CONFIDENTIAL MEMORANDUM

TO: **Steven Brill, Publisher, *The American Lawyer***
FROM: Victor John Yannacone, jr.
DATE: 10 September 1991

re: ***Large Time Billing Law Firms: Scourge of the American Economy***

At the heart of all the billing excesses so cavalierly reported in the pages of *The American Lawyer* over the last decade is the patently unsupportable idea that the value of legal services is **directly** proportional to the length of time it takes to perform them. Rather, the value of legal services is **inversely** proportional to the length of time it takes to perform them.

The measure of value for legal services is not the length of time it takes to perform them, but rather their effect in advancing the interests of the client consistent with the needs of society.

Leadership in the legal profession carries with its exalted status and high income, the responsibility to promote the interests of society and advance the cause of civilization; positions which may not always necessarily be consistent with the private interests of a client. While many large firms maintain "conflict" checking computer systems, the programs often overlook conflicts with the interests of Society.

The moment an individual attorney, much less an entire law firm takes the position that the interests of society are not to be considered in the context of providing services for a fee to their individual clients, those attorneys and those firms have accepted the morality and adopted the ethics of the *consiglieri* who serve organized crime.

Roscoe Pound pointed out almost a century ago that the conversion of the attorney from a professional— an advocate of principles and a defender of inherent human rights— to just another businessman began with the destruction of the Litchfield Law School by Lansdell at Harvard. No longer was the product of legal education a skilled advocate and a relentless defender of human freedom and personal dignity filled with social responsibility and willing to challenge any injustice; it soon became a well-schooled scrivener hiding behind the judicial positivism and the laissez-faire economics of the robber barons.

At the heart of all the excesses of big firm practice is the concept of time billing. The very concept provides an incentive to waste and profligacy that is totally inconsistent with the American Free Enterprise System. The business clients of large law firms may be very concerned with return on invested capital or from common labor, however they never apply the same kind of analysis to the return on their investment in legal services.

The idea that any corporate steward— CEO, CFO, Comptroller, or house counsel will hand a signed blank check to a group of arcane scriveners is exceeded in its foolishness only by the *chutzpah* of the lawyers who seem to believe that the leaders

of the American Free Enterprise System, assuming there are any leaders left, will continue to accept this state of affairs much longer.

It is interesting to note that the American Legal System has accommodated a standard against which the value of legal services can easily be measured and has been measured for many years, in spite of the considered efforts of large time billing firms to eradicate the system. The contingent fee system, crude as it is, and with its own excesses fueled again by the greed that has been sanctified by *The American Lawyer* as good management, takes a portion of a positive recovery as a measure of the value of the services rendered. No recovery, no fee! As a result, contingent fee lawyers exercise a kind of prior restraint on the proliferation of litigation. Cases are not accepted that will not produce a substantial recovery for the benefit of the client and a commensurate return on investment for the attorney.

If the personal injury/product liability defense bar were also driven in house at the major insurance carriers and *Fortune 1000* target defendants, and counsel became subject to the same standards of accountability as business management, there would be less litigation, more socially responsible, economically rational settlements, and an overall improvement in safety and health throughout the industrial world.

Secure in the knowledge that the hourly fee was a given and the ultimate sacred cow in American law, it has not been difficult to promote practices which encouraged the billing of time without regard to the value of the services represented by that time. Promotion of the profit center concept for law firms and practice group accountability, while certainly reasonable from the point of view of a B-School are, from the point of view of society in general, and clients in particular, anti social and economically disastrous.

When litigation is conducted by two time billing firms, the effect on American industrial competitiveness in the world suffers immediate and dramatic decline. As long as all the law firms involved on both sides of the litigation are billing time, there is no incentive to reduce the amount of time the litigation takes nor any incentive to settle the issues at the earliest stage of litigation. Exhausting, debilitating discovery, much of it little more than thinly disguised industrial espionage eagerly observed by competitors throughout the world, dominates such litigation.

Much like modern surgery where the patients are merely the objects upon which the surgeons exercise their skill or manifest its lack, litigation has become an exercise for lawyers in which the clients merely provide the economic resources necessary to support time billing law firms. The client seems to have no place in modern litigation other than as a deep pocket into which the hands of the equity partners of time billing law firms can find a home.

Unless the business firms and corporations upon which the whole American economy depends become directly responsible for management of the litigation which concerns

them, American industrial competitiveness will continue to be compromised and American business productivity will continue to decline.

Staffing Litigation

When a business organization becomes involved in major litigation it is betting the firm on the skill of its attorneys.

Staffing for any legal service is something that can and should be estimated before the service is provided and at the time the agreement to retain counsel is forged. If the law firm cannot identify the partner in charge of performing the service and estimate its own cost of staffing the effort, there is no reason to retain that law firm. They have too little understanding of the legal work they are about to perform to engender confidence that they will perform it well.

While this means that some firms will lose money in developing new business because they have estimated unwisely, this is a part of the law firm learning curve. Partners should be held accountable by their other partners in other profit centers for engaging in unprofitable work. That is a cost of doing business and will soon weed out the inefficient and the inept.

Only the large time billing American law firm is rewarded for its inefficiency. The more inefficient and inexperienced a law firm is, the greater its profit per partner. Just how many attorneys it takes to staff a large law suit varies depending on the nature and complexity of the law suit. But in the Courtroom only one attorney bears the burden of presenting the case. Cases are not tried successfully by committees.

Today behind every successful trial attorney and advocate there is some “law person”, a man or woman who is seldom seen and rarely heard from in public, but who is responsible for converting the “instincts”, “hunches”, “premonitions,” and “tactics” of the trial counsel into effective briefs and memoranda of law.

The attorney in charge of the case must have sufficient experience to estimate the staffing needs associated with trying the case as presented by the client on the initial retainer interview. The attorney who is trying the case and representing the client publicly is responsible for marshaling the evidence.

Utilizing my own personal experience with the *Agent Orange* litigation as a basis for comparison, skilled and competent trial counsel should be capable of dealing with a document database of over a million pages and conducting over 100 days of depositions in a year supported only by a single “law person”, a document manager and the clerical support personnel necessary to maintain the litigation timetable.

Counsel should associate a dollar cost with each of these functions that includes the amount which the partner wishes to earn for the services performed, and the cost to the firm of supporting the partner to the extent that the partner wishes or needs support. For example, the partner in charge of the litigation will probably want the

assistance of one or two associates or a junior partner to perform certain routine services on the case that are as effectively done by attorneys of limited experience as they are by seasoned litigators.

A client has the right to assume that if a deposition is important, counsel trying the case should be conducting it. If it is not important, well crafted interrogatories or requests to produce documents should suffice. If the party being deposed is to be a witness in the litigation, only the attorney responsible for trying the case should be conducting the deposition. If that attorney requires a "bag carrier" or the firm feels that a junior partner or associate should attend the deposition with trial counsel, then the cost of that educational effort is part of the overhead of the firm and should be born by the firm not the client.

These considerations raise the question of just how many cases a seasoned litigator should handle at any given time. Rules restricting barristers to one case at a time are a bit extreme, but there is a limit to the number of lawsuits that any attorney should be permitted to manage at any given time. No attorney should be permitted to promote delay or continuance of the action involving one client in order to accommodate the action of another.

For that reason, the cost of obtaining total commitment of experienced trial counsel should be quite high, even perhaps approaching that of obtaining the services of a skilled athlete. Nevertheless, recognizing that the client has the complete attention of counsel who is limited in obtaining other work during that period leads to a speedy resolution of the litigation.

When the work is being performed on a fixed fee basis, then the incentive is even greater for the attorney to dispose of the matter as quickly and successfully as possible. Quickly because it increases the attorneys earnings per unit time, and effectively because success leads to higher earnings and a greater value for similar services in the future. What has been created is a win-win situation in which both the client and counsel benefit. What will be eliminated is the win-lose situation that exists today. If the law firm wins by increasing its income, of necessity, the client loses by obtaining services at the highest possible cost rather than the lowest.

Litigation as a Profit Center

There is nothing inherently evil in establishing the litigation department of a large firm as a "profit center" provided the profit is earned as a result of the efficiency in providing services, not merely by the length of time it takes to provide the services. Top flight litigators are restricted in the number of cases that they can handle at any given time, and, as the amount of litigation conducted by, against, or involving American business continues to proliferate, the opportunity will arise for many more attorneys to become principal litigators. Admittedly, they will not be able to charge premium fees initially, but as their exposure continues and their won-lost records are

publicized in *The American Lawyer*, their value will increase or, if they lose too often, they will be driven to choose some other area of the law in which to provide services.

As long as attorneys can make money and turn profits by losing major litigation and therefore providing a less than valuable service to their clients, often turning around to profit from their bankruptcy, you must ask the serious question about whether the entire reward/compensation system for lawyers is skewed against the client. What should be paid for is the service, not the time. Reward the efficient and punish the inefficient. That is the scientific and social basis for evolution. * * *

The Arithmetic of Litigation Support

For the most complicated litigation the services of a skilled document preparation specialist can be provided 24 hours a day, 7 days a week, 365 days a year, a total of 8,760 hours at a maximum cost of $438,000 assuming a $50.00 hourly rate. Considering the 50 page limit for briefs imposed by most appellate courts and many trial courts as well, and a 4 page per hour production rate for these specialists, any brief, no matter how complex can be prepared for any court in less than one 24 hour day and you can expect 35,040 high quality typeset pages “ready for camera”.

As far as word processing is concerned, again consider the nature of modern litigation. How many pages of keyboard input are going to be produced in a year in even the most complex litigation? Staff the word processing center for 24 hours a day, 7 days a week, 365 days a year, a total of 8,760 hours, and charge $30.00 per hour. Assuming average productivity of 10 pages per hour, that provides 87,600 pages of fresh new typewritten material, for a total cost of $262,800.00.

Grade school arithmetic belies the costs associated with modern litigation. For only $700,800 more than 87,000 pages of original input, and more than 35,000 pages of finished high quality printed output can be produced.

These simple arithmetic exercises place some of the costs associated with litigation into their proper prospective. Any attempt to bill more than $700,800 a year for document production and word processing during any lawsuit, no matter how complex, is so unreasonable as to represent some kind of fraud.

Computer Services

The cost of computer services should be a basic element of any major litigation. It would not be unwise in litigation involving large numbers of documents to include the total cost of a dedicated in-house document management system. For major litigation, it is not unreasonable to budget the entire start up cost of a document management computer center located at the clients facility and accessible to counsel only subject to appropriate security precautions. Under no circumstances should any business allow documents to leave Company premises and be housed at a law firm. To pay a law firm for the cost of providing a secure depository for documents is ill-considered.

Law firms are not in the business of providing security and have no expertise in this area.

Litigation document management centers should be established running on dedicated computer systems. Security for both the document facility and the data must be assured by controlling and documenting logins. Company management must have full knowledge of who is accessing their documents, which documents are being accessed, and under what circumstances. Document scanning and data conversion should be provided by the Company in the way that is most cost effective for the Company.

Law firms have no business being in involved in document scanning and data production. Lawyers add work product to the document data base by annotating and consolidating the documents into meaningful information— meaningful to the client and the courts. * * *