP being an acronym for “strategic litigation against public participation”; these are frivolous lawsuits, sometimes for the tort of libel, intended to deter people from publicly voicing opposition to commercial activities.⁴¹⁸

Luban suggests that it is within the lawyer's locus of control whether he or she advises clients in a way that resembles a “Noble Dream”.⁴¹⁹ But are there types of clients that are more likely to receive advice that resembles the first or second version of Luban's “Nightmare”? Intuitively, some organizational clients may be able to use their financial power to cause their lawyers to capitulate to their demands. As Tamanaha suggests, law firms that are unwilling to bend to the will of their large organizational clients – ones that will provide regular work for the firm – will lose those clients to “a more compliant competitor”.⁴²⁰ Can large organizational clients sometimes be the victims of unethical billing practices, or other dominant tactics on the part of the professionals who serve them? Do individual clients also sometimes hold power over their lawyers?

If it is true that lawyers capitulate to their organizational clients more frequently than their individual clients for financial reasons, as Tamanaha suggests, this is an example of the sale of law; under those conditions, large organizational clients would have access to counsel who would not necessarily abide by the ethical rules followed by counsel

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid* at 35-36.

⁴¹⁸ *Ibid* at 36.

⁴¹⁹ *Ibid* at 161.

⁴²⁰ *Law as a Means to an End, supra* note 36 at 137.

representing individuals or small businesses. This is a particularly good example of the manifestation of the sale of law in cases where individuals and large organizations are adverse parties. Empirical data suggest that this is frequently true in personal injury litigation, in the form of an injured plaintiff suing another individual whose defense has been subrogated by an insurance company; however these data are ambiguous because most states have laws that require insured individual defendants, and not their insurance companies, to remain on the style of cause.⁴²¹

5.1.4 The Sources of Prices of Legal Services

The argument that lawyers “sell law” through the sale of legal services is not an easy argument to make because – obviously – the prices of legal services do not explicitly correlate with the legal determinations of files. Rather, the prices for legal services are the product of a variety of social factors that influence the cost to lawyers of providing the services, the supply of lawyers in the market, the demand for legal representation, as well as intangible factors that influence the willingness of clients to pay higher prices for a particular lawyer rather than another lawyer. Analysis of social factors that influence prices is the subject matter of the relatively new academic field referred to as “economic sociology”.⁴²² In other words, economic sociology studies empirical observations of the formation of prices in various contexts.

As mentioned in **Section 3.1.3 The Conflicting Interests of Lawyers and Their Paying Clients**, Gillian Hadfield has argued that the limited supply of and ample demand for legal services has created an atmosphere – a “non-competitive market” – in which lawyers can charge as much as clients are able to pay for their services.⁴²³ As such, in Hadfield’s view, the costs of providing legal services are a less important factor in determining the price of legal services. While costs of providing services are likely a *very* important factor of determining prices for many lawyers, especially those experiencing

⁴²¹ Herbert M. Kritzer, *The Justice Broker* (New York: Oxford University Press, 1990) at 34-38.

⁴²² See for example, “Where do prices come from?”, *supra* note 29. Beckert provides a list of categories and subcategories under which any social factor that influences price can be placed. While Beckert’s framework provides the conceptual backdrop for this section of this thesis, a category-by-category analysis of the economic sociology of prices for legal services is better left for a separate article.

⁴²³ “The Price of Law”, *supra* note 96, at 956.

acute financial hardship, Hadfield's view remains reasonable as a general proposition. As such, factors that influence the cost of providing legal services can be discussed very briefly herein. This brief section will focus more on factors that influence supply, demand, and willingness to pay for lawyers. That being said, even those categories will be discussed concisely herein, focusing only on the most significant social factors influencing price.

Law firms incur costs such as leasing or buying office space, hiring staff, paying electrical bills, and so on. In their day-to-day operations, firms obviously have to comply with relevant labour standards legislation, taxation laws, and other relevant regulations that apply to them, which necessarily impose some cost on the firm. Individual lawyers also incur various kinds of costs in relation to providing legal services. For example, insurance,⁴²⁴ law society licensing fees,⁴²⁵ and continuing professional development courses⁴²⁶ all cost money for lawyers, and these things are all mandatory for a lawyer to maintain his or her license to practice law. Perhaps most significantly, inexperienced lawyers – whose costs of providing legal service might otherwise be quite low – usually have student loan debt to pay after having incurred years of law school tuition expenses. Many prospective law students choose only to apply to high-priced, elite law schools, and may choose to pay more tuition even if the quality of their education is equal, because they realize that many elite firms only choose to hire from elite law schools.⁴²⁷ As such, student loan debt may be a very significant cost for recently graduated lawyers. But, as mentioned above, these factors that affect the cost of providing legal services might be less significant than other factors, given the non-competitive nature of the market for legal services.

Jens Beckert describes a category of social influences on price formation that find their source in the social networks of the parties to transactions. In turn, Beckert divides this

⁴²⁴ *The Legal Profession Act*, *supra* note 60, s.11.

⁴²⁵ *Ibid.*, s.10(h).

⁴²⁶ *CPD Program*, *supra* note 180.

⁴²⁷ Alvin J. Esau, "Competition, Cooperation, or Cartel: A National Law School Accreditation Process for Canada?" (2000) 23 *Dalhousie L.J.* 183 at 185-191.

category into three subcategories, namely “power”, “trust”, and “status”.⁴²⁸ The common theme in these three subcategories is that the social networks of participants in the marketplace will affect prices in the transactions to which those individuals are privy. Individual clients, for example, might not have contacts with knowledge of what legal fees might be appropriate for their matter, while organizational clients – being regular consumers of legal services – would presumably have first-hand experience as well as professional contacts – including other lawyers – who might have insight relating to industry standard legal fees to handle some types of litigation work.

However, the mere availability of this type of information would not set a price on its own. Switching lawyers in the middle of a civil litigation file is extremely costly, as the new lawyer must apprise himself or herself of the background of the file and its progress to date.⁴²⁹ Furthermore, clients may simply trust one lawyer more than another, giving rise to the client’s willingness to pay one lawyer a higher price.⁴³⁰ One example of this can be found in research conducted by Brian Uzzi and Ryon Lancaster. Uzzi and Lancaster found that law firms charge corporate clients more per hour for both partners’ and associates’ rates if lawyers from those firms sit on the boards of directors of those organizational clients.⁴³¹ Lawyers who participated in Uzzi and Lancaster’s research revealed that one reason why law firms have their lawyers sit on their clients’ boards of directors is so that the firms can access information about their competitors’ bids to provide services on upcoming projects.⁴³² One might usually assume that this would allow the firm with access to that information to undercut their competitors’ prices; however Uzzi and Lancaster observed *higher* prices being charged by firms with lawyers

⁴²⁸ “Where do prices come from?”, *supra* note 422 at 760.

⁴²⁹ “The Price of Law”, *supra* note 96 at 977-980.

⁴³⁰ Under the category of “Prices from networks”, Beckert also cites Uzzi and Lancaster, *infra*, for the proposition that mutual trust between lawyers and clients can reduce the need for documentation throughout the course of a file, thereby lowering the cost to both the firm and the client. See “Where do prices come from?”, *supra* note 422 at 763. Suffice it to say that trust existing between lawyer and client is an intangible factor that is likely to affect price

⁴³¹ Brian Uzzi and Ryon Lancaster, “Embeddedness and Price Formation in the Corporate Law Market” (2004) 69 *American Sociological Review* 319 at 338.

⁴³² *Ibid* at 327.

on their clients' boards of directors.⁴³³ This suggests that those corporate clients are choosing counsel based primarily on trust rather than price.

Lacking personal trust based on first-hand experience, a client might trust a lawyer based on reputation in the community. A lawyer-participant in Uzzi and Lancaster's interviews also expressed an opinion that status would lead corporate clients to choose one law firm over another, because the corporate officer in charge of hiring counsel could avoid scrutiny by hiring a high-status law firm.⁴³⁴ Furthermore, Uzzi and Lancaster found that higher status lawyers charged higher fees than lower-status lawyers.⁴³⁵ A variety of factors might contribute to a lawyer's status as "elite" counsel,⁴³⁶ possibly allowing the lawyer to charge higher hourly rates. For individual lawyers within a firm, one such factor is the Queen's Counsel designation, which bolsters a lawyer's apparent status without indicating actual quality of the services provided by that lawyer.⁴³⁷

Jens Beckert, in summarizing the relevant empirical research, juxtaposes the corporate client's perspective with that of the law firm as these perspectives pertain to the effect of a law firm's status on the price of legal services. From the law firm's perspective, price must realistically reflect the firm's status otherwise corporate consumers will not purchase the services; from the client's perspective, a higher status firm is desirable because association with a prestigious law firm will bolster the client's status, and – as mentioned above – because the individual who hires outside counsel is safe from scrutiny if he or she chooses a highly prestigious law firm.⁴³⁸

Do individual clients also prefer higher-status lawyers? Do they not perceive higher-priced lawyers as being higher-status? Are price and status of lawyers closely linked to

⁴³³ *Ibid* at 338.

⁴³⁴ *Ibid* at 328.

⁴³⁵ *Ibid* at 338.

⁴³⁶ This may include the quality of the lawyer's services, depending on the client's ability to assess quality.

⁴³⁷ See for example *Lawyers in Canada*, *supra* note 37 at 201.

⁴³⁸ "Where do prices come from?", *supra* note 422 at 764.

the actual quality of service provided by lawyers?⁴³⁹ Based on the ideas discussed in **Part 2. The Lawmaking Function of Lawyers**, the quality of a lawyer’s service is part of the law that governs a client. If price cannot accurately predict the quality of service that will be provided by a lawyer, this adds an element of randomness and unpredictability to the law, especially for clients retaining counsel who is unfamiliar to them. This kind of randomness is consistent with – if not indicative of – the sale of law.

There are institutional checks on prices that deviate from industry standards in the civil litigation context, most significantly the taxation of solicitors’ accounts. To be sure, institutional regulation of price is the other category of social factors in price formation identified by Beckett.⁴⁴⁰ Taxation of solicitors’ accounts is an important institutional check on rising prices for legal services, as it reduces fees that are outside of the range of reasonable fees, where “reasonable” fees are determined by the range of fees generally accepted as reasonable in the profession.⁴⁴¹ It is also important, because when clients use the taxation processes available to them, fees are usually reduced.⁴⁴² These decisions surely serve as a reminder to practitioners as to what prices are professionally acceptable in the market for legal services. However, these institutional checks are a retroactive measure to protect clients from over-billing, rather than a prospective measure to help them select counsel that will meet their needs.

For instance, as explained at the end of **Section 3.2.4 Value-Based Billing**, some clients may be willing to pay more money in order to have their lawyer place higher priority on their file; this is evidenced by the fact that the importance of the matter to the client is a factor that may be considered in establishing a reasonable fee, as this is explicitly provided for in Saskatchewan’s *Code of Professional Conduct*.⁴⁴³ How can such a client be sure that the lawyer’s work will be conducted both quickly *and* well? While price

⁴³⁹ The client’s own level of involvement throughout the course of a file might be a much stronger factor affecting the quality of service – and the end result – that client will receive. See Douglas E. Rosenthal, *Lawyer and Client: Who’s in Charge?*, *supra* note 262.

⁴⁴⁰ “Where do prices come from?”, *supra* note 422 at 766-771.

⁴⁴¹ “Time for Change”, *supra* note 67.

⁴⁴² *Ibid* at 870-871. As mentioned in **Section 3.2.1 Hourly Billing**, one study in Ontario found that 19% of taxation decisions resulted in a reduction of fees of 50% or more.

⁴⁴³ *Supra* note 40, R. 2.06(1)

formation in the market for legal services is not truly an “example” of the sale of law, it does show the element of randomness in the market that allows fees to become a factor in how the law applies to many cases.

5.2 The Rule of Law and the Sale of Legal Services

The theme of this part is that the sale of legal services in civil litigation matters interferes with the rule of law; a problem that is repeatedly referred to herein as the “sale of law”. There are two senses in which the sale of legal services amounts to the sale of law: the legal-realist sense, which relies on the fact that represented parties usually obtain better results than their unrepresented counterparts in civil matters; and the legal-formalist sense, which relies on the fact that the purchase of legal representation gives the purchaser a better opportunity to influence the law by way of setting legal precedents. Both senses are supported by strong empirical evidence showing that represented parties obtain better results in civil litigation than unrepresented parties.⁴⁴⁴ That evidence directly supports the legal-realist sense described above, in that substantive laws apply more favorably to parties who buy a lawyer’s representation in a civil matter.

However, the same evidence only indirectly supports the legal formalist sense described above. Those data are not specific enough to lead to the inference that represented parties are actually setting novel legal precedents, and the fact of the matter might be that represented parties are simply better able to express their version of the events in a way that is believable and persuasive for a trier of fact. It seems unlikely that lawyers, trained in the law and legal argumentation, are not helping their clients set novel legal precedents, and this chapter extends from the assumption that they are. If, however unlikely it may be, the greater success of parties represented by lawyers is attributable only to their greater ability to persuasive present facts of cases, then the legal-realist argument still applies.

From the legal-formalist perspective, a moral objection to the sale of law can be made with reference to the *purpose of the laws* that are created in the course of litigation.

⁴⁴⁴ *Access to Civil & Family Justice*, *supra* note 58 at 4.

Extending from an instrumental view of law, the legal formalist will of course be concerned with whether the purpose of each law is a legitimate one. If substantive laws are significantly influenced by the legal services provided by lawyers, and if one of the key motives for a lawyer to provide legal services is the potential for short-term or long-term profit, then it can be inferred that one of the purposes of changes made to substantive laws – specifically those changes that were made by way of the provision of legal services – is the profit of individual lawyers. Law, being very public in nature and applying to all members of society, cannot legitimately be manipulated for the purpose of private profit.

From the legal-realist perspective, a moral objection to the sale of law can be made with reference to an *inconsistency in the application of substantive laws* in the course of litigation. As mentioned above, represented litigants regularly obtain much better results than unrepresented litigants. The correlation between representation and success does not necessarily mean that legal representation causes litigants to obtain better results. Perhaps there is some personal characteristic common among conscientious members of society who are entitled to obtain very good results in litigation, which also causes those same litigants to retain lawyers to represent them. If that is so, then there is nothing wrong with a lawyer selling services to assist and make the process less stressful on the litigant. Anecdotally, though, it seems more likely that the services of a lawyer *cause* the litigant to achieve better results in litigation. Lawyers would like to think so, and so would the clients who pay them for their skillful services. Assuming that the lawyer's services do actually cause a litigant to obtain better results, the conflict of interests discussed in **Part 3. The Conflict of Interests Presented by a Lawyer's Fee** reveals another layer to the sale of law, among those litigants who *are* represented by counsel; not all billing arrangements yield the same results for clients (or the same incentives for them or their lawyers), and some lawyers do not adequately act in the interests of their clients. The next part examines the ways in which some of these problems can be alleviated effective regulation of lawyers and law firms.

6. Regulation to Mitigate the “Sale of Law”

The first five parts of this thesis established that billing for civil litigation services is at odds with many of the ideals of private law and the legal profession. At its essence, factors external to private law disputes (such as the exchange of money between clients and their lawyers) should not be factors that influence the provision of legal services and, hence, how the law applies; however, the application of law is necessarily somewhat inconsistent on a case-by-case basis, because if it is too rigid and predictable in its outcomes, it can produce outcomes that can prejudice the recipient of law.

This part argues that one way to reduce the sale of law problem is by way of regulating legal entities – particularly law firms – and monitoring the development and maintenance of their “ethical infrastructures”. This means that the policies and standard operating procedures in place at a law firm should be conducive to firm members’ compliance with ethical rules. Regulating the entity in conjunction with the individual lawyer makes intuitive sense when problems arise from billing. It is often the firm that has minimum billable hour requirements or other profit-oriented policies in place. Consequently, the policies that promote profitability can also create incentives to pad time sheets and behave unethically at the request of some clients, and create barriers to doing *pro bono*, discounted, or unbundled legal work.⁴⁴⁵

The first chapter of this part acknowledges that responsibility for the sale of law is a complex issue, and discusses some of the actors in the legal community that contribute to the sale of law or could help to reduce its impact; as such, it is acknowledged that entity regulation is only one method through which society could improve the consistency of application of laws. The second chapter describes what entity regulation is. The third and fourth chapters discuss why entity regulation might be a good way to counteract the sale of law; specifically, entity regulation could produce cultures within law firms that encourage good ethical decision-making including consistent legal analysis. Given that

⁴⁴⁵ Such incentives are a major theme in *Legal Ethics and Human Dignity*, *supra* note 93.

firms do have their own unique cultures that can influence lawyers' behaviour, monitoring firm's policies could be an effective, preventative way to regulate lawyers' ethics.

6.1 Who is Responsible for Solving the Sale of Law?

Assigning responsibility to solve problems is often a very difficult task, sometimes confused with or connected to attributing blame for the problem.⁴⁴⁶ In the context of this thesis, there are two categories of persons on whom responsibility can be placed: first, there are the active participants in the sale of law, law firms, lawyers, and clients; and second, there are the entities that create the conditions under which the active participants transact, including legislatures, judges, and law societies, among others. As mentioned above, this part focuses on law societies, and their regulation of "legal entities" such as law firms.

Legislators and judges make laws that are the subject matter of civil litigation. The content of such laws influences how civil litigation operates. For example, substantive and procedural laws drafted in simpler language could reduce the ambiguity of those laws and foster more consistent application of the law in similar cases.⁴⁴⁷ It is not just simpler language that could reduce ambiguity, but also the use of rules rather than principles.⁴⁴⁸ Rules that improve public access to information such as disclosed documents and settlement agreements could also potentially improve consistency in resolutions to private law disputes.⁴⁴⁹ Judges can also employ practices to make the courtroom a more accessible place for those who represent themselves.⁴⁵⁰ This thesis does not thoroughly address the potential contributions of individuals and entities that create the conditions under which the sale of law occurs; instead, a more direct method of addressing the sale of law is preferred.

⁴⁴⁶ The attribution of blame and assignment of responsibility for solutions is a theme discussed throughout the publications of Judith Shklar. See especially Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990).

⁴⁴⁷ See for example Ruth Sullivan, "The Promise of Plain Language Drafting" (2001) 47 McGill L.J. 97.

⁴⁴⁸ The use of rules and standards each have benefits and drawbacks. For a discussion about the use of rules and standards, see *Economic Analysis of Law*, *supra* note 385 at 586-588.

⁴⁴⁹ See for example Florida's *Sunshine in Litigation Act*, 69.081 F.S.

⁴⁵⁰ See "The National Self-Represented Litigants Project", *supra* note 381 at 124-126.

Similarly, litigants themselves may play an important role in solving the problem of the sale of law by proactively resolving disputes in an efficient and fair manner as they arise. However, the implementation of a general cultural shift among all litigants is also beyond the scope of this thesis. Many actors in the legal system have a role to play in reducing the potential influence of financial incentives for non-parties play in the legal resolutions of disputes; not all of these actors can be adequately discussed in this thesis; instead, the chapters below discuss one avenue (entity regulation) through which regulators of the legal profession could ensure external financial incentives (especially lawyers' fees) play a reduced role in determining how the law applies to civil litigants.

6.2 Ethical Infrastructures and Entity Regulation

Canadian law societies typically regulate the ethical standards of lawyers by way of disciplining individual lawyers when they breach ethical rules.⁴⁵¹ An emerging alternative to this reactionary model of professional regulation is the regulation of legal entities. Legal entities are law offices such as the in-house legal departments at corporations or law firms. “Ethical infrastructures” is a term, coined by Ted Schneyer, that refers to the features of a legal entity that influence the ethical behaviours of its members. For example, the use of conflict-checking software – or another conflict-checking system – at a multi-lawyer firm with large numbers of clients is an important part of such a firm’s ethical infrastructure. Of direct relevance to this thesis,⁴⁵² billing protocols within a firm are also part of a legal entity’s ethical infrastructure; billing protocols can lead to ethical billing practices such as detailed written agreements that reflect the fees that are actually charged, or policies that require high minimum billable hour requirements for associates (thereby inviting unethical practices to occur).

A legal entity’s ethical infrastructure is closely linked to entity regulation. Law societies’ regulation of legal entities in addition to the lawyers within them can take many forms. One form of entity regulation could be a collective penalty against a firm for misconduct

⁴⁵¹ See for example Adam Dodek, “Regulating Law Firms in Canada” (2012) 90 Can. Bar Rev. 383.

⁴⁵² Is the use of conflict-checking software also of *indirect* relevance to this thesis? Could the hasty acceptance of large numbers of civil litigation files lead to conflicts of interests? How could this affect the firm’s profit? How could this affect the application of the law to clients of the firm?

of one or more of its members;⁴⁵³ another is the requirement for larger firms to appoint an ethics counsel who may be sanctioned if the firm’s ethical infrastructure is lacking in some way.⁴⁵⁴ In fact, discipline is only one way in which legal entities could be regulated by law societies. Adam Dodek describes five kinds of legal entity regulation that are – or could be – exercised in some jurisdictions: first, legal entities could be required to register their names and the names of their partners; second, law societies could require legal entities to obtain licenses prior to operating as entities; third, legal entities could be required to continually provide information about their businesses to the law society; fourth, law societies can implement “compliance” regulation by way of auditing a firm’s practice management systems to ensure the use of proper ethical infrastructures; and fifth, firms could be disciplined by way of practice restrictions or fines affecting the firm rather than its members.⁴⁵⁵

Beyond legal entities themselves implementing policies that create ethical infrastructures – an internal form of law firm ‘self-regulation’ – the legal profession can also regulate legal entities. Entity regulation is coming into use by law societies around the world, though it is relatively new to Canada.⁴⁵⁶ While Nova Scotia was the first Canadian jurisdiction to be authorized to engage in legal entity regulation, other jurisdictions have recently made legislative changes that grant law societies the authority to regulate law firms, not just individual lawyers.⁴⁵⁷ Legal entity regulation has not been implemented in North America as much as in some other parts of the common law world, but many

⁴⁵³ See Ted Schneyer, “On Further Reflection: How ‘Professional Self-Regulation’ Should Promote Compliance With Broad Ethical Duties of Law Firm Management” (2011) 53 *Ariz. L. Rev.* 577 at 592-595.

⁴⁵⁴ “Regulating Law Firms in Canada”, *supra* note 451 at 423 & 439.

⁴⁵⁵ *Ibid* at 407-409.

⁴⁵⁶ *Ibid* at 409-433.

⁴⁵⁷ See British Columbia’s *Legal Profession Act*, SBC 1998, c 9, ss 11, 26(2), 27(2)(e), & 29(a); and Saskatchewan’s *The Legal Profession Act*, *supra* note 60, s. 10. Nova Scotia has more robust regulations pertaining to entity regulation, and these will be briefly discussed below. A more thorough interjurisdictional scan of entity regulation in Canada is not required herein; Dodek has conducted such a scan, as of July 2012, *ibid* at 409-433. The only major development in regulation since Dodek’s scan is the Law Society of British Columbia has created a “Law Firm Regulation Task Force” to make recommendations on how to implement entity regulations in that province. See LSBC Committees and Task Forces, *Law Firm Regulation Task Force*, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=3966&t=Law-Firm-Regulation-Task-Force>>. See also Bill 19, *The Legal Profession Amendment Act*, 4th Sess, 40th Leg, Manitoba, 2015, (legislative session ended June 11, 2015, without a second reading of this Bill).

jurisdictions have regulatory measures that affect firms, and several North American jurisdictions do use legal entity regulation more extensively.

One example of discipline-based legal entity regulation is found in New Jersey's *Rules of Professional Conduct*,⁴⁵⁸ Rule 5.1, which requires that lawyers "undertake measures giving reasonable assurance that all lawyers conform to the *Rules of Professional Conduct*." Dodek points out that this rule does not hold individual partners liable, but rather holds the firm liable to discipline.⁴⁵⁹ However, there is no reported case law providing examples of how this is actually done. Dodek explains that this is might be due to the private settlement of law firm disciplinary matters;⁴⁶⁰ Schneyer, however, points out that the ambiguous "reasonableness" standard makes it difficult to enforce this rule in disciplinary matters.⁴⁶¹ But ethical infrastructures depend on reasonableness; that is, ethical practices that might be appropriate for one style of practice will not make sense for a different kind of law firm. For example, a mid-size litigation firm will need a more robust conflict-checking system than a small transactional law firm. For this and other reasons,⁴⁶² an emphasis on preventative, compliance-based regulation is appropriate, while discipline-based entity regulation can provide the necessary deterrent in such a regulatory framework.

Nova Scotia requires registration of LLPs and the filing of an annual report disclosing all firm members, trust accounts, among other details.⁴⁶³ Furthermore, the Nova Scotia Barrister's Society also has the authority to conduct audits of a firm's accounts and files to determine compliance with professional rules and standards;⁴⁶⁴ if a firm is not in

⁴⁵⁸ New Jersey Supreme Court Office of Attorney Ethics, *Rules of Professional Conduct*, online: <<http://www.judiciary.state.nj.us/rules/apprpc.htm#x5dot1>>. According to Dodek, Rule 5.1 was passed in the mid-1990s when law firm regulation was being actively debated in the United States.

⁴⁵⁹ "Regulating Law Firms in Canada" *supra* note 451 at 417-418.

⁴⁶⁰ *Ibid* at 417.

⁴⁶¹ "On Further Reflection" *supra* note 453 at 595-603.

⁴⁶² For the purpose of this thesis, compliance-based entity regulation will allow firm leaders and other members to engage in the sort of self-skepticism described in the final chapter of this thesis. This is important in mitigating the sale of law, as lawyers day-to-day actions have the potential to conserve the rule of law.

⁴⁶³ Nova Scotia Barristers' Society, Regulations made pursuant to the *Legal Profession Act*, SNS 2004, c 28, R. 7.2.1.

⁴⁶⁴ *Ibid*, R. 8.1 & 10.7.1.

compliance, the Executive Director has the authority to order a firm to take steps to bring its practices into compliance.⁴⁶⁵ Finally, the Barrister's Society may order penalties against a law firm, including a fine of up to \$50,000.⁴⁶⁶

An emphasis on compliance-based regulation has been shown to successfully promote better ethical infrastructures in Australian law firms, and Dodek relies on this to support his assertion that entity regulation should be implemented with such emphasis.⁴⁶⁷ Dodek also recommends a system of registration and annual reports similar to that in Nova Scotia.⁴⁶⁸ He also recommends that regulators require firms to appoint a lawyer designated as "ethics counsel" for every firm.⁴⁶⁹ He also recognizes the need for a disciplinary aspect of entity regulation; he argues that discipline of legal entities is not likely to be frequently used, and is only appropriate in circumstances where there is widespread misconduct within an entity or where misconduct resulted from a lack of proper ethical infrastructures.⁴⁷⁰ Whether or not one agrees with all aspects of Dodek's conception of an *ideal* entity regulatory system, the essential parts of compliance-based regulation to promote ethical infrastructures, along with the potential of penalties in order to enforce that compliance-based regulation is the meaning of entity regulation for the purposes of this thesis.

The meaning of ethical infrastructures still requires elaboration. Schneyer has called "ethical infrastructures" an "undeniably abstract term".⁴⁷¹ However, Schneyer and others have successfully given tangible meaning to ethical infrastructures in the context of legal entities. Notably, the Canadian Bar Association provides a questionnaire for leaders of firms to assess the quality of their firms' ethical infrastructures. That questionnaire includes items under ten headings: competence; client communication; confidentiality; conflicts; preservation of clients' property/trust accounts/file transfers; fees and disbursements; hiring; supervision/retention/lawyer and staff wellbeing; rule of law and

⁴⁶⁵ *Ibid*, R. 10.7.7.

⁴⁶⁶ *Legal Profession Act*, SNS 2004 c 28, s 45(5).

⁴⁶⁷ "Regulating Law Firms in Canada", *supra* note 451 at 433-436.

⁴⁶⁸ *Ibid* at 435-436.

⁴⁶⁹ *Ibid* at 437.

⁴⁷⁰ *Ibid* at 437-438.

⁴⁷¹ "On Further Reflection", *supra* note 453 at 585.

the administration of justice; and access to justice.⁴⁷² As such, the items therein cover many features of a firm's relationship to its lawyers that in turn affect the lawyers' service of the firm's clients. All of those items are potentially part of the sale of law, in that they affect the way in which the law applies to clients of the firm.⁴⁷³ The adoption of a comprehensive ethical infrastructure could influence many law firm practices relevant to its 'sale of law'.

Several items on the questionnaire are of particular relevance to this thesis: under the heading of "Rule of Law and the Administration of Justice", there is a suggestion that, where appropriate, peer-review of opinion letters should occur or opinion letters should be drafted from template to ensure consistency.⁴⁷⁴ Under the heading of "Access to Justice", there is a suggestion that a written pro bono policy should be in place, and pro bono activities are to be encouraged by the firm.⁴⁷⁵ Under the heading of "Fees and Disbursements", there is a suggestion that where practicable, an estimate of fees should be provided to a client. This questionnaire could be adapted to include other suggestions that promote ethical infrastructures. For example, an effective ethical infrastructure required by a law society could include requirements that billing practices with the potential to invite billing abuses – hourly billing practices for example – are subject to monitoring or auditing within the firm itself. Are there other ways in which firm policies can promote consistency in how the law applies in similar cases? Are there ways that firms can reduce inconsistencies in how the law applies, and ensure that necessary or inevitable inconsistencies are attributable to factors other than their financial interests?

6.3 Cultures in the Legal Profession

The previous chapter explained what entity regulation and ethical infrastructures are. But why might they be such effective tools in mitigating the sale of law? One reason is that the breadth of the sale of law as a problem matches with the scope of entity regulation

⁴⁷² Malcolm M. Mercer, et al, "Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide" Canadian Bar Association Ethics and Professional Responsibility Committee, online: Canadian Bar Association < <http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf>>.

⁴⁷³ As discussed in **Part 2. The Lawmaking Function of Lawyers**, lawyers' service (and therefore the firm's service) is part of the law itself.

⁴⁷⁴ "Assessing Ethical Infrastructure in Your Law Firm", *supra* note 472 at 17.

⁴⁷⁵ *Ibid* at 18.

and ethical infrastructures as a solution. As discussed in the previous chapter, ethical infrastructures are flexible tools that can be used to create incentives for all sorts of ethical behaviour, and disincentives for all sorts of unethical behaviour. Ethical infrastructures can create firm atmospheres that promote intra-office consistency in the advice that clients receive; they can reduce employees' incentives to engage in unethical advocacy tactics on behalf of clients; they can put in place fair and reasonable billing procedures that help to ensure ethical billing; and they can promote pro bono activities. Legal advice that is influenced by the lawyer's financial interests, unethical advocacy tactics, unethical billing practices, and a lack of access to justice are some of the symptoms of the sale of law discussed throughout this thesis. As such, ethical infrastructures in law firms have the potential to mitigate the sale of law. Entity regulation is the method by which the public can ensure that firms undertake to implement ethical infrastructures. The first section below examines how new lawyers come to the profession with different ethical orientations, and the second identifies the likely possibility that entity regulation could positively influence the ethical orientations of lawyers as a class.

6.3.1 Ethical Aptitudes of New Lawyers

Could changes to the currently used system of legal education, and discipline-based regulation of individual lawyers be effective ways to positively influence the ethical orientations of lawyers as a class? One study from Australia examined the ethical judgment of participants who had enrolled in a clinical law program or a legal ethics course during law school.⁴⁷⁶ Participants were asked how they would behave in a number of hypothetical scenarios during their last year of law school, and completed the same questionnaire the following year, and the year after that. The study found that the ethical behavior of students who had enrolled in such courses tended to improve during their first two years of practice. However, the study began in 2001, and by that time many Australian firms had already begun to improve their ethical infrastructures in response to

⁴⁷⁶ Josephine Palermo & Adrian Evans, "Almost There: Empirical Insights Into Clinical Method and Ethics Courses in Climbing the Hill Towards Lawyers' Professionalism" (2008) 17 Griffith Law Review 252.

regulatory changes.⁴⁷⁷ Such changes may have influenced the results of the study; would the findings be similar in jurisdictions that were not implementing (or at least planning) some form of entity regulation? The authors of the study also expressed concern in their conclusion, though, stating that into later years of practice, any positive effect of enrollment in ethics or clinical courses might not be able to withstand the pressures of firm cultures and market incentives.⁴⁷⁸ Such market disincentives for lawyers to strive for the highest ethical conduct – or even incentives to behave unethically – are discussed at length in this thesis and the literature about entity regulation. Are those concerns justified? Is it likely that lawyers’ ethical shortcomings are often a product of firm culture? If so, what can lawyers do about this?

6.3.2 Maintaining and Improving Ethical Aptitudes During a Career

David Luban argues that lawyers’ self-skepticism is the only answer to the problem of market pressure and firm culture negatively influencing lawyers’ ethical orientations.⁴⁷⁹ Ethical infrastructures in firms theoretically have the potential to create environments in which self-skepticism about ethical issues is encouraged. As mentioned earlier, the CBA’s self-assessment questionnaire for firms includes a broad list including many different categories of questions. If answered in a genuinely introspective way, some of these questions could reveal aspects of firm culture that encourage profitability at the expense of clients’ interests, or the public interest. Furthermore, ethical infrastructures could include safeguards against the inadvertent sale of law. For example, one item in the CBA’s questionnaire suggests that firms should have a process for peer-review of opinion letters before they are sent.⁴⁸⁰ What would an appropriate peer-review process look like? Could another lawyer working on the same file review the opinion? Could the author’s supervisor review the letter? Could a lawyer from outside the firm review the letter?

⁴⁷⁷ For example, in New South Wales, Incorporated Legal Practices have been required to appoint a Solicitor Director (now called a “Legal Practitioner Director”) in charge of implementing an ethical infrastructure since 2000. See Schedule 1 to *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (NSW), s.47E. To be sure, many of the participants in the study were from New South Wales, although all states in Australia were represented in the study.

⁴⁷⁸ “Almost There”, *supra* note 476 at 279.

⁴⁷⁹ See *Legal Ethics and Human Dignity*, *supra* note 93 at 249-275 & 296-297.

⁴⁸⁰ “Assessing Ethical Infrastructure in Your Law Firm”, *supra* note 472 at 17.

The inadvertent sale of law is potentially more insidious than some other ethical problems (and may require more careful reflection to avoid), because there will necessarily be inconsistencies in the outcomes of similar files. The arguable nature of the law⁴⁸¹ makes it so that it is okay for different lawyers to provide their clients with dissimilar, but reasonable, advice in relation to similar problems, *but only if factors external to the lawyer's fiduciary role as advisor – particularly the lawyer's own financial benefit – did not influence the lawyer's advice*. This is an important issue for the lawyer to consider in relation to each file, but it is difficult because the lawyer cannot unilaterally resolve all ambiguities in the client's case by way of legal analysis. That is why a lawyer's advice to settle a civil claim or to continue to further stages of litigation should take the form of a risk analysis.⁴⁸² Risk analyses, as opposed to advice in the form of “should” or “should not” propositions, empower clients to make autonomous, informed decisions about their legal matters; this reduces – but does not eliminate – the risk that self-interested motives will influence the advice lawyers render.

Although legal analysis cannot conclusively resolve the correct outcome on a file, or even predict with certainty what a court will do, it can identify the client's “best alternative to a negotiated agreement”, “worst alternative to a negotiated agreement”, and “most likely alternative to negotiated agreement”,⁴⁸³ as well as roughly estimating the likelihood of each of these outcomes. A detailed risk analysis should provide a client with an estimate of the likely outcome at trial *for each point of law that is likely to affect the final outcome of the case*, so that clients can see what the probability of success is as well as the sources of uncertainty. Such a thorough risk analysis is consistent with the lawyer's duty of candour towards the client.⁴⁸⁴ Given the inherent tension between a client's best interests and the lawyer's financial interests, as described in **Chapter 3.2 The Substantial Risk of Harm to the Client**, it is likely that anything short of a risk analysis is inconsistent with

⁴⁸¹ See *Rhetoric and the Rule of Law*, *supra* note 151.

⁴⁸² See for example “Systemic Risk Analysis”, *supra* note 413.

⁴⁸³ These terms were coined by Roger Fisher and William Ury in *Getting to Yes*, (New York: Penguin Books, 1981).

⁴⁸⁴ See *Code of Professional Conduct*, *supra* note 40, R. 2.02(2). Each legal issue in relation to the client's matter is, undoubtedly, information that affects the client's interests.

the lawyer's duty of candour towards the client. Of course, written risk analyses could be quite minimalist, perhaps even hand-written in point form, in the interest of pragmatism when rendered in relation to time-sensitive or limited budget files.⁴⁸⁵ When possible, a clear but thorough risk analysis has the obvious advantage of providing a client with more information on which to base his or her autonomous decisions relating to the file.

However, a thorough risk analysis might take the form of a very cumbersome document, and the client might ask for the lawyer's advice on a specific course of action rather than just a risk analysis. If this is the case, the lawyer should provide such advice, but also candidly inform the client of which course of action is most financially beneficial for the lawyer. This procedure would make it easier for the lawyer and client to identify when inconsistencies between files are partly attributable to factors external to the lawyer's role. In other words, requiring lawyers to consider (and disclose) what their fees might be if the client took an alternate course of action would make it nearly impossible for this to subtly and inadvertently become a factor in the advice rendered. As an example of ethical infrastructure that mitigates the sale of law by promoting self-skepticism, firms could require written risk analyses on civil litigation files and candid advice to clients regarding the firm's financial stake in the file.

There are potential downsides to adding more due-diligence steps – such as mandatory risk analyses – to ensure ethical conduct on a file. There is indeed an easily anticipated risk that some more lucrative files could be “churned” on these due-diligence steps, leading to a higher fee for some clients, further perpetuating the sale of law. Should there be a standard format for risk analyses in relation to commonly litigated doctrinal areas, perhaps even taking the form of a checklist? Could such requirements be triggered when the potential value of a claim is worth a certain percentage of an individual litigant's annual income? When could such requirements trigger for commercial litigants? When should peer-review requirements trigger? If self-skepticism is to be an important tool in mitigating the sale of law, it should be encouraged in relation to all files, rather than just

⁴⁸⁵ See for example “Systemic Risk Analysis”, *supra* note 413.

files of a certain monetary value, but there are serious pragmatic problems in putting that ideology into practice.

Self-skepticism on the part of individual lawyers might or might not be the only way to ensure that lawyers allow only appropriate factors to influence their advice. Regardless whether there are other methods, would self-skepticism be an effective one? Is self-skepticism also an effective way to reduce unethical conduct directed towards adverse parties?⁴⁸⁶ What features of an ethical infrastructure could promote associates' self-skeptical thought about their own work on files? Can this be done in a solely complaints-based disciplinary system?

Self-skepticism on the part of individual lawyers might not be enough to promote highly ethical conduct that exceeds the bare minimum regulatory standards. Reduction of market incentives to behave in ways that promote the sale of law are necessary if this problem is to be addressed effectively. The best way for regulators to remove market incentives for the sale of law is to enlist the help of senior partners at the firms that employ large numbers of lawyers. Many senior partners may be unaware that their associates are padding time sheets, for example, but this activity may frequently be a product of firms' structures such as inefficient aspects of the firms' operations or minimum billable hour requirements. Imagine a firm in which there are not enough administrative staff to implement effectively delegation of administrative tasks; managing partners might see this as effective cost-cutting, but associates might be pressed to bill enough hours in such an environment, leading to the hourly billing of tasks that should not be billed. Perhaps, then, ethical infrastructures should also aim to promote self-skepticism in managing partners for the purpose of making them aware of the kinds of ethical breaches that do sometimes occur within their firms and what policy changes might mitigate problems.

⁴⁸⁶ Luban suggests that it is. See *Legal Ethics and Human Dignity*, *supra* note 93 at 249-275, 296-297.

One of the main limitations to complaint-driven regimes is that they focus exclusively on the bare minimum ethical requirements to avoid punishment.⁴⁸⁷ If a firm receives fewer complaints, can it be inferred that the firm's overall conduct trends towards a higher standard than a firm that receives more complaints? Alternatively, does it simply mean that the firm falls below the minimum standard less frequently? The answer to those questions is significant, because research has shown that the thoughtful implementation of ethical infrastructures in firms has reduced the number of complaints against those firms by approximately two-thirds.⁴⁸⁸ As discussed in the next and final chapter of this thesis, consistent application of professional regulatory laws to different firms is a necessary condition for entity regulation to improve consistency in how those firms channel the law to their respective clients.

6.4 Rule of Law, Entity Regulation, and Ethical Infrastructures

If a firm's only motivators to improve its ethical infrastructure are to reduce the number of complaints against its associates and to avoid sanctions against the firm, thereby increasing efficiency and profit, is this not also demonstrative of the sale of law? The reduction in complaints against associates and avoidance of sanctions against firms might not present a similar incentive to improve ethical infrastructures for different firms. For instance, some firms might have a greater capacity to absorb the inefficiency of addressing complaints, and consider these a cost of doing business.

Furthermore, there is a perception among lawyers, which might or might not be true, that regulators treat more prestigious firms with less scrutiny than their less prestigious counterparts.⁴⁸⁹ If this is true, entity regulation might have unintended effects potentially leading to further inconsistencies in how the law applies to various members of society. For example, if a law society imposed more-onerous-than-typical due diligence

⁴⁸⁷ John Briton & Scott McLean, "Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era" (2008) 11 *Legal Ethics* 241 at 243.

⁴⁸⁸ Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37 *Journal of Law and Society* 466.

⁴⁸⁹ See "Regulating Law Firms in Canada", *supra* note 451 at 396-397.

requirements on a less prestigious firm, this could lead to higher fees for clients of that firm as a result of more time spent on due diligence.

While the concerns mentioned above identify some possible limitations, entity regulation still shows promise as a means of bringing different firms closer to a common ethical orientation; in this way, the entities that shape business landscapes in which lawyers advise, advocate for, and bill their clients can be regulated in order to reduce external influences that cause inconsistencies in the application of law.

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