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## Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence

Paul F. Teich

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## ARTICLES

# ARE LAWYERS TRULY GREEDY? AN ANALYSIS OF RELEVANT EMPIRICAL EVIDENCE

By: Paul F. Teich

### ABSTRACT

*A serious and widespread complaint about lawyers is the charge that they are motivated by greed. More than half of Americans polled during the past two decades have agreed with the following statements: "lawyers are greedy," "lawyers make too much money," "lawyers charge excessive fees," and "lawyers are more interested in making money than in serving their clients." Today, Americans commonly assert that lawyers cheat their clients by hiding the reasons fees are imposed and charging for services that have never been provided.*

*Serious examination of the charge is overdue. If lawyers frequently swindle clients, a pressing ethical problem exists that bar authorities, the police, and criminal prosecutors have to confront and eliminate. Further, the public's concerns affect the business of law; the presumed cost of representation is the principal reason Americans avoid soliciting legal help.*

*Despite the very recent downturn in demand by consumers for legal services, demand has risen dramatically during the past thirty-five years overall, and aggregate demand is significantly higher today than it was several decades ago. During the past two decades, complaints about lawyers have also grown more strident. This Article addresses a single question: Have lawyers exploited the increase in demand for their services by adopting increasingly grasping practices such as price gauging, overbilling, and aggressive collection strategies? This Article examines relevant empirical evidence and proposes an answer: The term "greedy" unquestionably fails to describe average practitioners. The great bulk of practitioners are careful to control annual increases in the size of lawyer and paralegal fees; fee averages have increased only very slowly over decades throughout the country. Practitioners frequently provide free services for which they do not bill and typically avoid overbearing collection practices (a very large share of billed fees commonly are not collected), and practitioners collectively perform hundreds of thousands of hours of community service and pro bono work annually. The value of their donated services can be conservatively estimated to be over \$1 billion annually. It is also true that the evidence fails to support the view that lawyers routinely overbill. Finally, the moderate real income increase that has been experienced by the average practitioner over the recent past, while greater than that of the average American worker, is explainable as the result of two factors: an increase in productivity and relative insulation from the forces of global economic competition.*

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## I. INTRODUCTION

### A. *The Question at Issue and its Answer in Brief*

Since the early 1990s, the majority of Americans have repeatedly expressed the belief that lawyers charge too much for their services. The public is concerned not only about fee size but also about billing misconduct. It is claimed, for example, that lawyers routinely hide the reasons that fees are imposed, refuse to account for their hours, and charge for services that have never been provided—that they routinely fee gouge. Understandably then, the majority also believe that lawyers earn excessive incomes and that the average practicing lawyer is quite literally “greedy.”<sup>1</sup>

Every lawyer should take the public’s concern about greed seriously, and bar leaders should worry about the factors that provoke that concern. When deciding whether to secure a lawyer’s help,

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1. See *infra* Part III, for specific public views on lawyer greed.

Americans consider the likely cost of help to be critically important.<sup>2</sup> Americans pay for personal legal services primarily from current income,<sup>3</sup> and cost is the principal reason Americans avoid bringing otherwise insoluble law-related problems to lawyers.<sup>4</sup> Further, if lawyers are routinely cheating clients, as is often charged, their dishonesty should be considered a shameful professionalism problem that disciplinary authorities need to aggressively confront and eliminate. Finally, public beliefs about lawyer greed are influential determinants of the profession's occupational prestige,<sup>5</sup> and the reputation of lawyers affects public confidence in the justice system generally. Greed, in all its purported manifestations, is worth studying and addressing, and mistaken beliefs about lawyer behavior and motivation are worth correcting.

Available evidence indicates that the demand for legal services has dropped since the onset of the 2007–2009 recession.<sup>6</sup> A languishing economy has contributed to lawyer layoffs, salary decreases, and hiring freezes.<sup>7</sup> But the recent setback to the sector is just that—recent. For decades before the recession, the sector experienced tremendous and uninterrupted growth.<sup>8</sup> Further, the fall in demand appears to have already ended. Demand seems to be growing again—albeit slowly.<sup>9</sup> It needs to be emphasized that the recession-prompted drop, while noteworthy, has actually erased only a small fraction of the overall increase in demand that has occurred since the early 1970s.<sup>10</sup>

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2. Barbara A. Curran, *Report on the 1989 Survey of the Public's Use of Legal Services*, in AM. BAR ASS'N, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY (1989).

3. *Id.* at 60.

4. *Id.* at 82.

5. See *infra* text accompanying note 53.

6. The National Bureau of Economic Research has determined that the recent "great recession" began in December 2007 and ended in June 2009. See, e.g., Chris Isidore, *Recession Officially Ended in June 2009*, CNN MONEY (Sept. 20, 2010, 4:00 PM), [http://money.cnn.com/2010/09/20/news/economy/recession\\_over/index.htm](http://money.cnn.com/2010/09/20/news/economy/recession_over/index.htm).

7. Eli Wald, *Forward: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051–52 (2010).

8. See *infra* text accompanying footnotes 30–35.

9. See Hildebrandt Baker Robins, *PMI Rises in Fourth Quarter, Flat for 2010*, PEER MONITOR INDEX, 2 (Jan. 28, 2011), <http://amlawdaily.typepad.com/files/q4-pmi-report.pdf> ("In 2010, the legal market reflected the ups and downs of the overall economy – stabilizing early in the year, and suffering slight setbacks mid-year. We entered 2011 on a more positive note, as the uptick in demand seen at the end of 2010 across many important cyclical practices like corporate, real estate and litigation is encouraging. It appears that momentum will carry over and demand will continue to rise this year . . .").

10. See BUREAU OF ECON. ANALYSIS, DEP'T OF COMMERCE, GROSS-DOMESTIC-PRODUCT-BY-INDUSTRY DATA (last modified Apr. 26, 2012), [http://www.bea.gov/industry/gpotables/gpo\\_action.cfm?anon=976139&table\\_id=27017&format\\_type=0](http://www.bea.gov/industry/gpotables/gpo_action.cfm?anon=976139&table_id=27017&format_type=0).

GDP is considered a proxy for the general economic demand for goods and services within a nation. The contribution made by legal services to GDP actually rose in 2007 and 2008, but it fell from \$291 billion to \$282 billion in 2009—close to a 3% decline in a single year. *Id.* The decline reduced the value of legal services' contribution to

This Article, in significant part, is about the increase in demand that has occurred over the past several decades. More specifically, this Article concerns the growth in the sector that has occurred due to individuals' (rather than businesses') need for services. The demand for legal services provided by private practitioners to individuals has risen significantly in the United States since the early 1970s—more than 200%<sup>11</sup> when measured by lawyer receipts “coming from individuals.”<sup>12</sup> By comparison, since 1970 the population has increased by about 50%.<sup>13</sup> It is also true that since 1970, complaints about lawyer greed have grown more strident. This Article addresses a single question: has the increase in demand for legal services by individual American consumers contributed to the rise in negative public feeling about lawyer greed or, to put the question differently, has the profession exploited the increase in demand and generated legitimate public resentment? “Greed” is an unforgiving term. Its use to describe the profession as a whole suggests that unconscionable prices for legal service are standard and the incomes of practitioners bloated. It is of course logically possible that the profession *has* exploited the rise in demand for legal services that has occurred in the past forty years; that lawyers have increased the price of routine legal services to unconscionable levels; that dishonest billing and draconian collection practices have become ordinary; and that the incomes of practitioners who serve individuals have soared. It is possible that lawyers have turned their backs on their communities and abandoned civic and pro bono work in order to maximize income while consumers are vulnerable. The purpose of this Article is simply to address whether any of these things has occurred. Survey research sponsored or conducted by lawyer and paralegal professional organizations as well as by government agencies suggests that *none* of these things *has* occurred. This

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GDP below its 2007 level. *Id.* Since demand for legal services, however, began to rise at the end of 2010, see *supra* note 9, and demand has almost certainly continued to rise during 2011, the lion's share of the increase in demand since the early 1970s has clearly survived the “great recession.”

11. See *infra* notes 30, 34.

12. When used on “law firm census” questionnaires circulated to practitioners by the United States Census Bureau, the term “individuals” means individuals and the estates of individuals. See, e.g., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1997 ECONOMIC CENSUS, LEGAL SERVICES 2 (1997), available at <http://www.census.gov/eprd/www/pdf/97sv/sv8100.pdf>. The questionnaires, which are distributed at five-year intervals, ask law firms to report receipts and the sources of receipts. When used in any part of this Article that concerns sources of lawyer receipts, the term “individuals” has the meaning assigned by the Census Bureau.

13. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, tbl.2 at 8 (2008) [hereinafter 2011 STATISTICAL ABSTRACT], available at <http://www.census.gov/prod/2011pubs/11statab/pop.pdf> (showing that the resident United States population was 205,052,000 in 1970 and 307,439,000 in 2009).

Article reviews the relevant research<sup>14</sup> and elaborates on the following points.

Many state bar associations periodically undertake professional “economic surveys” to gather information about law office management practices, lawyers’ fees, and lawyers’ incomes. Since 1991, at least one national paralegal organization has occasionally polled paralegal workers concerning their economic circumstances, and national surveys of consumers have sometimes been conducted to learn more about the legal needs of the public and the actions that Americans undertake to meet those needs.

Little useful data about the fixed and contingent fees that American lawyers charge has been collected by the researchers conducting these surveys, but information concerning the hourly fees that are charged has been regularly gathered. Reports of survey results allow inferences to be drawn about the speed with which hourly fees are rising throughout the United States generally.

On survey questionnaires, bar associations often ask practitioners whether they ever charge by the hour and if they do, what single fee amount is the one most frequently charged. Concerning this “typical hourly fee,” data in bar-sponsored economic surveys<sup>15</sup> show the following:

- \* The real median or real average fee (whichever is reported by a bar association) does not inevitably rise in a given jurisdiction across time. Rather it is likely to fluctuate—sometimes rising and sometimes falling. Declines over multiyear periods occur in most states. The real median fee charged in one state, Michigan, fell across a recent thirty-one-year period (1972–2003), for example. Over many decades, the standard fee charged in a jurisdiction is likely to rise, however, even when measured in real (or constant) dollars.
- \* It is common for the size of the real median or real average fee in a given state to increase over many decades at an average compounded rate of less than 1% per year, although a higher rate of increase has sometimes been recorded over a multiyear period.
- \* The slow rate of increase in a state’s “typical” hourly fee (median or average) is often manifest in the total size of the increase that has occurred during the time period in which fee-related information has been gathered. Across a recent thirty-two-year period (1970–2002), the real median rate charged by Oklahoma

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14. The Author does not review in this Article any of the research concerning legal fees done by the consulting firm Altman Weil. Although the firm regularly surveys lawyers about their billing rates, its subject pool consists of firm “clients and contacts” and is “probably not representative of the smaller general practice or solo practitioner office serving individual clients.” Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 957 n.15 (2000).

15. See *infra* Part IV.

lawyers rose only 19%, for example, while during a recent twenty-five-year period in Nebraska (1981–2006), the real median fee rose only 11%. Across a recent eighteen-year period in Colorado (1982–2000), the real median rate charged by attorneys rose 9%. Between 1965 and 1998 (a thirty-three-year period), the real average fee in Alabama increased 13%. Between 1967 and 1991 (a twenty-four-year period), the real average fee in Kentucky increased 17%. Fees did not seem to be growing at an ominously steep rate in any of the fifteen states on which the Author could gather information.

- \* Since the mid-1960s, in 2007 inflation-adjusted dollars, the size of the median or average fee has always been determined by survey researchers to be above \$123 and below \$229 in each of the fifteen states for which data are available. (All real dollar figures in this Article are stated in constant 2007 dollars. The year 2007 represents a recent year for which statistics related to this Article were often available, and inflation since that year has been modest.) In other words, in these states there is no evidence that the typical fee has ever fluctuated outside this \$104 range.<sup>16</sup> The fifteen states are widely dispersed geographically. It seems likely that in much of the United States, standard fees have fluctuated only within this same real-dollar range.
- \* Data regarding fees charged by practitioners who provide services to individuals principally or exclusively (such as family lawyers and estate planners) are available.<sup>17</sup> The data show that such fees tend to be relatively low, that is, they tend to be low in comparison to the fees charged by lawyers as a whole. Individuals cannot afford to pay the high hourly fees that organizations, in particular large organizations like corporations and government agencies, typically can. Lawyers obviously know this fact and act on it in setting fees.
- \* Longitudinal data are available about the fees charged by lawyers for the work done by the paraprofessionals they employ. Data have been gathered nationally since 1991 regarding the typical fee billed by lawyers for work done by paraprofessional staff members.<sup>18</sup> These data show that the median hourly paralegal billing rate has increased only modestly across time. Between 1991 and 2010, the billing rate (in inflation-adjusted 2007 dollars) increased from \$73 to only \$94. Thus, during that time period, the rate stayed within a \$21 “real range.”

This surveys contain additional information that relates to the concerns of Americans about lawyer “greed”:

- \* Consumers report that lawyers very frequently do not charge *any fees* for legal work.<sup>19</sup>

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16. See *infra* Part IV TABLES 1–3. The actual range is \$124 to \$228; thus it is a \$104 range.

17. See *infra* Part V.A.

18. See *infra* Part VI.

19. See *infra* Part VII.

- \* Lawyers report that they frequently fail to collect fees that are due.<sup>20</sup> They rarely add a service charge or interest to an overdue bill, rarely use collection agencies, and do not use lawsuits as a primary means to collect a bill. Data from several states suggest that lawyers often negotiate with their clients over unpaid fees and often reduce fees as an inducement to pay. They often dun their clients, making simple requests or demands for payment. The next most common approach to handling an unpaid bill, however, is simply to write it off as a loss.
- \* Lawyers generally report doing surprisingly impressive amounts of civic and pro bono work.<sup>21</sup>

Fee-related data even shed some light on the claim that fraudulent over-billing has been a persistent problem. The claim is often made that the practice has been widespread, severe, and sustained over many decades. The claim seems implausible on its face, for it suggests that legal services consumers have been willing over a lengthy period to pay bills that have included the cost of fraudulently billed sums. If that has been true, then why have lawyers routinely risked their careers and the possibility of being jailed? They could simply have charged higher billing rates and charged for hours actually worked. The data suggest that lawyers could have increased their rates more rapidly than they have. For most lawyers, it appears that there has been ample room to increase nominal and real rates without provoking rate “shock” and alienating prospective clients.

Regarding the topic of lawyer income,

- \* Data concerning the money earnings of lawyers have been published by the United States Census Bureau in Current Population Survey (“CPS”) reports since 1982. Data concerning the money earnings of American workers fifteen years of age and older have also been published in CPS reports since that time. The average incomes of lawyers and of United States workers rose 76% and 41% respectively between 1982 and 2008. Private practitioners earn higher annual incomes than lawyers generally, but the difference is not great. This is because private practitioners today constitute three-quarters of the total lawyer population and have constituted the great bulk of the lawyer population for at least half a century. It is likely that the real average income of private practitioners has risen roughly 76% since 1982, which parallels the average income rise of lawyers as a group. The average annual income of private practitioners consequently has not soared over the past several decades although it has grown more rapidly than the mean income of other American workers. As is further discussed below, both logic and the evidence suggest that the growing income gap between lawyers and the rest of the working public is not being caused by

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20. See *infra* Part IX.

21. See *infra* Part VIII.



significant growth in overbilling by lawyers. The reason that there is a growing income gap between lawyers and other workers, however, is not clear. Rises and declines in income inequality among worker income cohorts are phenomena that are not well understood by economists. This is true despite the fact that most countries of the world are experiencing at least some rising income inequality, and the problem has been studied extensively. In any case, it appears the growing gap between the average income of lawyers and other Americans is not being caused by the forms of lawyer greed about which consumers seem most concerned: overbilling and fee gouging.<sup>22</sup>

Regarding the topic of paralegal income,

- \* Professional organizations began regularly surveying American paralegals about their incomes only recently. Surveys of the United States paraprofessional population conducted by the National Association of Legal Assistants show that in the nineteen-year period 1988 through 2010, average paralegal income grew 12%. Census data indicate that the average income of United States workers fifteen years and older also grew 12%. At least very recently, the rate of growth of paralegal income has mirrored the rate of growth of worker income generally.<sup>23</sup>

In sum, research sponsored or conducted by lawyer and paralegal professional organizations as well as by government agencies suggests that the average private practitioner is careful to control increases in the size of his or her own hourly fees as well as the size of fees charged for the work of paralegals. Further, the average practitioner often provides free services (including pro bono services), avoids overbearing collection practices, frequently does not collect billed fees, and is often generous with his or her time doing community service work. The income increases that have been experienced by the average practitioner and paralegal worker over the past several decades should not shock anyone's conscience, and the increase in the average lawyer's income does not seem logically to have been the result of widespread fraud through overbilling. Altruism is undoubtedly not the only reason that the typical practitioner is careful in his or her business practices and frequently helpful to the members of the community in which he or she works; however, the term "greedy" is not an apt adjective to use to describe the typical practitioner. Empirical evidence suggests that lawyers as a group are prudent businesspeople, often willing for both practical and altruistic reasons to give to their communities and the members of those communities. Market forces as well as ordinary human decency appear to be functioning perfectly adequately to control the behavior of the average lawyer.

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22. See *infra* Part X (discussing in detail the topic of lawyer income).

23. See *infra* Part XI (discussing the growth of paralegal income).

B. *Inflation and Growth in Dollar Denominated Measures of Greed*

As noted above, this Article discusses lawyer fees, receipts, and incomes across time. Consequently, the effects of inflation have to be taken into account when evaluating real changes in dollar figures. Readers should be aware that in the United States over the past half-century, substantial inflation has occurred. That inflation is evident in the movement of the Consumer Price Index for All Urban Consumers, the “CPI-U,” published by the Bureau of Labor Statistics (“BLS”).

The CPI-U covers about 87% of the total United States population<sup>24</sup> and is considered by the BLS to be the “broadest and most comprehensive” Consumer Price Index (“CPI”) published.<sup>25</sup> When the period 1982 through 1984 is used as the base period,<sup>26</sup> the “all items” CPI-U for 1960 is 29.6,<sup>27</sup> the CPI-U for 1970 is 38.8,<sup>28</sup> and the 2010 CPI-U is 218.1.<sup>29</sup> Thus, the cost of the market basket of goods and services tracked by the Department of Labor has risen more than sevenfold during the past five decades; an item or service that cost \$10 to purchase in 1960 now costs over \$70; and one that cost \$13 to buy in 1970 now costs over \$70. Dollar figures are sometimes stated in both nominal and constant (or inflation-adjusted) amounts in this Article. Again, all real-dollar figures in this Article are stated in *constant 2007 dollars*. Inflation has been modest since that time, and 2007 represents a year for which statistics related to this Article were often available. Increases that occur over decades in the nominal total of receipts earned by lawyers, in the nominal standard hourly fee that lawyers charge, or in nominal average lawyer income can appear *very* steep. Real figures should be consulted to determine *just how* dramatic, or modest, a particular increase has been, however.

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24. *Consumer Price Index Frequently Asked Questions*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cpi/cpifaq.htm> (last modified Oct. 19, 2011). Specifically, see Question 3 on the webpage: “Whose buying habits does the CPI reflect?”

25. *Id.* See Question 13: “Which index is the ‘official CPI’ reported in the media?”

26. *Id.* See Question 11 on the webpage: “How do I read or interpret an index?” When the period 1982 through 1984 is used as the base period, the average price of the CPI market basket of goods and services during that period is set to the number 100. *Id.* Historically, the Bureau of Labor Statistics has updated the base period from time to time. However, most currently published BLS CPI indices still use the period 1982–1984 as their base period. *Id.*

27. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CONSUMER PRICE INDEX, ALL URBAN CONSUMERS – (CPI-U) (2012), <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt> (documenting yearly CPI averages).

28. *Id.*

29. *Id.*

## II. GROWTH IN DEMAND FOR LEGAL SERVICES BY INDIVIDUALS

During the past several decades, receipts earned by private law firms have grown steadily. In 1972, 1982, and 2007 respectively, private practitioners as a group earned \$10 billion,<sup>30</sup> \$34 billion,<sup>31</sup> and \$228 billion in nominal dollars.<sup>32</sup> The increase in real revenue was less startling: in constant 2007 dollars in those years, practitioners earned roughly \$50 billion, \$73 billion, and, of course, \$228 billion. Thus, real annual revenue increased by about 356% between 1972 and 2007. Obviously the increase was still quite substantial.

Receipts earned from work done exclusively for individuals have also grown significantly since 1972; they have not grown as quickly as total receipts, however. Real receipts from individuals grew from \$25 billion in 1972<sup>33</sup> to \$82 billion in 2002,<sup>34</sup> a 228% increase. While rising as an absolute sum over recent years, receipts coming from individuals (in contrast to those coming from businesses, nonprofit organizations, government agencies, and other clients) have been falling as a share of total receipts.<sup>35</sup>

The growth in demand for legal services during the past half century has been discussed at length elsewhere.<sup>36</sup> One of the most thoughtful analyses concerning the reasons for such growth was written by former dean of Harvard Law School, Robert Clark, in the early 1990s.<sup>37</sup> He proposed five principal causes: greater frequency of contact between and among legal actors across international and state borders, which has led to an increase in transactional as well as other legal work;<sup>38</sup> greater diversity, which has caused an upsurge in civil rights, employment, family law, and housing cases;<sup>39</sup> an increase in the nation's level of wealth which has spawned the promulgation of complex

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30. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *LAW & SOC. INQUIRY* 431, 441 tbl.5 (1989).

31. *Id.*

32. U.S. CENSUS BUREAU, 2007 ECONOMIC CENSUS: SECTOR 54 (2007), available at [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2007\\_US\\_54SSSZ1&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_54SSSZ1&prodType=table). See figures concerning "Offices of lawyers, All establishments."

33. Sander & Williams, *supra* note 30, at 441 tbl.5.

34. U.S. CENSUS BUREAU, LEGAL SERVICES: 2002 ECONOMIC CENSUS 3, tbl.3 (2004) [hereinafter LEGAL SERVICES: 2002], available at <http://www.census.gov/prod/ec02/ec0254i01.pdf>.

35. See Sander & Williams, *supra* note 30 (showing in 1972 and 1982 respectively, 52.5% and 44.5% of practitioner revenue was paid by individuals). In 2002, individuals paid 41.4% of practitioner revenue. LEGAL SERVICES: 2002, *supra* note 34.

36. See, e.g., Marc Galanter, *Law Abounding: Legalization Around the North Atlantic*, 55 *MOD. L. REV.* 1 (1992).

37. Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275 (1992).

38. *Id.* at 288-90.

39. *Id.* at 290-91.

social welfare legislation and the need for enforcement measures;<sup>40</sup> greater human “involvement” in large-scale formal organizations such as corporations and government agencies, which has led to certain economies in the purchase of legal services;<sup>41</sup> and finally, “greater mobility and interconnectedness of . . . populations,” which has made it “less costly . . . to escape from informal social groups and their informal methods of social control” and in turn led to the use of law as a method of ordering human relations.<sup>42</sup>

Undoubtedly, other causes also exist. It is not the purpose of this Article to explain the causes of the growth in demand for legal services, however. It is to discuss the response of lawyers to growth in demand by individuals and lawyers’ alleged greed. As the demand for legal services has grown, public sentiment about lawyer motivation in the conduct of their work has grown increasingly negative.

### III. ALLEGED LAWYER GREED

It is no exaggeration to say that members of the public are deeply concerned about lawyer greed. Over the past two decades, *more than half* of all Americans in polls sponsored by the organized bar have agreed with the following statements: “lawyers are greedy,”<sup>43</sup> “lawyers make too much money,”<sup>44</sup> “it is fair to say that lawyers charge excessive fees,”<sup>45</sup> and “lawyers are more interested in making money than in serving their clients.”<sup>46</sup> In response to a 1998 American Bar Association (“ABA”) poll conducted to measure attitudes toward the United States justice system, 37% of those polled *strongly disagreed* or *disagreed* with the unarguable statement, “*Some costs* for lawyers’ services are warranted.”<sup>47</sup>

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40. *Id.* at 291–92, 294.

41. *Id.* at 295–97.

42. *Id.* at 298.

43. Gary A. Hengstler, *Vox Populi - The Public Perception of Lawyers: ABA Poll*, A.B.A. J. Sept. 1993, at 60, 63 (stating that 59% agree).

44. *Id.* (stating that 63% agree).

45. *Id.* (stating that 55% agree).

46. LEO J. SHAPIRO, PUBLIC PERCEPTIONS OF LAWYERS 7 (2002), available at <http://www.cliffordlaw.com/abaillinoisstatedelegate/publicperceptions1.pdf> (showing that 69% agree). Leo J. Shapiro and Associates conducted two polls. *Id.* The first was conducted in April 2001 with a “nationally representative sample of 450 U.S. households, with the head of the household reporting for household . . .”; the second was conducted in January 2002 with “a nationally representative sample of 300 households . . .” *Id.* at 2–3. See also Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 U. CIN. L. REV. 805, 808–09 (1998) (stating that in 1984 in a Gordon Black/USA Today survey done using a national sample of adults, 61% of respondents expressed the view that lawyers charge unreasonable fees while 56% indicated that lawyers recommend more legal work than is actually required).

47. M/A/R/C RESEARCH, AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 71 (1999).

Further, Americans' views concerning lawyer avarice seem to be turning more unfavorable with the passage of time. Certainly, individual American consumers who have used lawyers have become increasingly dissatisfied with the sums that they have been charged for the work done for them. During 1973 and 1974, the American Bar Association and American Bar Foundation jointly sponsored a survey of the American public that concerned routine legal needs and how those needs are met.<sup>48</sup> Each respondent who had previously used a lawyer was asked to rate the lawyer most recently used<sup>49</sup> on the basis of a set of selected characteristics. On the characteristic of "being fair and reasonable in charging for . . . services," only 7% rated their lawyer "poor," while most gave their lawyer the rating of "excellent" (56%) or "good" (26%).<sup>50</sup> By the 1980s, however, consumer views of the reasonableness of lawyer fees had soured considerably; in 1986, in answer to a question posed by the National Law Journal as part of a telephone poll, about a quarter (23%) of Americans who had previously hired lawyers stated those lawyers "had charged too much."<sup>51</sup> And by the 1990s, consumers had become very unhappy. During a 1993 National Law Journal poll, a stunning 43% of respondents who had used attorneys stated they had been overcharged.<sup>52</sup> Given the negative sentiments about lawyer greed expressed by Americans during the past two decades, there is no reason to believe that consumers who have used lawyers have become any more accepting since the 1990s of the fees they have been asked to pay.

Negative public views about lawyers' impulses concerning money should not be dismissed by the profession as silly and unimportant. Such views are clearly important to the people who hold them. Today, the charge of lawyer greed is one of the principal complaints people lodge against the profession. Reports of two of the national surveys sponsored by bar organizations in the past twenty years have listed lawyer greed as one of only four principal areas of public concern

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48. See BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977).

49. *Id.* at 199. Curran reported that "[e]ighty-seven percent of the lawyer users had their most recent case consultation with a lawyer after 1960." *Id.* That is, within thirteen to fourteen years from the time that survey data was collected.

50. *Id.* at 210.

51. Randall Samborn, *Anti-Lawyer Attitude Up; But NLJ/West Poll Also Shows More People are Using Attorneys*, NAT'L L. J., Aug. 9, 1993, at 1, 22. In the same poll, each respondent was asked which from among five characterizations specifically offered most closely represented his view of the most negative aspects of lawyers. In descending order of frequency, respondents chose the following characterizations: "too interested in money" (chosen by 31%); "file too many unnecessary lawsuits" (chosen by 27%); "manipulate the legal system without regard for right or wrong" (chosen by 26%); "too interested in representing corporations, not people" (chosen by 8%); and just "hired guns" (chosen by 3%). *Id.* at 4.

52. *Id.*

about lawyer motivation and behavior.<sup>53</sup> Also, when thinking about lawyers, the supposed “fact” that lawyers are greedy is close to the surface of Americans’ thought processes. This is made clear in the answers they give when asked to volunteer impressions of lawyers. In the free response portion of an ABA poll taken in 1992, for example, members of the public were asked to describe both favorable and unfavorable impression of lawyers. The two most frequently volunteered negative impressions were that lawyers are too expensive (an opinion that was volunteered by 17%) and that they are “greedy” or “money hungry” (stated by 11%).<sup>54</sup> Further, of the concerns that people have about the legal representation that they have received, concerns about fees are foremost. The report of a 2002 study sponsored by the ABA Section of Litigation that includes a review of comments about the image of lawyers made by Americans who attended focus groups explains as follows:

Of all the criticisms that consumers [who have previously hired lawyers] raise about their personal experiences with lawyers, the greatest number of complaints arises around lawyers’ fees. Consumers say that lawyers charge too much for their services; are often not upfront about their fees; and are unwilling to account for their charges or hours . . . . No one legal specialty is singled out for overcharging. Consumers complain about fees charged by all types of lawyers.<sup>55</sup>

Consumers who have used lawyers often believe that high fees are inescapable; lay people simply cannot do legal work on their own and have to turn to lawyers who they believe inevitably charge high sums. Some specific comments made by focus group members include the following:

I was very impressed (with the work the lawyer did for me), but shocked at the charges because I did not realize they bill you for every little minute. The overall complete thing was wonderful, but we paid out the nose to get all the estate trust settled. But, it’s not something that a normal person can do, and there are all kinds of rules and regulations.<sup>56</sup>

The last time we bought a house, the real estate attorney did absolutely nothing. But, she got this huge commission because there

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53. Compare Hengstler, *supra* note 43, at 62 (“Public complaints about lawyers generally can be placed into four categories – [a] perception that lawyers lack caring and compassion; a perception of poor ethical standards and enforcement; a view that lawyers are greedy; and an apparent distaste for lawyer advertising.”), with SHAPIRO, *supra* note 46, at 7 (“Consumers have four central criticisms of lawyers. The public says that lawyers are greedy; lawyers are manipulative; lawyers are corrupt; and that the legal profession does a poor job of policing itself.”).

54. See Hengstler, *supra* note 43, at 63. See also Ross Laguzza, *The Lawyer Image Study: Some Surprising Results About Texans’ Opinions of Lawyers*, 54 TEX. B. J. 485 (1991).

55. SHAPIRO, *supra* note 46, at 14–15.

56. *Id.* at 14.

were only things that she could do, and we couldn't do it on our own.<sup>57</sup>

You normally need a lawyer when you have a problem, and you associate them with problems. And, the deeper your problem, the more that you need them, and the more expensive they are going to become.<sup>58</sup>

Such remarks appear to voice upset over the supposed monopolization of the field of law by lawyers and the high prices for routine services that monopolization has allowed. No doubt, to such people, lawyer exploitation of their seeming helplessness is particularly galling.

Finally, it is important to note, as stated above, the view that lawyers are greedy appears to be the principal reason that members of the public avoid soliciting professional legal help. The average American believes that legal services are too costly due in significant part to lawyer greed, and it is clear that many believe that greed spawns the desire to hide fee-related information from clients. Many Americans complain that lawyers do not warn clients about the size of likely future fees and that they frequently fail to explain, and thus account for, the fees that are charged.<sup>59</sup> Some say that lawyers both delay cases and assign more staff members than necessary in order to pad bills.<sup>60</sup> Others complain that lawyers promise results that cannot be delivered,<sup>61</sup> apparently simply to secure fees. The real or presumed cost of representation is the principal reason that Americans with unsolved legal problems do not seek legal help.<sup>62</sup> To avoid the anxiety associated with working with lawyers (anxiety that is related to views about lawyer greed), many Americans who need help avoid contact with them.<sup>63</sup>

It is clear that public concern about alleged lawyer greed is not confined to concern about fees charged to businesses and the incomes that lawyers earn from corporate practice. Nor is it limited additionally to upset over the size of lawyer fees recovered in celebrated tort cases. In substantial part, it represents concern about the greed Americans believe is evident in the manner lawyers treat ordinary people.

The nature of public concern gives rise to questions concerning lawyer behavior and possible changes in lawyer behavior across time. How high are the fees that are currently charged to Americans for routine services? Have fees risen steeply with the rise in demand for services across the past several decades? Are sharp or unduly aggres-

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57. *Id.* at 15.

58. *Id.* at 14.

59. *Id.*

60. *Id.* at 15.

61. *Id.* at 16.

62. See Curran, *supra* note 2, at 82.

63. SHAPIRO, *supra* note 46, at 23-24.

sive billing practices employed today to collect high legal bills, and are the incomes of lawyers who serve the public unconscionably high? The heart of this Article begins with an exploration of the fees that lawyers charge.

#### IV. SIZE AND GROWTH OF THE STANDARD HOURLY LAWYER FEE

Today, it is impossible to know the size of average *fixed* and *contingent* fees charged for routine legal services, including those charged just four to five decades ago. Information about such fees was rarely gathered and certainly was not gathered systematically on a national scale. Today, it is still difficult to find publicly available information about these sorts of fees. It is possible to know something about the standard fees that lawyers have been charging for work done on an *hourly basis* during roughly the past four decades in many specific states, however. This is because during that time period, various state bar associations have been conducting “economic surveys” seeking information from the lawyers that the associations represent. Economic surveys typically gather information about the number of hours worked by lawyers per week, month, or year; office staff size; methods of record keeping; the incomes of lawyers; use of technology by lawyers; and other office-management related topics. Because they are simply surveys, they represent snapshots of lawyer economic life in the years in which they are undertaken. Many states gather information irregularly. For example, a bar association may circulate one survey instrument in a specific year, another instrument seven years later, and a third three years after that. Additionally, bar associations often fail to retain reports summarizing survey results, and thus, survey reports can be hard to locate.

However, the Author was able to obtain a number of reports from bar associations as well as to find journal articles referring to specific results. The Author located sources of information concerning fifteen jurisdictions.

Each of the sources the Author located contains data about the fees charged by private practitioners. State bar associations in the fifteen jurisdictions have periodically asked practitioners whether they ever charge on an hourly fee basis and if they do, what size fee they most typically, or most frequently, charge. Each association has then published some or all of the following information: (1) the *median* fee reported by all practitioners; (2) the *average* fee reported by all practitioners; and (3) the median or average fee reported by selected practitioner subgroups—subgroups such as sole practitioners, lawyers working in firms, partners in firms, firm associates, and practitioners working in large cities. Bar associations differ in the ways they report the gathered information. One association will report the standard fee charged in its state as an exact median or average number (e.g., \$156), while another will report the standard fee using a fee range



(\$151–\$160, for example). One association will report fee size by “number of years lawyer has been licensed”; another will not do so, and so forth. Even a single bar association will sometimes summarize fee data differently in one report than it has summarized data in all previously published reports. A bar association might report a median hourly fee for all private practitioners one year, even though it has previously reported only the average size of fees, for example. The reports are limited in their usefulness as sources of data about the movement in the size of fees across time. Still, the Author was able to create an estimate of the gradual movement of fee size in each state considered. Some useful information about each state was available in the collection of reports that the Author consulted.

The three tables below provide information about median and average fees charged by lawyers or subgroups of lawyers across varying lengthy periods in fifteen states. The states are widely dispersed geographically. The first two of the three tables list *median* fees. The third table displays *average* fees. In a survey report, when a jurisdiction’s median fee has been reported as a fee range, both that range and the midpoint of the range are provided in the tables. The total percentage increase in fee size for each data set was derived by making a simple comparison of the most remote and the most recent fee reported in the state in question. By necessity, the midpoints of fee ranges were sometimes used to estimate the total increase or decrease in a state’s fee size. It appears that researchers have never analyzed longitudinal data about fee size contained in bar sponsored economic surveys.

A number of things are noteworthy about the information in the tables.

The real median or real average fee in a state typically both rises and falls as years go by, presumably with the economic circumstances of the state and therefore the economic circumstances of clients. Reductions as well as increases in the real standard fee charged are common. The real standard fee drops between at least two of the years in which surveys were taken in nine of the fifteen states. The size of the real median fee charged in one state, Michigan, seesawed throughout a recent thirty-one year period (1972–2003) both rising and falling. It ultimately ended lower than it had been at the start of that lengthy period. It is well known that Michigan has suffered economic difficulties for many decades. In every other state over the *total* time that information about fees has been gathered by a bar association, the real median or real average fee has risen, however.

While nominal median and average fees have increased markedly across the past four to five decades in the states for which information is available, real fees have only increased modestly. Of course, this is because inflation has also been substantial. The average compounded rate of yearly increase in the real median or average fee is typically

below (and often well below) 1% per year. Across a recent thirty-two year period (1970–2002), the real median rate charged by Oklahoma lawyers rose only 19%, while across a thirty-year period (1975–2005), the real average rate charged by Wisconsin lawyers increased 18%. Between 1981 and 2006 (a twenty-five year period) in Nebraska, the real median fee rose only 11%. Across a recent eighteen-year period in Colorado (1982–2000), the real median rate charged by attorneys rose 9%. The largest increase calculated across any lengthy period (i.e., a period of more than a single decade) was calculated for Missouri lawyers. Real fees charged specifically for trial work in the state increased 40% across the twenty-three year period (1982–1995). Even so, the compounded annual rate of increase in the trial work fee in Missouri was 1.5%, and during the same twenty-three year period, the increase in Missouri in the real median fee charged for legal work done in lawyers' offices was only 22%.

During the past four to five decades in 2007 inflation-adjusted dollars, real median, as well as real average, hourly fees in the states examined (and therefore in much of the rest of the United States, one can safely assume) have ranged between \$124<sup>64</sup> and \$228. There is no evidence that the real median or average fee has ever equaled or exceeded \$228, in any of these states, or ever been lower than \$124. Thus, fees have fluctuated in a fairly narrow “real range” across the states as a whole.

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64. *But see infra* TABLE 2 (showing the real median fee charged by Mississippi lawyers for non-trial work in 1970 is \$123; however, this amount does not represent the median fee charged by *all lawyers across all cases*).

TABLE 1:

<b>NOMINAL MEDIAN AND REAL MEDIAN HOURLY FEES CHARGED BY ALL PRACTITIONERS CHARGING HOURLY FEES IN SELECTED JURISDICTIONS, 1960-2007</b>
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Sources: Michigan, Missouri, Nebraska, Ohio, Oklahoma, Oregon, and Texas economic survey reports.

- MICHIGAN - <sup>65</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
1972	\$40	\$198
1984	\$75	\$150
1988	\$92	\$161
1991	\$105	\$160
1994	\$125	\$175
1997	\$125	\$161
2000	\$150	\$181
2003	\$170	\$192
<i>Increase/Decrease Across 31 Years</i>	325%	-3.0%
<i>Compounded Average Annual Increase/Decrease</i>	4.8%	-0.01%

65. John P. Henderson & Maurice Weinrobe, *The Economics of Law Practice in Michigan* (Centerfold Pullout), 53 MICH. B.J. 1, 8 (1974); John M. Wright, *1984 State Bar of Michigan Economics Survey* (pts. 1-3), 64 MICH. B.J. 1186, 1306 (1985); State Bar of Mich., *The 1988 Desktop Reference on the Economics of Law Practice in Michigan*, 67 MICH. B.J. 3, 22 (1988) [hereinafter MICH. 1988 DESKTOP REFERENCE]; State Bar of Mich., *The 1991 Desktop Reference on the Economics of Law Practice in Michigan*, 70 MICH. B.J. 1223, 1231, 1233 (1991); State Bar of Mich., *Economics Survey: The Economics of Law Practice in Michigan*, 73 MICH. B.J. 1219, 1225, 1227 (1994); State Bar of Mich., *The 1997 Desktop Reference on the Economics of Law Practice in Michigan*, 76 MICH. B.J. 1309 (1997); State Bar of Mich., *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, 79 MICH. B.J. 1545 (2000); Lawrence H. Stiffman, *A Snapshot of the Economic Status of Attorneys in Michigan: Excerpts from the 2003 Economics of Law Practice Survey*, 82 MICH. B.J. 20 (2003).

<b>- MISSOURI (OFFICE WORK) -<sup>66</sup></b>		
<b>Year</b>	<b>Nominal Median Fee</b>	<b>Real Median Fee (in 2007 Dollars)</b>
1982	\$66 (\$61-\$70)	\$142 (\$131-\$150)
1985	\$76 (\$71-\$80)	\$146 (\$137-\$154)
1988	\$101 (\$91-\$110)	\$177 (\$159-\$193)
1990	\$101 (\$91-\$110)	\$160 (\$144-\$174)
1992	\$101 (\$91-\$110)	\$149 (\$134-\$163)
1994	\$121 (\$111-\$130)	\$169 (\$155-\$182)
1997	\$121 (\$111-\$130)	\$156 (\$143-\$168)
1999	\$126 (\$116-\$135)	\$157 (\$144-\$168)
2001	\$138 (\$126-\$150)	\$162 (\$147-\$176)
2003	\$138 (\$126-\$150)	\$155 (\$142-\$169)
2005	\$163 (\$151-\$175)	\$173 (\$160-\$186)
<b><i>Increase Across 23 Years</i></b>	146%	22%
<b><i>Compounded Average Annual Increase</i></b>	4.0%	0.9%

<b>- MISSOURI (TRIAL WORK) -<sup>67</sup></b>		
<b>Year</b>	<b>Nominal Median Fee</b>	<b>Real Median Fee (in 2007 Dollars)</b>
1982	\$66 (\$61-\$70)	\$142 (\$131-\$150)
1985	\$76 (\$71-\$80)	\$146 (\$137-\$154)
1988	\$101 (\$91-\$110)	\$177 (\$159-\$193)
1990	\$101 (\$91-\$110)	\$160 (\$144-\$174)
1992	\$101 (\$91-\$110)	\$149 (\$134-\$163)
1994	\$121 (\$111-\$130)	\$169 (\$155-\$182)
1997	\$121 (\$111-\$130)	\$156 (\$143-\$168)
1999	\$126 (\$116-\$135)	\$157 (\$144-\$168)
2001	\$138 (\$126-\$150)	\$162 (\$147-\$176)
2003	\$138 (\$126-\$150)	\$155 (\$142-\$169)
2005	\$188 (\$176-\$200)	\$199 (\$187-\$212)
<b><i>Increase Across 23 Years</i></b>	185%	40%
<b><i>Compounded Average Annual Increase</i></b>	4.7%	1.5%

66. THE MO. BAR, 2003 ECONOMIC SURVEY REPORT 25, 31, app. 3 (2003); THE MO. BAR, 2005 MISSOURI BAR ECONOMIC SURVEY RESULTS 36 (2005).

67. See sources cited *supra* note 66.

- NEBRASKA - <sup>68</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
1981	\$56 (\$51-\$60)	\$128 (\$116-\$137)
1985	\$66 (\$61-\$70)	\$127 (\$118-\$135)
1989	\$83 (\$76-\$90)	\$139 (\$127-\$150)
1994	\$91 (\$81-\$100)	\$127 (\$113-\$140)
2003	\$113 (\$101-\$125)	\$127 (\$114-\$141)
2006	\$138 (\$126-\$150)	\$142 (\$130-\$154)
<i>Increase Across 25 Years</i>	146%	11%
<i>Compounded Average Annual Increase</i>	3.7%	0.4%

- OHIO - <sup>69</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
1990	\$100	\$159
2001	\$150	\$176
2004	\$175	\$192
2007	\$185	\$185
<i>Increase Across 17 Years</i>	85%	16%
<i>Compounded Average Annual Increase</i>	3.7%	0.9%

- OKLAHOMA - <sup>70</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
1970	\$25	\$134
1982	\$73 (\$61-\$85)	\$157 (\$131-\$183)
1992	\$103	\$152
2002	\$138 (\$126-\$150)	\$159 (\$145-\$173)
<i>Increase Across 32 Years</i>	452%	19%
<i>Compounded Average Annual Increase</i>	5.5%	0.5%

68. NEB. STATE BAR ASS'N, 2003 ECONOMIC SURVEY (2003); NEB. STATE BAR ASS'N, 2006 ECONOMIC SURVEY (2006).

69. OHIO STATE BAR ASS'N, THE 1990 DESKTOP REFERENCE ON THE ECONOMICS OF LAW PRACTICE IN OHIO (1990); SOLO, SMALL FIRM & GEN. PRACTICE SECTION, OHIO STATE BAR ASS'N, THE ECONOMICS OF LAW PRACTICE IN OHIO, DESKTOP REFERENCE FOR 2007 (2007), available at [https://www.ohiobar.org/General%20Resources/pub/2007\\_Economics\\_of\\_Law\\_Practice\\_in\\_Ohio.pdf](https://www.ohiobar.org/General%20Resources/pub/2007_Economics_of_Law_Practice_in_Ohio.pdf).

70. Billie Bethel, *Report of the 1970 Economic Survey of the Oklahoma Bar Association*, 41 OKLA. B.J. 2853, 2872 (1970); Billie Bethel, *Report of the 1982 Informational and Service Survey of the Oklahoma Bar Association*, 54 OKLA. B.J. 223

- OREGON - <sup>71</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
1994	\$120	\$168
1998	\$130	\$165
2002	\$165	\$190
<i>Increase Across 8 Years</i>	38%	13%
<i>Compounded Average Annual Increase</i>	4.1%	1.5%

- TEXAS - <sup>72</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
1967	\$28 (\$25-\$30)	\$174 (\$155-\$186)
1981	\$68 (\$61-\$75)	\$155 (\$139-\$171)
1989	\$117	\$196
2000	\$175	\$211
2003	\$200	\$225
2005	\$215	\$228
<i>Increase Across 38 Years</i>	668%	31%
<i>Compounded Average Annual Increase</i>	5.5%	0.7%

(1983); Mark Payton et al., *2002 Oklahoma Bar Association Membership Survey Report*, Okla. Bar Ass'n, 73 OKLA. B.J. 3395, 3416 (2002), available at [www.okbar.org/news/obj2002dec7.pdf](http://www.okbar.org/news/obj2002dec7.pdf); Charles L. "Bo" Monnot, III, *1992 Oklahoma Bar Association Survey*, 63 OKLA. B.J. 3540, 3563 (1992).

71. OR. STATE BAR, OREGON STATE BAR 1994 ECONOMIC SURVEY (1995); OR. STATE BAR, OREGON STATE BAR 2002 ECONOMIC SURVEY 37 (2002).

72. DEP'T OF RESEARCH & ANALYSIS, STATE BAR OF TEX., HOURLY RATES IN 2005 REPORT 2 (2006), available at [http://www.texasbar.com/AM/Template.cfm?Section=Demographic\\_and\\_Economic\\_Trends&Template=/CM/ContentDisplay.cfm&ContentID=8820](http://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=8820); DEP'T OF RESEARCH & ANALYSIS, STATE BAR OF TEX., HOURLY RATES IN 2003 REPORT 2 (2005), available at <http://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=11483>; DEP'T OF RESEARCH & ANALYSIS, STATE BAR OF TEX., 2001 HOURLY RATE REPORT 11 (2001), available at <http://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=11530>; J. Harris Morgan, *Membership Questionnaire: An Analysis of the Results*, 44 TEX. B.J. 908 (1981); Billie Bethel, *Report of the 1967 Economic Survey of the State Bar of Texas*, 31 TEX. B.J. 9 (1968).

TABLE 2:

**NOMINAL MEDIAN AND REAL MEDIAN HOURLY FEES CHARGED BY  
SUBGROUPS OF PRACTITIONERS, CHARGED IN SPECIFIC  
CIRCUMSTANCES, OR CHARGED BY ALL LAWYERS CHARGING HOURLY  
FEES IN SELECTED JURISDICTIONS, 1960–2007**

*Sources:* Colorado, Iowa, Mississippi, and Montana economic survey reports.

- COLORADO - <sup>73</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
<b>1967: Denver Lawyers</b>	\$25	\$155
<b>1967: Non-Denver Lawyers</b>	\$23	\$143
<b>1982: All Lawyers</b>	\$80	\$172
<b>2000: All Lawyers</b>	\$155	\$187
<b><i>Increase Across 18 Yr. Period 1982-2000*</i></b>	94%	9%
<b><i>Compounded Average Annual Increase Across Period 1982-2000*</i></b>	3.7%	0.5%

\* All-lawyers-all-cases comparable medians exist only for 1982 and 2000.

- IOWA - <sup>74</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
<b>1985: Trial Work</b>	\$75 (\$70-\$79)	\$145 (\$135-\$152)
<b>1985: Non-trial Work</b>	\$75 (\$70-\$79)	\$145 (\$135-\$152)
<b>1990: Trial Work</b>	\$95 (\$90-\$99)	\$151 (\$143-\$157)
<b>1990: Non-trial Work</b>	\$85 (\$80-\$89)	\$135 (\$127-\$141)
<b>2000: All Work</b>	\$125	\$151
<b>2006: All Work</b>	\$143 (\$136-\$150)	\$147(\$140-\$154)
<b><i>Increase/Decrease Across 6 Year Period 2000-2006*</i></b>	14%	-2.6%
<b><i>Compounded Average Annual Increase/Decrease Across Period 2000-2006*</i></b>	2.2 %	-0.4%

\*All-lawyers-all-cases comparable medians exist only for 2000 and 2006.

73. *The Colorado Survey – 1967*, 10 LAW OFFICE ECONOMICS AND MANAGEMENT 215 (1969–1970); *Summary of 1982 CBA Economic Survey Results*, 12 COLO. LAW. 741 (1983); COLO. BAR ASS'N, COLORADO BAR ASSOCIATION 2000 ECONOMIC SURVEY 32 (2001) [hereinafter COLO. 2000 ECONOMIC SURVEY].

74. IOWA STATE BAR ASS'N, THE ECONOMICS OF LAW PRACTICE IN IOWA – 2006 (2006) [hereinafter IOWA ECONOMIC SURVEY 2006], available at <http://isba.affiniscape.com/associations/4664/files/2006%20Economic%20Survey.pdf>; IOWA STATE BAR ASS'N, 1985 ECONOMIC SURVEY (1985) (on file with author); PHILIP A. HOULE, THE

- MISSISSIPPI - <sup>75</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
<b>1970: Trial Work</b>	\$28 (\$26-\$30)	\$150 (\$139-\$160)
<b>1970: Non-Trial Work</b>	\$23(\$21-\$25)	\$123 (\$112-\$134)
<b>1997: Partners &amp; Shareholders</b>	\$129	\$167
<b>1997: Sole Practitioners</b>	\$112	\$145
<b>2005: Partners &amp; Shareholders</b>	\$186	\$197
<b>2005: Sole Practitioners</b>	\$162	\$172

*\*There are no all-lawyer-all-cases medians that would allow a calculation of a meaningful nominal or real increase across any period of time.*

- MONTANA - <sup>76</sup>		
Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
<b>1993: Senior Partners*</b>	\$88 (\$76-\$100)	\$126 (\$109-\$144)
<b>1993: Associates*</b>	\$88 (\$76-\$100)	\$126 (\$109-\$144)
<b>2004-05: All Lawyers*</b>	\$138 (\$126-\$150)	\$149 (\$136-\$162)

*\*There is no all-lawyer-all-cases median for 1993 that would allow a calculation of a meaningful nominal or real increase across the period 1993–2004. The numbers in the Montana table are not inconsistent with the data in other state tables, however.*

1990 ECONOMICS SURVEY OF THE IOWA STATE BAR ASSOCIATION (1991); IOWA STATE BAR ASS'N, THE ECONOMICS OF LAW PRACTICE IN IOWA IN 2001, at 12 (2001).

75. MISS. STATE BAR ASS'N, MISSISSIPPI STATE BAR ECONOMIC STUDY 1970/71 (1971); HORNE CPA GROUP, 1993 LAW FIRM ECONOMIC SURVEY (1993). The letter of transmittal from the Horne CPA Group to the Mississippi Bar included in the report is dated 1993. *Id.*

76. STATE BAR OF MONT., LAW PRACTICE COMMITTEE, 1993 ECONOMIC SURVEY OF MONTANA LAWYERS AND LAW FIRMS (1993); STATE BAR OF MONT., *Membership Survey: Part II, What We Earn—Compensation for Montana's Lawyers*, MONT. LAW, May 2005 at 5, 6 [hereinafter MONT. 2005 ECONOMIC SURVEY].



TABLE 3:

**NOMINAL AVERAGE AND REAL AVERAGE HOURLY FEES CHARGED BY  
ALL PRACTITIONERS CHARGING HOURLY FEES IN SELECTED  
JURISDICTIONS, 1960-2007**

- ALABAMA - <sup>77</sup>		
Year	Nominal Average Fee	Real Average Fee (in 2007 Dollars)
1965	\$22	\$145
1978	\$51	\$162
1986	\$75	\$142
1998	\$129	\$164
<i>Increase Across 33 Years</i>	486%	13%
<i>Compounded Average Annual Increase</i>	5.5%	0.4%

- KANSAS - <sup>78</sup>		
Year	Nominal Average Fee	Real Average Fee (in 2007 Dollars)
1997	\$113	\$146
2005	\$167	\$177
<i>Increase Across 8 Years</i>	48%	21%
<i>Compounded Average Annual Increase</i>	5.0%	2.4%

- KENTUCKY - <sup>79</sup>		
Year	Nominal Average Fee	Real Average Fee (in 2007 Dollars)
1967	\$20	\$124
1991	\$95	\$145
<i>Increase Across 24 Years</i>	375%	17%
<i>Compounded Average Annual Increase</i>	6.7%	0.7%

77. *The Economics of Law Practice in Alabama*, 29 ALA. LAW. 6 (1968); WILLIAM M. KIMMELMAN, DEMOGRAPHIC SURVEY OF ALABAMA LAWYERS, 1978: A REPORT TO THE ALABAMA STATE BAR (1979); Samuel H. Fisher III et al., *A Survey of Alabama Lawyers: 1986*, 48 ALA. LAW 160 (1987); ALA. STATE BAR, SURVEY OF LAWYERS IN ALABAMA 28 (1998).

78. *1997 Economic Survey of Kansas Lawyers*, 66 J. KAN. B. ASS'N. E-1 (1997); KAN. BAR ASS'N, THE ECONOMICS OF LAW PRACTICE IN KANSAS IN 2005 (2006).

79. KY. BAR ASS'N, SPECIAL REPORT TO THE MEMBERSHIP: 1977 ECONOMIC AND OPINION SURVEY (1977); Ky. Bar Ass'n, *1991 Economic Survey: An Economic Analysis of Kentucky's Lawyers and Law Firms*, 56 KY. BENCH & BAR 57 (1992) (survey report is appended to issue and has its own page numbering system).

- WISCONSIN - <sup>80</sup>		
Year	Nominal Average Fee	Real Average Fee (in 2007 Dollars)
<b>1975*</b>	\$42	\$153
<b>1983</b>	\$70	\$146
<b>1987</b>	\$88	\$161
<b>1992</b>	\$116	\$171
<b>2001</b>	\$146	\$171
<b>2005</b>	\$171	\$181
<b><i>Increase Across 30 Years</i></b>	307%	18%
<b><i>Compounded Average Annual Increase</i></b>	5.1%	0.6%

\*The survey was conducted after October 24, 1975, and before August 1976.

One might argue that the real hourly fees charged by lawyers have always been high if one considers fees in the range of \$124 to \$228 an hour high, given the costs associated with maintaining a law office, the years of education required of lawyers, the complexity of casework, and the stress of adversarial conflict. But, given the numbers just reviewed, it is hard to argue that lawyers in the states examined have been exploiting the desperation of Americans and greedily boosting fees as demand for legal services has increased. Typical increases of typical fees in the states about which we have comprehensive information have been measured and gradual.

## V. THE HOURLY FEES CHARGED TO INDIVIDUAL CONSUMERS FOR ROUTINE LEGAL SERVICES

### A. *The Legal Services Most Needed by American Consumers*

In any given year, many lawyers represent more than one type of entity. Lawyers represent individuals, trusts, government agencies, businesses, and non-profit organizations. Individuals seeking representation from lawyers who serve diverse client populations commonly have to “bid” against wealthier consumers in order to actually secure legal help; individuals compete with wealthier clients for legal talent. The hourly fees charged to individuals are undoubtedly higher than they otherwise would be in the absence of this economic fact.

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80. *Results of Economic Survey*, 49 WIS. B. BULL. 47 (1976); Adrian P. Schoone, *Presidents Perspective: Membership Survey Helps to Fill Information Gap*, 56 WIS. B. BULL. 5 (1983); *Survey Reveals: Little Time Spent on Client Development*, 61 WIS. B. BULL. 23 (1988); BECKY WEINER, WISCONSIN STATE BAR 1992 ECONOMICS OF PRACTICE SURVEY REPORT (1992); Dianne Molvig, *1998 Member Survey: Gauging Members' Needs*, 71 WIS. LAW. 18 (1998); Dianne Molvig, *The Economics of Practicing Law: A 2001 Snapshot*, 74 WIS. LAW. 6 (2001); Dianne Molvig, *The Economics of Practicing Law: A 2005 Snapshot: Sizing Up Your Business Practices*, 79 WIS. LAWYER, no.2 (2006), [http://www.wisbar.org/am/template.cfm?section=current\\_issue1&template=/cm/contentdisplay.cfm&contentid=59706](http://www.wisbar.org/am/template.cfm?section=current_issue1&template=/cm/contentdisplay.cfm&contentid=59706).

Because much of the bidding that individuals do for legal help is against other and wealthier types of entities, it might be assumed that the average (or median) fee charged by lawyers in a given locale during a given period of time to *all clients* constitutes a fair approximation of the average (or median) fee charged to *individuals*. In fact, it is very likely a fair approximation. But any such approximation can be refined. It will always, or virtually always, be at least somewhat too high. Any such approximation can be refined through the use of information about the prices charged by specialists in any locale at issue who concentrate on the legal problems faced by individuals. Data gathered by economic-survey researchers in a number of jurisdictions regarding the hourly fees charged by specialists are available. The prices charged by "public-needs-oriented" specialists, specialists who concentrate on the needs of individuals, are typically lower than prices charged by attorneys as a group. In addressing the area of prices charged by specialists, this Article begins by discussing research concerning the legal services needed by individual Americans.

The most comprehensive survey of the legal needs of Americans published to date was conducted by the American Bar Association (specifically the Special Committee of the ABA to Survey the Legal Needs of the Public) in cooperation with the American Bar Foundation under the direction of Barbara Curran. The survey, which was conducted in 1973 and 1974, will be referred to as the "Curran Study" throughout the rest of this Article. The study has already been mentioned, although not by name, in the main text of Section III regarding alleged lawyer greed.

The results of the Curran Study have been reported in book-length form.<sup>81</sup> The study systematically examines, and draws conclusions about, the types of problems individual Americans bring to lawyers. Curran and her staff conducted interviews with 2,064 persons<sup>82</sup> in households randomly chosen throughout the United States,<sup>83</sup> and they posed questions concerning both the types of legal problems that household residents had previously encountered and the actions that had been undertaken to address those problems. They specifically asked participants whether household members had ever used the help of lawyers to address legal problems.<sup>84</sup> To help study subjects better remember the past, batteries of questions were asked about particular types of problems individuals commonly bring to lawyers. The Curran staff asked participants to answer questions about

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81. See CURRAN, *supra* note 48. See *id.* at xxvii, for a summary of the study's history.

82. *Id.*

83. *Id.* at 33-34.

84. *Id.* at 99.

problems in ten major areas.<sup>85</sup> One such area was real property, for example. With regard to that area, respondents were asked whether they had ever encountered, and what they had done to handle, problems involving acquisition of property, interference with property ownership, and disputes with home builders, repair contractors, and mortgagees.<sup>86</sup> Another area about which questions were specifically asked was that of “consumer matters.” With regard to consumer matters, respondents were asked about possible disputes with landlords, creditors, and goods-and-service providers; additionally, they were asked about problems such as eviction, garnishment, repossession of personal property, and so on.<sup>87</sup>

Curran and her staff found that people most frequently had encountered problems in the areas of real property law (“over 50% of the population” had previously encountered “at least one real property problem”), torts (50% had faced a problem or problems involving tort law), and consumer law (27% had had serious consumer problems). “Between 10% and 25% of the population” had faced problems in the areas of “government matters” (specifically, difficulties with municipal, state, or federal government agencies), “marital” matters, and employment problems. Many had had problems relating to estate law (23% had tried to do estate planning and 10% had faced the death of a spouse), and less than 10% had confronted problems involving the need for adult or juvenile criminal defense or involving violations of “constitutional rights.”<sup>88</sup>

The researchers separately examined the types of problems that had actually been taken to lawyers by individuals. Of all such problems, ones relating to real property, wills, estates and trusts (“mostly wills”), and marital difficulty dominated (in that specific order of problem type). They were the problem types most frequently seen by lawyers representing individuals. Lawyers handled tort problems next most frequently (in particular, tort problems concerning “personal injury and property damage relating to automobile accidents”). Together these problem types constituted the core problem areas of public need. The cases next most likely to involve a lawyer were consumer problems, matters involving government, employment matters, and criminal defense.<sup>89</sup>

It is unlikely that the legal needs of the public have changed dramatically since the Curran Study. Very recent research concerning lawyer specialization indicates that the same core set of legal

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85. *Id.* at 102 (stating that questions concerning eleven major areas were asked). The Author conflates the purportedly separate areas of estate planning and estate settlement into one area: estate law.

86. *Id.* at 102–04.

87. *Id.* Obviously, disputes with landlords and eviction-related matters could have been labeled real property problems by Curran’s staff but were not.

88. *Id.*

89. *Id.* at 196–97.

problems is being handled by the private bar today that was being handled in the 1970s. Lawyers answering economic surveys are sometimes asked by bar associations to list their primary fields of practice or concentration. The definition of primary field normally revolves around either the amount of income derived from work in a field or the amount of time spent on such work. Sometimes for example, a field is “primary” if, from among the fields in which a lawyer practices, it constitutes one of the lawyer’s highest sources of income.<sup>90</sup> Alternatively, if work in a field consumes 25% or more of a lawyer’s time, the lawyer might be considered to be a specialist in the field.<sup>91</sup> Or a field might constitute a specialty if it is among the *three* fields on which the lawyer spends the most time.<sup>92</sup> Survey reports often contain a table that displays a list of fields and the number of lawyers who identified each field listed as a specialty. The lists allow one to determine the fields of practice that provide the most work to lawyers. Economic surveys conducted since the year 2000 in Colorado, Illinois, Iowa, Ohio, and Michigan all indicate that among the many specialty fields that involve work performed for individuals, the fields of family law, estate law, real property, and plaintiff’s torts work are by far the fields most commonly pursued by lawyers. Trailing behind are those fields having to do with the areas of civil rights, private adult and juvenile criminal defense,<sup>93</sup> debtor-related bankruptcy work, education and school law, elder law/public benefits/and ERISA law, employment law (done on behalf of labor), tax work done for individuals and small businesses, and representation of workers in worker’s compensation cases.<sup>94</sup>

B. *The Size of Fees Charged by Specialists in Fields of Practice Serving the Needs of the Public*

When state bar associations publish information about fees charged by various types of specialists, they normally publish information that relates at most to only several dozen specialties. They do not report

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90. COLO. 2000 ECONOMIC SURVEY, *supra* note 73, at 13; THE ECONOMICS OF LAW PRACTICE IN IOWA IN 2001, *supra* note 74, at 12; *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1551; THE ECONOMICS OF LAW PRACTICE IN OHIO, DESKTOP REFERENCE FOR 2007, *supra* note 69, at 13.

91. 2001 HOURLY RATE REPORT, *supra* note 72, at 11.

92. MONT. 2005 ECONOMIC SURVEY, *supra* note 76, at 6.

93. In contrast to criminal defense handled by publicly funded defender organizations.

94. See COLO. 2000 ECONOMIC SURVEY, *supra* note 73, at 14; THE ECONOMICS OF LAW PRACTICE IN IOWA IN 2001, *supra* note 74, at 13; THE ECONOMICS OF LAW PRACTICE IN OHIO, DESKTOP REFERENCE FOR 2007, *supra* note 69, at 13; *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1566. Each of the surveys contains a table displaying lawyer income figures by specialty, and each such table provides by specialty the number of lawyers who reported income. The areas said in the text accompanying this footnote to be “trailing behind” are not presented in any special order.

data (and obviously cannot gather data) about every conceivable field of specialized legal knowledge that could be said to exist. Data regarding median fees charged over many decades by specialists who primarily or exclusively serve individual clients are available from a number of states. They indicate that the median fees charged for work done by such specialists are almost always *lower than or equal to* the median fee reported for lawyers as a group. This is true for fees charged by specialists working in what this Article describes as the four “core areas of public need”—family law, estate law, torts work done on behalf of plaintiffs, and real property law—as well as the fees charged by specialists working in other areas of individual need. The standard fee charged in a core area of public need is sometimes as much as one-fifth less than the standard fee reported by lawyers as a group. Insufficient data exists from which to draw firm conclusions about the speed with which fees charged by particular types of specialists are changing over time, and that issue will not be addressed further, however.

Tables 4, 5, and 6 display median fee amounts charged by lawyers in Ohio, Texas, and Iowa by primary field of practice or specialty in the years 2007, 2003, and 2001. The data are illustrative of the point being made. Other recent and older economic surveys that contain similar relevant data could have been used to demonstrate the same point equally well, and providing more than three tables seems unnecessary. In each table, the rows of information are arrayed in order by median fee charged. The tables speak for themselves, and extensive comments on their contents are not necessary. One can see by only quickly glancing at the tables that work done solving the problems of individuals tends to be done for a relatively low price.<sup>95</sup> Even real property specialists, who frequently work for businesses, report fees that are lower than or equal to those charged generally. Of course it is understandable that the standard fees charged for work done by lawyers who specialize in serving the needs of individual clients are low. Individuals cannot afford to pay the sums that organizations, particularly large-scale organizations, typically can.

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95. Many lawyers are certainly taking into account in setting fees that low- and moderate-income clients have a more limited ability to pay than high-income clients. Lawyers have sometimes been asked on economic survey questionnaires to state what factors they consider to be important in setting fees. In a Michigan survey done in 1988, 27% of lawyer respondents stated that a “client’s ability to pay” is a “very important” factor in fee determination, and 59% stated it is a “moderately important” factor. See MICH. 1988 DESKTOP REFERENCE, *supra* note 65, at 22. In response to a 1986 Alabama survey question, 16% of the state’s lawyers stated that “the client’s ability to pay” is a “very important” factor, and 61% stated it is an “important” factor, in determining fees. See SURVEY OF LAWYERS IN ALABAMA, *supra* note 77, at 24.

TABLE 4:

<b>OHIO 2007 NOMINAL MEDIAN HOURLY BILLING RATES BY LAWYER'S PRIMARY FIELD OF PRACTICE<sup>96</sup></b>
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Field of Practice	Median Fee	Field of Practice	Median Fee
Labor Law (Labor)	\$125	Labor Law (Management)	\$188
Criminal (Prosecution)	138	Elder Law/Public Benefits/ERISA	195
Civil Rights	150	Other Specialties	195
Collections	150	Professional Liability	195
Criminal (Public Defendant)	150	Trial Practice, not PI (General Civil)	195
Personal Injury (Defendant)	150	Administrative Law	198
Probate, Protected Persons	150	Employment Law (Management)	200
Real Property Law	150	Education/School Law	205
Immigration Law	163	Corporate/Business Law	210
Product Liability	165	Intellectual Property	225
Worker's Comp. (Plaintiff)	170	Estate Planning/Wealth Management	225
Bankruptcy, Debtor	175	Employment Law (Labor)	228
Criminal (Private Defendant)	175	Trial Practice, not PI (Commercial)	228
Domestic Relations/Family Law	175	Taxation	235
General Practice	175	Health & Hospital Law	250
Municipal/Public Entity Law	175	Construction Law	255
Probate, Decedent's Estates	180	Bankruptcy, Creditor	275
Personal Injury (Plaintiff)	185	Environmental Law/ Natural Resources Law	280
Worker's Comp. (Defense)	185		
<i>[list continues at top of next column]</i>		<b>Median Fee (based on all cases handled by all Ohio specialists and non-specialists)</b>	<b>\$185</b>

96. THE ECONOMICS OF LAW PRACTICE IN OHIO, DESKTOP REFERENCE FOR 2007, *supra* note 69, at 21.

TABLE 5:

TEXAS 2003 NOMINAL MEDIAN HOURLY BILLING RATES BY LAWYER'S SPECIALTY AREA OF PRACTICE <sup>97</sup>			
Field of Practice	Median Fee	Field of Practice	Median Fee
Bankruptcy Consumer	\$125	Real Estate	\$200
Bankruptcy Business	142	Oil and Gas	206
Criminal	150	Litigation – General Civil	213
Disability and Workers Compensation	150	Business	225
Insurance	150	Health	225
Litigation – Personal Injury Defense	150	Labor – Employment	230
Environmental and Natural Resources	175	Public Utility	234
Immigration and Naturalization	175	Bankruptcy – Not Specified	240
Litigation – Personal Injury Not Specified	175	Consumer – DPTA*	241
Family	180	Banking	256
Wills-Trusts-Probate	180	Tax	290
Maritime Admiralty	193	Appellate	300
Administrative and Governmental	200	Alternative Dispute Resolution	325
Construction	200	Intellectual Property	335
Litigation – Not Specified	200	International	490
<i>[list continues at top of next column]</i>		<b>Median Fee (based on all cases handled by all Texas specialists and non-specialists)</b>	<b>\$200</b>

\* "DPTA" is an acronym for the Texas Deceptive Trade Practices Act.

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97. HOURLY RATES IN 2003 REPORT, *supra* note 72, at 11–15.



TABLE 6:

IOWA 2001 NOMINAL MEDIAN HOURLY BILLING RATES BY LAWYER'S PRIMARY FIELD OF PRACTICE/SOURCE OF INCOME <sup>98</sup>			
Field of Practice	Median Fee	Field of Practice	Median Fee
Criminal Prosecution	\$100	Real Estate Law	\$125
Criminal Defense	110	Other	128
Labor Relations (Employees/Unions)	110	Bankruptcy/Receivership	130
Taxation (Individuals/Small Businesses)	110	Insurance Law (Not Torts)	130
Municipal/Public Entity Law	115	Labor Relations (Management)	135
Estate Planning, Probate and Trusts	120	Professional Malpractice (Defense)	140
Family Law/Domestic Relations	120	Civil Rights	150
General Personal Matters (Not [Otherwise] Covered)	123	Professional Malpractice (Plaintiff)	150
Banking	125	General Corporate Law (Not [Otherwise] Covered)	160
Personal Injury (Defense)	125	Intellectual Property	180
Personal Injury (Plaintiff)	125		
<i>[list continues at top of next column]</i>		<b>Median Fee (based on all cases handled by all Iowa specialists and non-specialists)</b>	<b>\$125</b>

## VI. SIZE AND GROWTH OF THE STANDARD HOURLY PARALEGAL FEE

Longitudinal data exists on the median fees charged clients throughout the country for work done by paralegals and legal assistants during the last two decades (*see* TABLE 7). The National Association of Legal Assistants has been surveying the national paralegal population concerning their economic and work-related circumstances at least since 1988, and the association has gathered information about billed fees at least since 1991.<sup>99</sup>

Looking at Table 7 we can see that between 1991 and 2010, the nominal paralegal billing rate in the United States increased 104%, rising from \$48 in 1991 to \$98 in 2010. By comparison, the *real* United States median hourly billing rate increased only 29%, going from \$73 to \$94.<sup>100</sup> The average compounded real rate of increase across the nineteen-year period was 1.4%. The real billing rate has not increased

98. THE ECONOMICS OF LAW PRACTICE IN IOWA IN 2001, *supra* note 74, at 25.

99. NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, <http://nala.org/survey.aspx> (last visited Sept. 21, 2012) (describing itself as "the leading professional association for legal assistants and paralegals providing continuing education and professional development programs").

100. Please recall that all real dollar figures in this Article are stated in 2007 inflation-adjusted dollars.

radically over time. Here too, it appears that alleged lawyer avarice has not motivated harsh increases in the amount charged for law-related expertise.

Further, it should be noted that lawyers who employ paraprofessionals freely hire their own competition. Paralegals are hired to do work too complex for the average secretary. They are expected to spend at least the bulk of their time doing work that would otherwise be done by a lawyer, and lawyers have hired a legion of paralegal professionals over the past thirty to forty years. It is estimated that prior to 1972, fewer than 30,000 paralegals worked in the United States.<sup>101</sup> The Department of Labor reports that there were 128,000 legal assistants employed in the American work force by 1983, however, which represented more than four-and-a-quarter times as many as in the early 1970s.<sup>102</sup> By 2006, 345,000 legal assistants worked in the United States, more than two-and-a-half times as many as the large number that were already employed in 1983.<sup>103</sup> Today the population of legal paraprofessionals is more than a quarter of the size of the active lawyer population.<sup>104</sup> The fact that lawyers have embraced the opportunity to hire paralegals is evidence that lawyers have not aggressively and greedily sought to maintain a monopoly on the right to provide legal services. Undoubtedly, competitive pressure has driven lawyers to hire paralegals. As lawyers have hired paralegals, more lawyers still have felt the need to hire them in order to contain fees. Thus, while the employment of paralegals has not been an act of altruism directed toward the client pool, it has unquestionably helped to constrain the rise in the cost of legal work.

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101. Sander & Williams, *supra* note 30, at 442.

102. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, at 417 tbl.669 (2000), available at <http://www.census.gov/prod/2001pubs/statab/sec13.pdf>.

103. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008, at 388 tbl.598 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/labor.pdf>.

104. AM. BAR ASS'N, NATIONAL LAWYER POPULATION BY STATE (2011) [hereinafter LAWYER POPULATION BY STATE], available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2011\\_national\\_lawyer\\_by\\_state.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2011_national_lawyer_by_state.authcheckdam.pdf) (showing that in 2011, 1,225,452 lawyers were "resident and active" in the United States).

TABLE 7:

<b>NOMINAL AND REAL MEDIAN BILLING RATES IN THE UNITED STATES FOR PARALEGALS AND LEGAL ASSISTANTS, 1991-2010<sup>105</sup></b>
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Year	Nominal Median Fee	Real Median Fee (in 2007 Dollars)
1991	\$48 (\$46-\$50)	\$73 (\$70-\$76)
1993	\$53 (\$51-\$55)	\$76 (\$73-\$79)
1995	\$58 (\$56-\$60)	\$79 (\$76-\$82)
1997	\$63 (\$61-\$65)	\$81 (\$79-\$84)
2000	\$68 (\$66-\$70)	\$82 (\$79-\$84)
2002	\$73 (\$71-\$75)	\$84 (\$82-\$86)
2004	\$83 (\$81-\$85)	\$91 (\$89-\$93)
2008	NA*	NA*
2010	\$98 (\$96-\$100)	\$94 (\$92-\$96)
<i>Increase</i>	104%	29%
<i>Compounded Average Annual Increase</i>	3.8%	1.4%

\* Only average, and not median, fee data is available for the year 2008.

The surveys that were consulted for this Article contain more than just data concerning fee size that are relevant to the charge that lawyers are greedy. Subsequent sections of this Article discuss some of the other relevant information that the surveys provide.

## VII. FEES FOR LEGAL SERVICES FREQUENTLY ARE NOT CHARGED BY LAWYERS

Legal services consumers report that they frequently are not charged by lawyers for work done on their behalf. This has been noted in at least three comprehensive studies of the legal needs of the public conducted over several decades. Sometimes lawyers do not charge because a “case” has consisted exclusively of a free initial consultation, but more often they do not charge for other reasons.

Close to one-quarter (or 23%) of the respondents who had previously used a lawyer reported to researchers working on the Curran

105. 2010 *National Utilization and Compensation Survey*, NALA, <http://nala.org/survey.aspx> (last visited Sept. 21, 2012); NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, 1995 NATIONAL UTILIZATION AND COMPENSATION SURVEY REPORT 30 (1995); NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, 2008 NATIONAL UTILIZATION AND COMPENSATION SURVEY REPORT, SECTION 3, at 2 (2008); NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, 2010 NATIONAL UTILIZATION AND COMPENSATION SURVEY REPORT, SECTION 3, at 2-3.

Study<sup>106</sup> that they had not been personally charged for their most recent completed case.<sup>107</sup> Please recall that the Curran Study was done in the early 1970s. The reasons that clients were not charged varied and appear in Table 8 below. Table 8 is a modified version of a similar table contained in the Curran study.

TABLE 8:

<b>DISTRIBUTION OF USERS WHO PAID NO FEES FOR MOST RECENT CASE BY REASON<sup>108</sup></b>	
<b>Free legal service program (Legal Aid, public defender, military legal assistance)</b>	16%
<b>Some other party paying fee (codefendant, coplaintiff, adversary, insurance company, union, relative, other)</b>	17%
<b>Lawyer did not charge Lawyer was friend or relative</b>	33%
<b>Lawyer received fees from respondent on other matters and this was just a simple matter</b>	3%
<b>Lawyer just gave advice</b>	9%
<b>Lawyer just a "nice guy"</b>	6%
<b>Lawyer provided no service</b>	5%
<b>Lawyer did not charge for other reason</b>	11%
<b>TOTAL</b>	100%

It appears that in about 50% of the no-fee cases, fees could legitimately have been charged but were not. The percentage figures associated with "lawyer was a friend or relative," "lawyer received fees from respondent on other matters," "lawyer just gave advice," and "lawyer [was] just a nice guy," when added, total roughly 50%.<sup>109</sup> Consequently, one can conclude that lawyers did not charge fees even though legal work was done in roughly 13% (i.e., 23% \* 50%) of all cases handled.<sup>110</sup> There is no way to know how much work lawyers performed completing no-fee cases, although Curran notes that only 30% of the no-fee cases studied involved more than "limited [lawyer] service."<sup>111</sup>

106. CURRAN, *supra* note 48, at 207.

107. *Id.*

108. *Id.* at 207, 222.

109. The figure "11%" in Table 8 associated with the statement "lawyer did not charge for other reason" is not added into the specific total of 51%. It is possible that some or all of the lawyers who did not charge for "other reasons" had no right to collect fees. For example, some lawyers might have lost contingent fee cases and thus the right to collect fees. Others might have waived fees in conjunction with the settlement of malpractice claims filed against them by clients.

110. 51% of 23% equals 11.7%.

111. CURRAN, *supra* note 48, at 207.

The Curran Study is not the only one showing that legal fees frequently are not charged by lawyers to clients, however. The American Bar Association commissioned the Institute of Survey Research at Temple University to conduct a study of the legal needs of low- and moderate-income Americans in 1993.<sup>112</sup> Over the course of several months, Temple researchers interviewed spokespersons for 2,784 households.<sup>113</sup> For the purposes of the study, a low-income household was defined as one with an annual income at or below 125% of the maximum earned by households living at the official (federal) “poverty level.”<sup>114</sup> A moderate-income household was defined as one with an annual income above that of a low-income household “but below \$60,000 (that is, below the top quintile of the United States income distribution).”<sup>115</sup> Because moderate-income households included households in the third and fourth income quintiles, many were actually fairly wealthy. Researchers determined that 55% of the cases in which low-income respondents had been involved during at least some part of the previous year *had been* handled by lawyers free of charge or were expected by low-income respondents *to be* handled free of charge.<sup>116</sup> 38% of the cases in which moderate-income respondents had been involved had been handled without charge or were expected to be handled without charge.<sup>117</sup> The reasons that fees had not been charged or were not expected to be charged are set forward in Table 9 below. Again, Table 9 is simply a recreation of a table appearing in the original study report.

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112. AM. BAR ASS'N, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), available at <http://www.americanbar.org/content/dam/aba/migrated/legalser-vices/downloads/sclaid/legalneedstudy.authcheckdam.pdf>.

113. *Id.* at pts. 1, 4.

114. *Id.* at pts. 1, 3.

115. *Id.*

116. *Id.* at pts. 1, 29.

117. *Id.*

TABLE 9:

Fee Structure	Low- Income Households	Moderate- Income Households
<b>Not (or don't expect to be) charged because:</b>	<b>55%</b>	<b>38%</b>
Free initial consultation	20	11
Eligible for Legal Aid	13	1
<i>Pro bono</i> work	3	6
Lawyer worked as favor	1	5
Contingency fee & lost	5	3
Other	6	6
Don't know reason	6	3
<b>Charged (or expect to be charged):</b>	<b>43%</b>	<b>59%</b>
Usual fee	30	45
Reduced fee	8	8
Don't know if usual or reduced	6	6

A significant number of respondents (20% of those in low-income households and 11% of those in moderate-income households) had not been charged because they had participated in free initial consultations. A free initial consultation is the legal services equivalent of a loss leader. It involves the free delivery of services nonetheless and is an undeniable bargain for consumers. From the numbers, it is clear that Americans frequently go to lawyers because lawyers offer free initial consultations, and it is clear that free consultations often do not result in paid work for lawyers. For example, 4% of low-income respondents and 11% of moderate-income respondents had received, or expected to receive, free services “as a favor” or in the form of pro bono work. A substantial number had received free services because a contingent fee case had been lost. Even quite a few respondents who had been charged, or expected to be charged, reported that their lawyers had charged, or were going to charge, a *reduced* fee.

Finally, at least one legal needs survey done on a statewide basis, in New Jersey in 2002, confirms that lawyers frequently do not charge fees.<sup>118</sup> This particular survey concentrated exclusively on the needs of the poor. Researchers surveyed 1,013 adults drawn randomly from low-income households.<sup>119</sup> All eligible respondents had gross incomes below 200% of federally established poverty-level-income.<sup>120</sup> The survey report states that

118. See MELVILLE D. MILLER & ANJALI SRIVASTAVA, LEGAL PROBLEMS, LEGAL NEEDS: THE LEGAL ASSISTANCE GAP FACING LOWER INCOME PEOPLE IN NEW JERSEY (2002), available at <http://LSNJ.org/PDFs/LegalNeedsReport.pdf>.

119. *Id.* at 62.

120. *Id.* at 61.

when lower income adults receive legal assistance from organizations or firms *other than legal services or legal aid*, they will be provided free legal representation or services 39% of the time.<sup>121</sup>

The studies obviously are hard to compare. The Curran and Temple studies categorize the reasons that fees are sometimes not charged in somewhat different ways. The New Jersey study does not make a serious attempt to categorize those reasons at all. Each of the studies examined a somewhat different population, and of course each was done in a different year. Nonetheless, together they paint a convincing picture: they show that individual consumers are provided free services frequently by members of the private bar and for many different reasons. They receive free services because their contingent fee cases are lost; pro bono services are provided; they are lawyers' friends and relatives; they pay for services on other matters and, in return, small unrelated matters are handled for free; and for reasons clients do not understand, because free initial consultations are provided to clients who then do not hire the lawyers consulted. Often they pay reduced fees. Consumers are not expected to pay for every minute of every lawyer's time. Very far from it, and this fact appears not to have changed over the past thirty to forty years.

## VIII. THE PRO BONO AND CIVIC WORK DONE BY LAWYERS

### A. *The Nature and Amount of Work Done*

While available studies do not explain exactly how much free legal work is done for individual clients by members of the private bar *in toto*, very precise figures are available concerning how much pro bono work is done.

Pro bono is a Latin expression often translated to mean "for the public good."<sup>122</sup> Black's Law Dictionary states that involvement in pro bono work is involvement in "uncompensated legal services performed *especially* for the public good."<sup>123</sup> Rule 6.1 of the ABA Model Rules of Professional Conduct<sup>124</sup> asserts that every lawyer has a "responsibility to provide legal services to those unable to pay," and that a lawyer should aspire to "render at least 50 hours of pro bono publico legal services per year." It goes on to say that more than half of the time that a lawyer spends doing pro bono work should be spent providing services to "persons of limited means" or to community organizations "in matters which are designed primarily to address the needs of persons of limited means." According to the Rule, additional pro bono service should be provided through the following:

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121. *Id.* at 39 (emphasis added).

122. BLACK'S LAW DICTIONARY 1240 (8th ed. 2004) (stating that the term is taken from the Latin phrase "pro bono publico").

123. *Id.* (emphasis added).

124. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009).

- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
- (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession.

Thus, the ABA accepts the view that many sorts of public service activities can properly be described as pro bono work. Representation of low-income clients is only one of a number of ways to discharge one's pro bono obligation, and delivery of free legal services to civic or community groups often constitutes pro bono work. In 2005, the ABA Standing Committee on Pro Bono and Public Service (hereinafter referred to as the "Standing Committee") reported that forty-three states had adopted ethics rules modeled on the most recent or an earlier version of Model Rule 6.1.<sup>125</sup> At that time, a number of state and local bar associations additionally had adopted resolutions or policies encouraging pro bono work, and a few local bar associations had conditioned membership on some amount of pro bono work.<sup>126</sup> Today, all states and the District of Columbia have pro bono policies in force.<sup>127</sup> Twenty-three states have adopted a goal of fifty hours per year of work; five have goals of twenty to thirty hours; Oregon has an eighty-hour goal; and most other states do not suggest any specific number of hours.<sup>128</sup> Virginia's policy recommends that a lawyer spend 2% of his or her professional time doing pro bono work.<sup>129</sup>

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125. See ABA STANDING COMM. ON PRO BONO AND PUB. SERV., AM. BAR ASS'N, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 6 (2005) [hereinafter SUPPORTING JUSTICE], available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/probono\\_public\\_service/report\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/probono_public_service/report_2011.authcheckdam.pdf). MRPC 6.1 was first adopted in 1983. *Id.* The original version stated that "[a] lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities to improve the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means." *Id.* at 6, 22 n.1.

126. *Id.* at 6.

127. *State-By-State Pro Bono Service Rules*, AM. BAR ASS'N, [http://www.americanbar.org/groups/probono\\_public\\_service/policy/state\\_ethics\\_rules.html](http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html) (last updated Jan. 30, 2012) [hereinafter *State-By-State Pro Bono Rules*].

128. *Id.*

129. *Id.*



Seven states have mandatory, and eleven states have voluntary, reporting of pro bono hours.<sup>130</sup>

How have lawyers responded to the organized bar's call for the rendering of pro bono work?<sup>131</sup> A national survey of 1,100 lawyers done over a one-year period in 2003 and 2004 by the Standing Committee determined that 93% of lawyers "personally believe that pro bono work is something that lawyers should be doing."<sup>132</sup> Only 16% said they had done no work during the past year meeting any part of the ABA's definition.<sup>133</sup> Only 14% stated they had done no work that "met either the ABA's or their own definition of pro bono."<sup>134</sup> A chart in the formal report of survey results (recreated in a modified form as Table 10 below) identifies the percentage of respondents who engaged in each of the various pro bono activities sanctioned by the American Bar Association.

TABLE 10:

<b>PERCENT OF ATTORNEYS PROVIDING FREE LEGAL SERVICES BY PRO BONO ACTIVITY (BASE=1,100)<sup>135</sup></b>	
<b>Entity</b>	<b>Percent of Attorneys Providing Free Service</b>
<b>People of Limited Means</b>	60%
<b>Organizations for Poor</b>	33
<b>Improving Legal System</b>	46
<b>Organizations for Civil Rights</b>	15
<b>Other Non-Profit Organizations</b>	46

In the Standing Committee survey, lawyers who had done at least some pro bono work<sup>136</sup> were asked to estimate how many hours they had worked on each sanctioned activity. Respondents provided the following information:

130. *Overview of State Pro Bono Reporting Policies*, AM. BAR ASS'N, <http://apps.americanbar.org/legalservices/probono/reporting.html> (last updated July 14, 2009).

131. A very well organized effort is ongoing not only to encourage pro bono work but also to enable it. Today more than 900 formal programs operate in the United States with the purpose of referring potential low-income pro bono clients to practicing lawyers or to law students authorized to practice under practice statutes or other relevant law. See SUPPORTING JUSTICE, *supra* note 125, at 6.

132. *Id.* at 20.

133. *Id.* at 11.

134. *Id.*

135. *Id.*

136. Here, "pro bono work" means work that met any of the ABA definitions of "pro bono work" that appeared when the survey was conducted in the then-current version of MRPC 6.1. *Id.* at 9-10, 13.

TABLE 11:

ESTIMATE OF THE AVERAGE HOURS OF FREE SERVICES PROVIDED (BASE=1,100) <sup>137</sup>	
Entity	Hours of Free Service
People of Limited Means	27
Organizations for Poor	12
Improving Legal System	17
Organizations for Civil Rights	6
Other Non-Profit Organizations	15
<b>TOTAL</b>	<b>77</b>

As Table 11 above shows and as the survey report noted, the average respondent provided thirty-nine hours of free services just by engaging in the first two activities in the table—that is, by rendering service to people of limited means and organizations serving the poor. These are both priority activities under the current version of Model Rule 6.1, and, following the practice of the Standing Committee, this Article subsequently refers to these activities as “Tier 1” activities. The average respondent additionally worked for thirty-eight hours, engaged in other sanctioned (“Tier 2”) activities, and did a total of seventy-seven hours of free pro bono work. If one takes into account the average number of lawyer pro bono hours done by the group of respondents who acknowledged doing *no* ABA-approved work (i.e., their zero hours of work), the average lawyer rendered sixty-five, not seventy-seven, hours of service, however.<sup>138</sup>

There is no reason to believe that private practitioners do less pro bono work on average than lawyers working in other practice settings. The Standing Committee determined that private practitioners are much more likely than corporate counsel or government lawyers to engage in Tier 1 legal work.<sup>139</sup> It stands to reason that practitioners likewise do much more Tier 1 work than academicians, who often carry no professional liability insurance and frequently do not represent either paying or pro bono clients. Economic survey data gathered recently in Oregon indicate that private practitioners, lawyers who work for non-profit organizations, and government lawyers do

137. *Id.* at 12.

138. While some lawyers do much less pro bono work than is average for the profession, some do much more. 5% of Colorado lawyers performed 200 or more hours of pro bono work in the year 2000. See COLO. 2000 ECONOMIC SURVEY, *supra* note 73, at 32. 5% of Ohio lawyers performed 188 or more hours of pro bono service in 2007. See THE ECONOMICS OF LAW PRACTICE IN OHIO, DESKTOP REFERENCE FOR 2007, *supra* note 69, at 27.

139. 33% of government lawyers, 35% of corporate counsel, and 73% of private practitioners performed Tier 1 activities during the twelve months preceding the survey. SUPPORTING JUSTICE, *supra* note 125, at 12.

very similar *total* amounts of pro bono and community service work, and the data further indicate that each of these groups does more pro bono and community service work than either in-house corporate counsel or judges and hearing officers.<sup>140</sup>

### B. *Monetizing the Value of Work Done*

Should the amount of pro bono work done by private practitioners each year be considered a little or a lot? Bar association economic survey data, as discussed above in this Article, indicate that in most states, the standard hourly fee<sup>141</sup> charged currently by members of the private bar ranges between \$150 and \$200. The average practitioner would charge paying clients between \$9,750 and \$13,000 then for sixty-five hours of legal work, and it seems safe to assume that the average practitioner does at least an average of sixty-five hours of pro bono work per year. On the surface, it seems that by doing pro bono work, the average practitioner makes a substantial contribution to his or her community.

One might object to the way in which the Author has monetized the value of pro bono work. After all, the typical pro bono client cannot pay for legal services. Why should any monetary value at all be attributed to such services? Monetary value should be attributed because the work has an opportunity cost, even if it is work that by definition is never paid work. A private practitioner who does volunteer work is reducing the energy and limiting the time that he or she has to perform work done for a fee. If instead of doing sixty-five hours of volunteer work, a practitioner worked an additional sixty-five billable hours, that attorney could earn an additional \$9,750 to \$13,000. Foregoing that amount of income is unquestionably laudable.

Additionally, one might object to the fact that the Author has monetized the value of pro bono work done for community organizations and to improve the legal system. The ABA definition of pro bono work includes both types of work. Non-lawyers as well as attorneys do work designed to improve the law, the legal system, and the legal profession, and such work clearly often has very limited market value. Clerical work, collecting signatures on a referendum petition, and telephoning voters are forms of volunteer work with limited value, for example. Further, work done by a volunteer for a community organization or to advance a favored cause is often done in the evening, and it can be argued that work done in the evening has little or no opportunity cost for most workers—at least in the form of lost income. Most paid work is done during the day.

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140. OREGON STATE BAR 2002 ECONOMIC SURVEY, *supra* note 71, at 37.

141. Both the average hourly fee and the median hourly fee in most states range between \$150 and \$200. See *supra* Part V.B.

However, even if one restricts one's focus to the amount of pro bono service work being done solely for low-income clients, the great bulk of which is undoubtedly ordinary case work done during the day (and is therefore work with an undeniable opportunity cost), the contribution of lawyers, and in particular private practitioners, to the public good is impressive. As noted in Table 10, 60% of all lawyers report doing work for "people of limited means." Those who do such work report doing an average of twenty-seven hours of work per year. Again, if one takes into account lawyers who do no such work, then *the average lawyer in the United States* performs 16.2 hours of free pro bono work per year for individuals with modest or low incomes and consequently, donates services to people in that group annually that are worth roughly between \$2,400 and \$3,200. Over one million lawyers are licensed in the United States currently.<sup>142</sup> An average donation of between \$2,400 and \$3,200 per year by lawyers to low-income Americans represents a total donation of roughly \$2 billion (using the conservative \$2400 figure) to more than \$3 billion (using the higher \$3,200 figure). That is a substantial and, again, laudable sum. How much of that sum is being donated by allegedly greedy private practitioners? Today, private practitioners comprise roughly three quarters of the bar.<sup>143</sup> Since it appears that private practitioners do significantly more pro bono casework than other lawyers, one can conclude that more than three-quarters of \$2-\$3 billion, i.e., more than \$1.5 to \$2.25 billion, is being donated by private practitioners each year to the commonwealth in the form of labor.

Finally, it should be said that close to half of all lawyers donate money to legal services or pro bono programs. The Standing Committee survey asked lawyers whether they had donated any money to such programs during the "past" year—that is, during the year prior to the date on which the survey question was being answered. 43% answered that they had donated money, and those who had donated reported an average contribution of \$276.<sup>144</sup> Twelve states, as well as the District of Columbia, encourage monetary contributions to public service organizations in their pro bono policy statements or describe such contributions as potential alternatives to pro bono work.<sup>145</sup> Many lawyers outside of those thirteen jurisdictions are obviously contributing money to legal services and pro bono programs as well.

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142. LAWYER POPULATION BY STATE, *supra* note 104, at 3.

143. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 28 (2004) (stating that in the year 2000, 75% of male lawyers, 71.2% of female lawyers, and 74% of all lawyers in the United States in the year 2000 worked in private practice).

144. SUPPORTING JUSTICE, *supra* note 125, at 16–17.

145. *State-By-State Pro Bono Rules*, *supra* note 127.

Why do lawyers do pro bono work? Deborah Rhode surveyed 844 individuals and firms about their pro bono work recently.<sup>146</sup> She discovered that individual lawyers who do pro bono work<sup>147</sup> rank “personal satisfaction,” and “sense of professional obligation” as their primary motivations. On a scale of one to five, with five representing “very significant” and one representing “not significant,” her respondents gave these factors ratings of 4.4 and 4.0 respectively.<sup>148</sup> The next most highly ranked motives were “employer encouragement” (with a rating of 2.5); “reputation/recognition” (2.5); “employer policies” (2.3); “opportunity for trial experience” (2.2); “professional value of pro bono work (contacts, training, referrals)” (2.1); and “political commitment” (2.0).<sup>149</sup> Other motivations examined by Rhode all received scores of less than 2.0 and thus were perceived as relatively insignificant by respondents. As might be suspected, lawyers then do pro bono work for mixed motives. They do it principally because helping others is personally satisfying and because they take their professional obligations seriously. Additionally, they sometimes do it because they believe it helps them personally, helps their firm, or helps the profession. Rhode has pointed out, however, that in having “mixed motives,” lawyers are not much different from ordinary Americans who help others: “As a wide range of data makes clear, motivations for assisting others usually are mixed, and a degree of self-interest is typically present.”<sup>150</sup>

## IX. FEES THAT ARE DUE TO LAWYERS FREQUENTLY ARE NOT COLLECTED

### A. *The Evidence*

Lawyers have the skills, and the great majority have the temperament, necessary to collect fees that are overdue. Data from a number of states suggest that lawyers are typically, and surprisingly, reluctant to use aggressive methods to collect fees, however.

In Iowa in 2006, when asked on an economic survey questionnaire what action they “usually” take with “reference to fees charged but not paid in due course,” 28% of lawyers answered that they “take no action,” and 45% stated they “dun [their] client [and] take no further action.” 6% said they “turn [the] account over to a collection

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146. DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* 127 (2005). Survey questionnaires were mailed “beginning in 2001.” *Id.* at 230. Thus, questionnaires could have been sent in one or more subsequent years. *See id.*

147. *Id.* at 181. In the survey questionnaire, pro bono work was defined as “services undertaken normally without expectation of fees and consisting of the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations.” *Id.*

148. *Id.* at 131.

149. *Id.*

150. *Id.* at 56–57.

agency.” Fewer, only 1%, said they “turn [the delinquent] account over to another lawyer,” and 11% answered that they “sue [a] client *if all other options fail*.”<sup>151</sup> Thus the great majority indicated that they generally take no action on an overdue bill or simply make repeated demands for payment (i.e., “dun” their nonpaying client) without the intention of taking further action. Less than one-eighth stated they turn delinquent accounts over to other lawyers for collection or use lawsuits even as a last resort. Few said they use collection agencies.

In Nebraska in 2006, on a bar sponsored questionnaire, lawyers were asked how they “primarily handle past-due billings and fee disputes.” About one-half (46%) of lawyers said they “negotiate or voluntarily reduce [their] fee,” and more than a third (37%) stated they “write [unpaid bills] off as a loss.” Less than one-fifth (17%) said they use a collection agency, while only 7% stated they file suit. None used a fee dispute resolution program.<sup>152</sup>

As part of an economic survey done in 1998, the Alabama State Bar asked lawyers in telephone interviews, “[d]oes your organization take any of the following actions with reference to charged fees not paid in due course,” and with regard to each potential action that interviewers then stated, allowed respondents to answer “yes,” “no,” or “don’t know.” Alabama lawyers gave the following responses:<sup>153</sup>

	<u>Yes</u>	<u>No</u>	<u>Don't Know or No Answer</u>
Negotiation with Clients	74%	18%	8%
Send a Dunning Letter	61%	28%	11%
File a Suit	24%	65%	10%
Turn the Account Over to a Collection Agency or Another Lawyer	11%	79%	10%
Enter into Fee Mediation	8%	81%	11%

Thus, the sparse data<sup>154</sup> that are available indicate that lawyers try to avoid using lawsuits or commercial collection agencies to collect

151. IOWA ECONOMIC SURVEY 2006, *supra* note 74, at 10 (emphasis added). Also, 10% of survey participants did not answer. *Id.*

152. NEB. STATE BAR ASS'N, 2006 ECONOMIC SURVEY, *supra* note 68, at 18. An additional 7% stated they collect fees primarily using “other” methods. *Id.* The percentage figures add to more than 100%; some respondents apparently chose more than one of the answers listed on the survey questionnaire. *See id.*

153. SURVEY OF LAWYERS IN ALABAMA, *supra* note 77, at 28. The same question was asked during a survey done in 1986, and very similar responses were given by Alabama lawyers. Fisher, *supra* note 77, at 160.

154. *See* 2003 ECONOMIC SURVEY REPORT, *supra* note 66, at 31, app. 3. In 2003, the Missouri Bar asked lawyers whether they had been involved in a fee dispute during the previous year. *Id.* The Bar additionally asked each lawyer how he or she “primarily handle[d]” disputes. *Id.* 29% of Missouri lawyers answered that they “negotiate or voluntarily reduce [the] fee,” 2% said that they utilize the state’s “Fee Dispute Resolution Committee,” 1% stated that they file a “lawsuit,” 2.4% said they use “other means,” (“other” was listed on the questionnaire as one potential answer), and

overdue fees. Lawyers instead tend to negotiate with nonpaying clients, dun clients, reduce fee amounts charged, and write off uncollectible fees as bad debts.

Economic survey data gathered in four states (Colorado, Michigan, Nebraska, and Ohio) suggest that lawyers currently do not usually even add interest or "service" charges to sums that are overdue. By failing to add charges of this sort to overdue accounts, lawyers are failing to subject clients even to the modest pressure-to-pay that interest and service charges would create. In answer to survey questions, 72% of Ohio lawyers and 55% of Colorado lawyers stated in 2007 and 2000 respectively that they *never* add a service charge to their bills. Only 10% of Ohio lawyers said they *always* or *often* add a service charge, and less than a quarter of Colorado lawyers (22%) stated that they *always* or *usually* add a charge.<sup>155</sup> In Nebraska in 2006, 73% of lawyers stated they do not charge interest on past-due billings, while 27% stated that they do.<sup>156</sup> In Michigan in 2000, only 9% of lawyers said they always add a service charge to a delinquent account, while 15% said they usually do. The remainder (76%) said only that they sometimes add a charge.<sup>157</sup>

Understandably, lawyers also often report that they have difficulty collecting fees. Bar associations in surveys often ask lawyers to report the percentage of billed fees that the lawyers' firm or the lawyers fail to collect. Sometimes the question is posed as the percentage of billed fees that has to be considered a complete loss. In whatever form the question is posed, lawyers across the United States are remarkably consistent in the answers that they give. A high percentage of billed fees are commonly deemed to be uncollectible. Tables 12 and 13 display data recently gathered in eight states concerning uncollectible fees.<sup>158</sup> Notice that in every state, a significant fraction of lawyers say

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65% provided no answer. *Id.* The Missouri Bar also asked lawyers how they "primarily" handled "past-due billings that are not being disputed by the client." *Id.* 47.7% said that they "write off [the amounts due] as a loss." *Id.* 6% said they use a "collection agency," while 7% stated they file a "lawsuit." *Id.* 23% said they use one or more "other" methods of collecting fees, and 16% provided no answer. *Id.*

155. THE ECONOMICS OF LAW PRACTICE IN OHIO, DESKTOP REFERENCE FOR 2007, *supra* note 69, at 30; COLO. 2000 ECONOMIC SURVEY, *supra* note 73, at 31.

156. NEB. STATE BAR ASS'N, 2006 ECONOMIC SURVEY, *supra* note 68, at 18.

157. *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1561. The report states additionally that 53% of lawyers who add a charge add less than 1% to their legal bills, 33% add 1 to 2%, and 14% add over 2%. *Id.*

158. See MONT. 2005 ECONOMIC SURVEY, *supra* note 76, at 5, 6 (In answer to the question, "[f]rom these hours billed [i.e., the hours that you bill], what amount is actually paid," 67.5% of respondents stated "76-100%," 17.5% stated "67-75%," 8.3% said "51-66%," and 6.7% said "50% or less."); see also Fisher, *supra* note 77, at 160 (In response to the question, "[a]bout what percentage of your organization's charged fees during the last fiscal year were not collected," lawyers provided the following answers: "none" (6%), "1-5 percent" (39%), "6-10 percent" (27%), "11-20 percent" (16%), and "more than 20 percent" (12%).).

that roughly 1/10th or more of billed fees are uncollectible. For example, in Iowa 26% of lawyers state that 10% or more of fees are uncollectible. In Colorado, 37% of lawyers report that 9% or more of fees cannot be collected. In Kansas, 48% of lawyers report that 9% or more are uncollectible. One might wonder why, given the private bar's poor collection record, lawyers are not more forceful in their collection efforts.

TABLE 12:

<b>PERCENTAGE OF BILLED LEGAL FEES REPORTED UNCOLLECTIBLE BY COLORADO, KANSAS, MICHIGAN, AND OHIO LAWYERS<sup>159</sup></b>				
<b>Percent of Billed Fees That Are Uncollectible</b>	<b>Percent of Responses</b>			
	<b>Colorado (2000)</b>	<b>Kansas (1997)</b>	<b>Michigan (2000)</b>	<b>Ohio (2007)</b>
<b>2% or Less</b>	34%	25%	30%	36%
<b>3-8%</b>	29	27	28	28
<b>9-12%</b>	19	25	21	19
<b>13% or More</b>	18	23	21	17

159. COLO. 2000 ECONOMIC SURVEY, *supra* note 73, at 31; 1997 *Economic Survey of Kansas Lawyers*, *supra* note 78, at E-13; *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1561; THE ECONOMICS OF LAW PRACTICE IN OHIO, DESKTOP REFERENCE FOR 2007, *supra* note 69, at 30.



TABLE 13:

**PERCENTAGE OF BILLED LEGAL FEES REPORTED  
UNCOLLECTIBLE BY IOWA, MISSOURI, NEBRASKA, AND  
OKLAHOMA LAWYERS<sup>160</sup>**

Percent of Billed Fees That Are Uncollectible	Percent of Responses			
	Iowa (2006)	Missouri (2005)	Nebraska (2006)	Oklahoma (2002)
None	3.5%	na	na	na
Less Than 5%	38	44%	45%	32%
5-9%	25	27	25	22
10-19%	18	19	19	22
20% or More	8	na	na	13
20-29%	na	6	7	na
30% or More	na	5	2	na
No Response	7.5	na	na	10

### B. *The Reasons*

No credible research seems to be available explaining the reasons why lawyers do not use forceful tactics to collect fees. Lawyers undoubtedly believe or know that many clients cannot, as a practical matter, be compelled to pay. Lawyers often know a great deal about their clients' finances. Additionally, it takes time to collect overdue bills—time that can often be better spent generating more billable hours.

Further, lawsuits against clients, although permitted under all jurisdictions' ethical rules, can damage the reputation of a lawyer. As one commentator who has written about the efficacy of asserting attorneys' liens during fee disputes has asked facetiously, "who wants to be known as the lawyer who sues his clients?"<sup>161</sup> He might as well have asked, "Who wants to be known as the lawyer who hires other lawyers to sue his clients?" Further, lawsuits can lead to disciplinary complaints and malpractice counterclaims asserting either negligence or misconduct. A significant percentage of client complaints to bar officials consist of complaints about fees,<sup>162</sup> and studies done by insurers have determined that 25% to 45% of malpractice actions are counter-

160. IOWA ECONOMIC SURVEY 2006, *supra* note 74, at 10; 2005 MISSOURI BAR ECONOMIC SURVEY RESULTS, *supra* note 66, at 41; NEB. STATE BAR ASS'N, 2006 ECONOMIC SURVEY, *supra* note 68, at 18; Payton, *supra* note 70, at 3427.

161. Zach Elsner, *Rethinking Attorney Liens: Why Washington Attorneys Are Forced Into "Involuntary" Pro Bono*, 27 SEATTLE U.L. REV. 827, 828 (2004).

162. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 557 (1986) ("A typical report of bar committees and researchers is that fee disputes are frequent, and a high

claims to lawyer fee actions.<sup>163</sup> Insurance companies sometimes screen lawyers before insuring them in part on the basis of previously filed claims for fees.<sup>164</sup> A suit, if met with a counterclaim for malpractice or the mere assertion of malpractice by a client, can lead to the need to report the claim or assertion to an insurer. Lawyers whose work predominantly serves the needs of individuals may have the most concern about malpractice suits. A recent ABA survey shows that malpractice claims as a general matter are most frequently filed against lawyers practicing in the areas of plaintiffs' personal injury work; real estate law; defendants' personal injury work; family law; and estates, trusts, and probate. 20%, 16%, 10%, 10%, and 9% of all claims filed are filed respectively against lawyers in these fields.<sup>165</sup> Finally and obviously, recoveries by clients as a result of malpractice counterclaims can be much greater than the fees claimed by lawyers in the suits that provoked the counterclaims. In illustrating the same point, Anthony Davis has recently cited a case in which one firm's action to collect fees resulted in a \$7 million verdict against that firm for malpractice, including a \$5 million award for punitive damages.<sup>166</sup> Bad things can happen as a result of harsh measures undertaken to collect fees.

It should also be noted that the organized bar actively discourages lawsuits by lawyers against clients to collect fees and has done so literally for 100 years. This may be because of client protection concerns; lawyers are considerably more capable of handling the practical business of fee disputes than are most clients. They are more capable of handling mediation, arbitration, bar investigations, and lawsuits. Additionally, lawyers control access to most of the records that can prove or disprove the legitimacy of their claims for fees. There is an inherent power imbalance in a fee dispute. But it is more likely that the organized bar is concerned about the professional reputation of lawyers as a whole.<sup>167</sup> Canon 14 of the ABA Canons of Professional Ethics adopted in 1908 stated the following:

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his

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proportion of client and public complaints about lawyers involve charges of excessive fee charges.") (footnotes omitted).

163. James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 83 (2006).

164. *Id.* at 84.

165. AM. BAR ASS'N STANDING COMM. ON LAWYER'S PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 2000-2003, at 4 (2005).

166. Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 99 (2008).

167. Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2020 (1993) ("The avowed 'primary motive' of [early efforts to provide alternatives to litigation as a means of resolving fee disputes] was a desire to protect the bar's image.").

services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.<sup>168</sup>

Similar but more emphatic language later appeared in Ethical Consideration 2-23 of the American Bar Association Model Code of Professional Responsibility first published in 1969. The Ethical Consideration stated the following:

A lawyer should be zealous in his efforts to avoid controversy over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.<sup>169</sup>

Today, authorities with the power to control lawyer behavior, including the organized bar and state legislatures, have moved beyond merely avowing that lawyers have the obligation to avoid suits for fees. Jurisdictions have increasingly adopted mandatory, as well as voluntary, fee dispute resolution programs.<sup>170</sup> A survey done by the ABA in 2008 showed that at least forty-five states have such programs.<sup>171</sup> Thirty-two of these forty-five states have programs that allow clients to “arbitrate” their claims even if the attorney declines to participate; nine programs require attorneys to participate if the client requests participation; and fee arbitration is binding in thirty-two states.<sup>172</sup> Arbitration is free or costs and only requires a nominal sum in at least thirty-two states.<sup>173</sup> Information about the programs is generally available on bar association websites, and almost all associations provide assistance by phone to clients who call asking for information about the programs.<sup>174</sup> Binding arbitration programs are clearly designed to prevent lawyers from suing clients. Given the time and effort they take, mandatory non-binding arbitration and mediation programs impede the ability of lawyers to sue.

Social research seems unnecessary to understand why lawyers are typically not particularly forceful in their efforts to collect fees. It is in their interest, the interest of the organized bar, the interest of clients, and the interest of malpractice insurance companies that lawyers avoid aggressive collection methods. Given the caution that lawyers

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168. ABA CODE OF PROF'L ETHICS CANON 14 (1908), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/1908\\_code.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/1908_code.authcheckdam.pdf); see also ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 250 (1943) (“Ours is a learned profession, not a mere money getting trade . . . Suits to collect fees should be avoided. Only when the circumstances imperatively require, should resort be had to a suit to compel payment.”).

169. See, e.g., Supreme Court of Ohio, Bd. of Comm'rs on Grievances & Discipline, Op. 1991-96 (1991).

170. STANDING COMM. ON CLIENT PROT., AM. BAR ASS'N, 2008 ABA FEE ARBITRATION SURVEY 1-2 (2008), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/fee\\_arb.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/fee_arb.authcheckdam.pdf).

171. *Id.* at 3-8.

172. *Id.* at 1.

173. *Id.*

174. *Id.*

exercise in collecting fees, the statements they make to bar associations about the amount of fees that they typically fail to collect seem eminently believable. One has to wonder whether lawyers as a group will continue to be so disinclined to aggressively collect fees, but to date they have been surprisingly disinclined.

#### X. SIZE AND GROWTH OF THE AVERAGE INCOME OF PRIVATE PRACTITIONERS

Up to this point, the focus of this Article has been on the fees that lawyers charge and fee collection. However, members of the public are concerned about more than just lawyer fees. They are concerned also about the related issue of lawyer income. As already discussed, many Americans believe strongly that private practitioners, at least in general, “greedily” make too much money from the fees that they charge. Have the real incomes of practitioners increased, decreased, or stayed about the same during the past several decades as public demand for legal services has risen? The United States Census Bureau has published figures concerning the average income of lawyers by gender that one can use to calculate the average yearly income of all lawyers and judges between the years 1982 and 1992.<sup>175</sup> In 1995, the Census Bureau published the average yearly income of all lawyers and judges the previous year—that is, in 1994.<sup>176</sup> During every subsequent year, the Census Bureau has also published the same income figure for the preceding year.<sup>177</sup> Figures are available at the time of the writing of this Article through the year 2008; consequently, it is possible to trace the increase in lawyer income over several recent decades using reliable data.

Figures are also available from state bar sponsored economic surveys that allow one to calculate ratios on a state level of average-yearly-private-practitioner-income to average-yearly-lawyer-income. In any given year in any given state, that ratio is likely to be within the range of roughly 1.05 to 1.20.<sup>178</sup> In other words, in any given year, private practitioners make from 5% to 20% more than lawyers as a

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175. See *Population – Consumer Income Reports (P60)*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/www/abs/p60.html> (last visited Sept. 19, 2012). See the editions covering the years 1982 to 1992.

176. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, MARCH 1995 (1995), available at <http://www.census.gov/apspd/techdoc/cps/cpsmar95.pdf>.

177. See *Current Population Survey (CPS)*, U.S. CENSUS BUREAU, <http://www.census.gov/cps/methodology/techdocs.html> (last revised Sept. 18, 2012).

178. See, e.g., Henderson & Weinrobe, *supra* note 65, at 8; Wright, *supra* note 65, at 1306; *The 1988 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 16–17; *The 1991 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1231, 1233; *Economics Survey: The Economics of Law Practice in Michigan*, *supra* note 65, at 1225, 1227; *The 1997 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1315, 1317; *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1551, 1553.

group make. Also, in any given state across time, the ratio tends to fluctuate, sometimes rising and sometimes falling. There is no evidence that private practitioners have recently been earning a larger and larger fraction of all money earned by lawyers. The fact that the ratio being discussed is commonly so close to “1.0” should not be much of a surprise. Private practitioners constitute the great bulk of all lawyers, and since 1980 private practitioners have constituted an increasing share of the total lawyer population.<sup>179</sup> Currently, they constitute about three-quarters of all lawyers. It appears that one can take the rate of change in the yearly income of lawyers and judges in the United States to be the approximate rate of increase of private practitioner income.

Table 14 below compares the average yearly total money earnings of full- and part-time American workers fifteen years old and older with the earnings of lawyers and judges in the United States during the years 1982 to 2008. During that twenty-six year period, the average real income of United States workers increased 41%, while the average income of lawyers and judges increased 76%. Each year during the period, the average income of private practitioners was probably 5%–20% greater than the average shown in the table for lawyers and judges more generally. It is very likely that during the twenty-six year period, the income of private practitioners also increased roughly 76%.

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179. THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, *supra* note 143, at 6 (stating that in 1980, 1991, and 2000, private practitioners constituted 68%, 73%, and 74% respectively of the total population of lawyers in the United States).

TABLE 14:

**AVERAGE TOTAL MONEY EARNINGS OF FULL- AND PART-TIME AMERICAN WORKERS  
15 YEARS OLD AND OVER AND FULL- AND PART-TIME AMERICAN LAWYERS AND  
JUDGES, 1982-2008. (REAL DOLLAR AMOUNTS ARE IN CONSTANT 2007 DOLLARS.)**<sup>180</sup>

Year	Income Of U.S. Workers In Constant Dollars	Income Of Lawyers And Judges In Constant Dollars	Income Of U.S. Workers In Real Dollars	Income Of Lawyers And Judges In Real Dollars	Year	Income Of U.S. Workers In Constant Dollars	Income Of Lawyers And Judges In Constant Dollars	Income Of U.S. Workers In Real Dollars	Income Of Lawyers And Judges In Real Dollars
1982	\$13,868	\$37,315	\$29,790	\$80,159	1996	\$27,366	\$97,127	\$36,157	\$128,326
1983	14,641	41,372	30,473	86,108	1997	28,754	96,555	37,138	124,709
1984	15,513	39,329	30,952	78,468	1998	30,135	107,697	38,325	136,967
1985	16,575	45,716	31,933	88,075	1999	31,521	99,008	39,222	123,195
1986	17,518	52,625	33,134	99,536	2000	33,688	99,251	40,555	119,482
1987	18,382	51,400	33,544	93,796	2001	35,034	112,319	41,008	131,472
1988	19,419	55,297	34,029	96,898	2002	35,557	121,516	40,973	140,024
1989	20,779	63,326	34,739	105,866	2003	36,323	135,260	40,923	152,388
1990	21,197	65,860	33,620	104,459	2004	37,151	133,970	40,770	147,019
1991	21,798	70,114	33,176	106,715	2005	38,828	141,025	41,214	149,690
1992	22,667	80,325	33,491	118,683	2006	40,649	134,795	41,798	138,606
1993	NA	NA	NA	NA	2007	41,328	139,674	41,328	139,674
1994	25,189	76,302	35,234	106,730	2008	41,948	140,896	41,910	140,767
1995	26,099	75,939	35,501	103,295					
					<b>Percent Increase 1982 to 2008</b>	202.5%	277.6%	40.7%	75.6%

\* The data covers only civilian workers for years 1987 and earlier.

It seems then that the average income of private practitioners has been rising faster than the average income of Americans generally, but it has certainly not risen at a rate that is shocking.

It has already been established that the average practitioner is controlling growth in the size of his or her standard hourly fee as well as growth in the size of fees charged for paralegal work. Nonetheless, could the fact that the average incomes of practitioners and American workers have risen at very different rates be evidence of lawyer greed? It could conceivably be evidence of greed if it indicates that lawyers increasingly overbill; one explanation for the divergence in incomes might be that overbilling is increasingly rampant. When asked if they think that other lawyers overbill, the vast majority of private practitioners (80%) say they think that overcharging is only

180. See *Population - Consumer Income Reports (P60)*, supra note 175; CURRENT POPULATION SURVEY, MARCH 1995, supra note 176; *Current Population Survey (CPS)*, supra note 177.

occasional or is rare, however.<sup>181</sup> Judges who are called upon to approve bills submitted to clients by lawyers seem to approve all or most hours.<sup>182</sup> And it is very difficult to imagine that the significant disparity could be accounted for by fraud which, if detected, could result in criminal punishment and disbarment.

Further, it would be odd to claim that lawyer fraud has been widespread (widespread across many practitioners), severe (sufficiently severe to account for the disparity at issue), and sustained over all or most of a twenty-six year period. Such a claim would implicitly accept the notion that consumers of legal services have over a lengthy period been willing to pay bills for legal services that incorporate the cost of fraud. If that has been true, why have lawyers risked committing fraud? Why have they not simply billed for the hours that they have worked and charged higher billing rates? The empirical evidence shows that there has been plenty of room over the years for hourly fee increases. Real fee increases have been very modest over many decades.

If overbilling and fee gouging do not explain recent lawyer/American-worker income disparity, then what does? Income inequality in the United States has been rising over several decades. Various measures of inequality consistently show that this is so. Households in the highest (i.e., the fifth) income quintile earn an increasing share of all money earnings.<sup>183</sup> Ratios showing the relationship between the earnings of high and low male income earners are rising;<sup>184</sup> the ratio of ninetieth-percentile income to tenth-percentile income is rising, as is the ratio of median income to tenth-percentile income.<sup>185</sup> The same ratios are rising for women.<sup>186</sup> Economists do not clearly understand why.<sup>187</sup> Income inequality is rising in most nations of the world.<sup>188</sup> It would be mere pretense for the Author to claim to know with certainty the factors causing the growing gap between lawyers and other workers.

The factors might include ones that operate on a macroeconomic as well as a microeconomic scale, such as technological progress and

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181. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 4 *RUTGERS L. REV.* 1, 16 (1991).

182. *Id.* at 13.

183. U.S. CENSUS BUREAU, *INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005*, at 40–41 (2006), available at <http://www.census.gov/prod/2006pubs/p60-231.pdf>.

184. U.S. CENSUS BUREAU, *THE CHANGING SHAPE OF THE NATION'S INCOME DISTRIBUTION: 1947 – 1998*, at 3 (2000), available at <http://www2.census.gov/prod2/pop-scan/p60-204.pdf>.

185. *Id.*

186. *Id.*

187. Kenneth F. Scheve & Matthew J. Slaughter, *A New Deal for Globalization*, 86 *FOREIGN AFFAIRS* 34, 41 (2007).

188. INT'L MONETARY FUND, *WORLD ECONOMIC OUTLOOK: GLOBALIZATION AND INEQUALITY* 135, 139 (2007).

globalization. A 2007 International Monetary Fund report states that technological progress and the growth of trade between nations account for part of the growing income inequality experienced in advanced economies,<sup>189</sup> and it seems quite possible that law firms and therefore lawyers are benefiting more from recent advances in information processing and communications technology than most other businesses and their workers. Law is fundamentally an information processing business, and technological advances have undoubtedly helped to contain costs significantly. Liberalization of trade policy and the flow of investment capital across borders has generated increased competition between American and foreign workers—competition from which lawyers are largely insulated. Competition between American and foreign workers may have disproportionately depressed the growth of the average worker's income. Global competition should affect lawyer income growth at least somewhat because a large portion of law firm receipts come from individuals as already noted, and individuals are less likely to purchase services when they are experiencing stagnant or slow income growth.<sup>190</sup>

The growing income gap between lawyers and the worker population generally might be explainable by factors that operate directly and simply. For example, private practitioners are working more billable hours than they did forty years ago. Surveys done in the late 1960s and in 1970 indicate that practitioners around that time tended to bill in the range of 1,400 to 1,500 hours per year,<sup>191</sup> while studies done in the mid-1980s and early 1990s show they were then billing in the range of 1,500 to 1,700 hours annually.<sup>192</sup> Today, private practitioners generally bill 1,750 hours per year or more.<sup>193</sup> Thus, there has

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189. *Id.* at 154.

190. See *infra* Part VIII.A. Consumers as a group cannot easily avoid the purchase of at least some legal services in any era, however. Criminal defendants and Americans facing divorce or bankruptcy greatly benefit from legal assistance, for example.

191. RICHARD L. ABEL, *AMERICAN LAWYERS* 192 (1989). Abel discusses three studies showing (1) Florida lawyers billed a median of 1,450 hours in 1966, (2) Colorado lawyers billed a median of 28.2 hours per week, or 1,410 hours for a fifty-week year in 1967, and (3) South Carolina lawyers billed a median of 1,450 hours in 1969. *Id.* See also Billie Bethel, *Report of the 1967 Economic Survey of the State Bar of Texas*, 31 *TEX. B.J.* 9, 50 (1968) (reporting that, in Texas, associates; associates working for sole practitioners; sole practitioners; sole practitioners who employ associates; sole practitioners sharing office space with others; and partners respectively report medians of 1,500; 1,500; 1,300; 1,500; 1,200; and 1,500 hours per year); see also Billie Bethel, *Report of the 1970 Economic Survey of the Oklahoma Bar Association*, 41 *OKLA. B.J.* 2853, 2872 (1970) (reporting that in Oklahoma, the "median lawyer" reports 6 chargeable hours of work per day; this would be equal to 1,500 hours per year for a 250-day working year).

192. See, e.g., Wright, *supra* note 65, at 1306 (showing a median of thirty chargeable hours reported per week); Monnot, *supra* note 70, at 3563 (showing an average of thirty-two chargeable hours reported per week).

193. Molvig, *supra* note 80, at 8, no.2 (reporting that Wisconsin lawyers in 2005 billed an average of thirty-five hours per week, or roughly 1,750 hours per year assuming a fifty-week year); 1997 *Economic Survey of Kansas Lawyers*, *supra* note 78,



been a gradual but significant rise over many decades in the average practitioner's annual billable hours total. It is logical to presume that the increase has been enabled by growth in the size of law firms. Private practitioners work in increasingly large practice settings. Because staff members in large organizations can serve very specialized functions, lawyers can leave many if not most clerical, technical, and routine administrative matters to legal secretaries, computer and technology experts, librarians, marketing specialists, and messengers. This allows lawyers to concentrate on casework. Since 1960, the number of lawyers working in firms has increased at two times the rate that the number of lawyers working alone as solo practitioners has.<sup>194</sup> In 1960, 64% of private practitioners were solo practitioners. By the year 2000, fewer than half (48%) were.<sup>195</sup> Marc Galanter has noted that only several thousand lawyers worked in law firms that employed fifty or more lawyers in 1960.<sup>196</sup> By the year 2000, more than 120,000 lawyers worked in firms of that size.<sup>197</sup>

Notably, during the modern era, the rate of growth of lawyer income has not always been higher than the rate of growth of worker income more generally. In the twenty-two year period between 1929 and 1951, the average net income of non-salaried lawyers increased 58%, and the mean net income of persons employed in the legal services industry rose 77%.<sup>198</sup> By comparison, the earnings of full-time employed persons in all industries rose 131%, and the incomes of non-salaried dentists and non-salaried physicians rose 83% and 157% respectively.<sup>199</sup> In the twenty-year period 1959 to 1979, real median lawyer income first increased and then shrank, ultimately dropping

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at E-9 (reporting a median of 1,850 billable hours per year for practitioners); *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, *supra* note 65, at 1562 (reporting a median of thirty-five billable hours per week for practitioners); COLO. 2000 ECONOMIC SURVEY, *supra* note 73, at 32 (showing Colorado lawyers report a total of forty hours per week of "compensable legal work"); 2005 MISSOURI BAR ECONOMIC SURVEY RESULTS, *supra* note 66, at 36 (showing a median of 1,751 to 2,000 hours per year for practitioners); 2005 HOURLY RATE REPORT, *supra* note 72, at 34 (showing a median of thirty-five hours per week for full-time private practitioners).

194. Marc Galanter, "Old and in the Way": *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1090 (1999).

195. THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, *supra* note 143, at 29.

196. Galanter, *supra* note 194, at 1090.

197. THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, *supra* note 143, at 9.

198. MILTON Z. KAFUOLIS, ECONOMIC CONDITIONS OF THE LEGAL PROFESSION IN OHIO 6-7 (1955) (citing U.S. DEP'T OF COMMERCE, A SUPPLEMENT TO THE SURVEY OF CURRENT BUSINESS: NATIONAL INCOME 200-01 (1954); OFFICE OF BUS. ECON., U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 7 (1952)).

199. *Id.*

about 2% across the entire period.<sup>200</sup> In contrast, the real median income of people fifteen years old and older rose 19%.<sup>201</sup> Incomes in varied industrial sectors change at different rates in different eras. A proper explanation of income inequality might even require a thorough explanation of the forces that have shaped twentieth and twenty-first century economic history, and an examination of those forces lies outside the intended scope of this Article.<sup>202</sup>

In any case, both logic and the evidence suggest that the growing income disparity being discussed here has not been caused by rampant overcharging on individuals' legal bills or by runaway increases in the size of the standard hourly fee—two manifestations of supposed lawyer greed about which Americans seem to worry unnecessarily.

#### XI. SIZE AND GROWTH OF THE AVERAGE INCOME OF PARALEGALS

While Americans do not appear to be interested in the size of paralegals' incomes, Americans should be interested. Paralegals are legal service providers, and their incomes have to be paid from the fees charged by lawyers on clients' legal bills. As mentioned above, the paralegal population in the United States today is about one-quarter the size of the population of active lawyers; the paralegal population is more than one-half the size of the private practitioner population. Paralegals are a very large group of service providers. National Association of Legal Assistants ("NALA") figures are available concerning average incomes of paralegals in the United States; the organization has surveyed members about their total compensation (salary and bonuses) since at least 1988. Table 15 below contains NALA survey results and compares those results to Census Bureau data concerning the incomes of United States workers fifteen years and older between the years 1988 and 2008.

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200. Sander & Williams, *supra* note 30, at 448 (showing that real average lawyer income ended the time period only 1% lower than it had been at the beginning of the period; in other words, it essentially neither declined nor increased).

201. U.S. CENSUS BUREAU, MEASURING 50 YEARS OF ECONOMIC CHANGE C-3 tbl.C-2 (1998), available at <http://www2.census.gov/prod2/popscan/p60-203.pdf>.

202. In the course of research for this Article, the Author uncovered no evidence that lawyers routinely accused workers in other industries of greed during either of the two time periods, 1929–1951 or 1959–1979.

TABLE 15:

**AVERAGE TOTAL MONEY EARNINGS OF FULL- AND PART-TIME AMERICAN WORKERS 15 YEARS OLD AND OVER AND FULL- AND PART-TIME PARALEGALS, 1988–2008. (REAL DOLLAR AMOUNTS ARE IN CONSTANT 2007 DOLLARS.)<sup>203</sup>**

Year	Income Of U.S. Workers In Constant Dollars	Income Of Paralegals In Constant Dollars	Income Of U.S. Workers In Real Dollars	Income Of Paralegals In Real Dollars
1988	\$19,419	\$26,023	\$34,029	\$45,592
1991	21,798	28,980	33,176	44,108
1993	NA	29,894	NA	42,898
1995	26,099	32,000	35,501	43,520
1997	28,754	36,435	37,138	47,074
2000	33,688	40,474	40,555	48,731
2002	35,557	46,074	40,973	53,077
2004	37,151	46,862	40,770	51,408
2008	38,213	50,953	38,178	50,905
<b>Percent Increase 1988 to 2008</b>	96.8%	95.8%	12.2%	11.7%

During the years for which data are available, the overall rate of increase of paralegals' income has matched almost exactly the rate of increase of all American workers' income. The income of both sets of workers rose about 12%.

## XII. CONCLUSION

In a capitalist economy, the market is the predominant force setting the price of goods and services.

During the second half of the twentieth century, American courts eliminated a number of impediments to the free functioning of the market for legal services. In 1975, the United States Supreme Court issued a ruling in the case *Goldfarb v. Virginia State Bar* that ended the practice by bar associations of promulgating and enforcing legal services fee schedules.<sup>204</sup> In 1977, with the issuance of the majority

203. 1995 NATIONAL UTILIZATION AND COMPENSATION SURVEY REPORT, *supra* note 105; 2008 NATIONAL UTILIZATION AND COMPENSATION SURVEY REPORT, *supra* note 105; see also *Population–Consumer Income Reports (P60)*, *supra* note 175; CURRENT POPULATION SURVEY, MARCH 1995, *supra* note 176; *Current Population Survey (CPS)*, *supra* note 177.

204. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 785–86 (1975) (stating that “there may be legal services that have no nexus with interstate commerce” and implying that fee schedules concerning such services might be legal). It is commonly believed that the

opinion in *Bates v. State Bar Association*,<sup>205</sup> the Supreme Court nullified jurisdictional bans on lawyer advertising. In 1985, the Court invalidated as a practical matter lawyer residency requirements in force in the majority of states. By mid-twentieth-century, the majority of states had promulgated rules requiring lawyers to reside in-state, often for lengthy periods, in order to qualify for licensing.<sup>206</sup> The Court's ruling in *Supreme Court of New Hampshire v. Piper* ended the enforcement and promulgation of these rules.<sup>207</sup>

Law schools greatly increased in number and in total enrollment throughout the second half of the twentieth century. In the 1963–1964 academic year, roughly 50,000 Juris Doctor candidates attended 136 ABA-approved American law schools.<sup>208</sup> In 2009–2010, about 155,000 students attended 200 approved schools.<sup>209</sup> Although it is often thought that state bar administrators tightened admissions standards and increased the difficulty of bar examinations during the late twentieth century, average annual pass rates on the nation's bar examinations have actually climbed substantially since the 1950s. This may be because of improvements in legal education or better test preparation by applicants, or both. In any case, today's law school graduates pass the examinations more easily than did law graduates fifty years ago. Only about 50% of all applicants for admission passed their jurisdictions' bar examinations between the years 1930 and 1950.<sup>210</sup> About two-thirds of all takers of the February and July bar examinations pass the examinations annually today.<sup>211</sup> Approximately three-quarters of *first time* takers pass each year.<sup>212</sup> Because total law school enrollment has increased and because bar passage rates have risen, the ranks of lawyers have swelled. In 1950, about 222,000 law-

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*Goldfarb* decision held that all fee schedules sponsored by the organized bar are illegal, nonetheless. See, e.g., Thomas Morgan, *Economic Realities Facing 21st Century Lawyers*, 69 WASH. L. REV. 625, 625 n.4 (1994).

205. *Bates v. State Bar Ass'n*, 433 U.S. 350, 384 (1977).

206. ABEL, *supra* note 191, at 117. After World War II, states imposed residency requirements on lawyers. *Id.* Thirty-nine states required lawyers to establish residency through an extended period of stay by the year 1959. *Id.*

207. *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 288 (1985).

208. AM. BAR ASS'N, ENROLLMENT AND DEGREES AWARDED 1963-2011 ACADEMIC YEARS (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf).

209. *Id.* at 1.

210. Herbert E. Clark, *Bar Examinations: Should They Be Nationally Administered?*, 36 A.B.A. J. 986, 987 (1950).

211. *Ten-Year Summary of Bar Passage Rates*, 79 B. EXAMINER 22, 25 (2010). The pass rate of all bar examination takers in all United States jurisdictions in the year 2009 was 68%. *Id.* The pass rates of all takers in 2008, 2007, 2006, and 2005 respectively were 71%, 67%, 67%, and 64%. *Id.*

212. *Id.* The pass rate of all first-time bar examination takers in all U.S. jurisdictions in the year 2009 was 79%. *Id.* The pass rates of all first-time takers in 2008, 2007, 2006 and 2005 respectively were 82%, 79%, 78%, and 76%. *Id.*

yers practiced in the United States.<sup>213</sup> Today, more than five times as many practice—1.2 million.<sup>214</sup> Between the early 1970s and 2006, lawyers hired an increasing number of paralegals as has been mentioned. Their population increased about eleven and one-half times.<sup>215</sup>

There are many more legal service providers today (lawyers and paralegals) than decades ago who compete more effectively and aggressively for business. Market forces have generated an increased supply of service providers. Suits brought by consumers and lawyers have loosened constraints on competition, and such suits by themselves constitute market forces. The market has thus responded to the increased demand for services.

The evidence that is available indicates that the increase in demand for services by individuals since the early 1970s has not caused the exploitation of the public; it has not caused rampant increases in the size of real lawyer or paralegal hourly fees, nor drastic increases in the incomes of average paraprofessionals or average private practitioners. Private practitioners generally have been careful to control hourly fees. The average practitioner's income has risen more quickly than that of the average American worker, but this may be due to large scale economic forces restraining the growth of the average worker's income and certain law office business practices other than fee hikes. It does not appear to be due to overbilling. Additionally, the increase in demand for services has not caused an explosion in profession-wide manifestations of greed. Today, as a group, practitioners provide many free services including pro bono services to low-income clients; they tend to avoid overbearing collection practices and often write off overdue fees; and they do a significant and impressive amount of community service work. Altruism is certainly not the only reason that the typical practitioner treats his or her clients and community decently. Lawyers are responding to many external pressures in addition to internal ones like self-interest and conscience. The external pressures include increased competition, which has resulted from the swelling in the size of the lawyer population,<sup>216</sup> the demise of minimum fee schedules, the modern<sup>217</sup> advent of lawyer advertising, and increased movement of lawyers across jurisdictional borders. The ex-

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213. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 15 (1992).

214. LAWYER POPULATION BY STATE, *supra* note 104.

215. *See supra* text accompanying notes 101–04.

216. Americans sometimes complain that there are too many lawyers, and the average American believes that the country would be better off with fewer lawyers. In fact, 51% of Americans agree that “[w]e would be better off with fewer lawyers.” *See SHAPIRO, supra* note 46, at 7. This is ironic. Americans should welcome increases in the size of the population of legal service providers as a means of controlling fees.

217. ABEL, *supra* note 191, at 118–19. Prior to 1908 and the adoption of the Canons of Professional Ethics, lawyer advertising was common and generally tolerated by the public and profession. *Id.* at 119.

ternal pressures also include the controls placed on lawyer behavior by bar authorities, law firms, and malpractice insurance companies. The term “greedy” is not a fitting adjective to use to describe the typical practitioner. Empirical evidence suggests that the typical practitioner is a prudent businessperson, often willing for both pragmatic and altruistic reasons to contribute time and money to community causes and organizations as well as to provide good service to clients. As such, the “average” or representative lawyer is no different than the typical businessperson who works in virtually any other American industry.