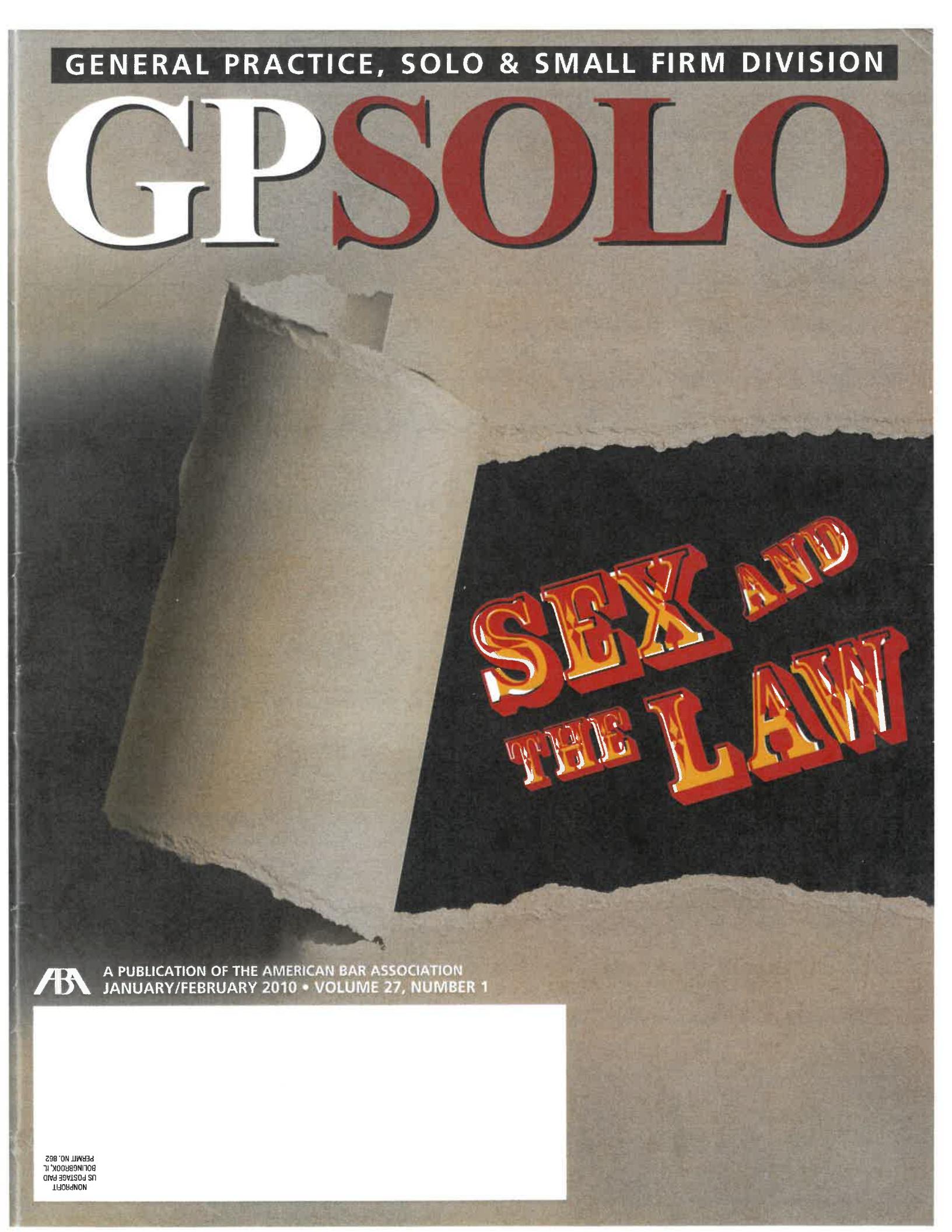


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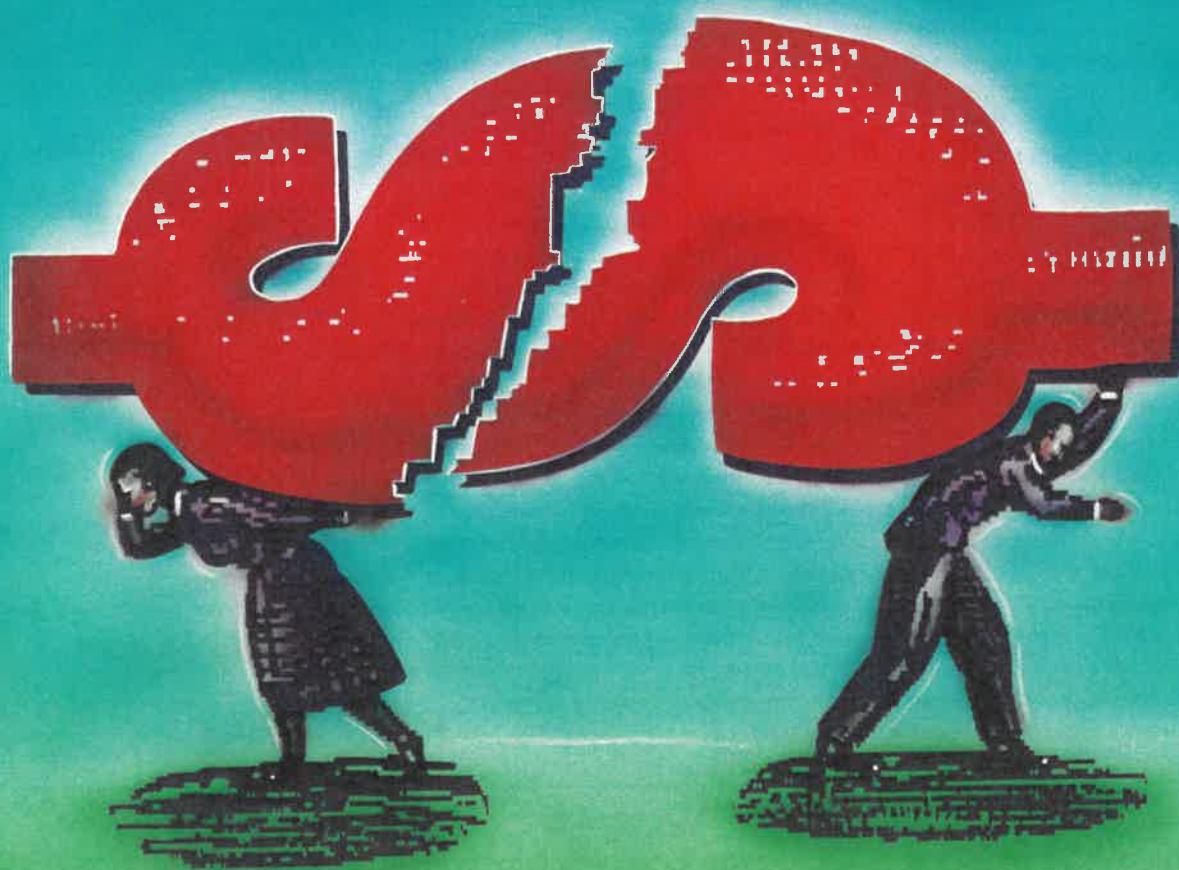
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A PUBLICATION OF THE AMERICAN BAR ASSOCIATION
JANUARY/FEBRUARY 2010 • VOLUME 27, NUMBER 1

Constructive Divorce with Value-Based Pricing

By Mark A. Chinn



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This article deals with two issues in our practices that appear to be disconnected, but that are being brought together by a convergence of circumstances: value pricing and the collaborative handling of family law cases. If lawyers are able to master the combination of collaboration with value pricing, they will enjoy greater client satisfaction, a rejuvenated culture in their firm, reduced accounts receivables, and business models that will survive the current economic climate.

Mediation and Collaborative Law

If you were to survey your clients and ask them if they preferred long, drawn-out legal battles to quick resolutions through settlement or mediation, what do you think the response would be? I submit that 90 percent of clients would prefer to avoid the long, drawn-out battle. All too frequently, however, family lawyers file suits or counterclaims, engage in discovery with interrogatories, depositions, requests for documents, subpoenas, and motion hearings, and then settle the case, usually "on the courthouse steps."

Now consider how satisfied you are with the litigation aspects of your practice. How often do you endure uncivil conduct from opponents who are uncooperative in discovery or scheduling and engage in destructive conduct toward parties in depositions? Again, the answer is self-evident: Family trial lawyers routinely endure the worst of human emotions coupled with the most difficult of litigation lifestyles.

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This needs to change, and the change can only start with each one of us.

Family law cases involve families. This means that the handling of the family law case impacts lives. Forever. When children are involved, the impact is obvious. The divorcing couple faces a lifetime of having to work with each other as they care for their children. There is also a seemingly infinite number of lifetime events—birthdays, holidays, meeting boyfriends and girlfriends, sports and other activities, graduations, marriages, the births of grandchildren—to be shared and enjoyed. In light of this tremendous impact on lives, family lawyers have a unique responsibility to look for ways to resolve the family law case in a constructive manner.

Abraham Lincoln, known as one of the finest trial lawyers of his time, is said to have admonished lawyers to settle cases, saying, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

The first step for lawyers in this process is to change their viewpoint about the law and their role. Have you ever had a client ask you, "What's your win-loss record against that attorney?" Or, "What is your win-loss record in custody trials?" Have you ever heard a lawyer talk about "winning" a divorce or custody case? The answer to all of these questions is probably yes. However, any experienced lawyer, such as President Lincoln, knows that cases, particularly family law cases, are rarely "won" or "lost."

Family lawyers practice in courts of "equity." The family law judge does not generally consider himself or herself to be bound by law or procedure, but by fairness. This means that the lawyer who is able to seize a procedural advantage over his opponent may be thwarted by a judge who is bound to ultimately "do right" by the parties and children involved. No matter how strong a case an attorney might build for his client, the judge may still refuse to accept the position if the judge concludes it will lead to a result

Family law cases involve families. How you choose to handle these cases impacts lives. Forever.

Additional Resources

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cial case or the toughest custody battles can be resolved in a single day of mediation. On a national basis, 85 percent of cases that are mediated are settled.

Collaborative law has emerged in several states. In collaborative law, the lawyers sign an agreement not to litigate but to work together to settle the case. The lawyers look for ways to resolve disputes in all aspects of the case through negotiation and mediation and by agreeing to jointly hire appraisers, custody evaluators, and other experts. This saves time, money, and loss of quality of life for clients.

Mediation and collaborative law can be combined to create a technique I call "handling cases collaboratively." Although collaborative law may not be practiced in your area, its concepts can be combined with mediation to obtain quick and constructive resolutions for clients. Listed below are some of the tools and techniques:

- **Exchange information freely.** This is similar to the Federal Court's requirement of "full disclosure."
- **Exchange your evidence and proof.** There may be times when it is advantageous to withhold evidence or arguments, but, most of the time, withholding evidence or arguments creates risk and extends the case unnecessarily. Free exchange promotes a favorable environment for settlement.
- **Cooperate in scheduling.** Call opposing counsel before scheduling anything, *unless it would be stupid to do so*. If the opposition is known to be difficult, schedule or notice the matter and send a letter saying you will reschedule if needed, but only to a date that is earlier or similar in time.
- **Use joint experts.** Jointly employ experts, such as custody experts, valuation experts, and CPAs. Jointly employ the family CPA to develop the joint asset list for both parties to use.
- **Create a joint asset list with opposing counsel for use by all parties.** The fight should be over values and classification, not what goes on the list.

that is fundamentally unfair. Finally, it must always be remembered that even if a family lawyer is able to pull off a stunning "victory" in the trial court, there is a good chance the "victory" will be taken away by a higher court.

An obvious tool for settling disputes without unnecessary litigation is mediation. Mediation serves as a "mini trial date" to force the lawyers and the parties to sit down and *work* on the case. The mediator makes each party see the pros and cons of his or her position. Mediators also can help lawyers show their own clients the unreasonableness of a position while preserving the lawyer's relationship with the client. Even the most complicated finan-

- **Mediate.** As soon as the case comes in your door, schedule the matter for mediation. This creates an “end date.” If you are not ready by the date scheduled, move it.

Constructive Handling of Cases

Whether mediation or collaborative law is used or not, civil cases in general, and family law cases in particular, should be handled with extreme civility. Here are some simple tips for improving civility:

- **Never retaliate.**
- **Never, never send a nasty letter.**
- **Assemble a civility committee.** Whenever you feel you are about to send a nasty communication, assemble two trusted people to review the communication. This will prevent non-productive or destructive communication.
- **Talk to opposing counsel.** When you find out another lawyer is involved in a case, or when you enter an appearance in a case, call the opposing counsel.
- **Never argue.** Instead of arguing, respond positively: “Do you have some case law to support that position? If you do, please send it to me so I might reevaluate my position, as I certainly don’t want to mislead my client as to what the law is.”
- **Be courteous.** Always treat opposing counsel like a brother or sister in the practice of law. Treat them as though they may be a judge some day.
- **Rarely, if ever, ask for Rule 11 sanctions.**

Value Pricing

The plan for the efficient and relatively quick resolution of cases flies in the face of the method by which most lawyers charge: hourly billing. The hourly billing method does not incentivize efficiency or the swift handling of a case; it creates incentive to delay and create extra steps for everyone to go through. This is not to say that lawyers are motivated to delay. It is simply stating the obvious: Hourly billing does not create an incentive to be efficient.

In his preface to the 2002 report of the

ABA Commission on Billable Hours, ABA President Robert E. Hirshon opines that “many of the legal profession’s contemporary woes intersect at the billable hour.” He writes that the billable hour is responsible for a lack of balance in lawyers’ lives, negative impacts on lawyers’ families, loss of professional mentoring, decrease in lawyer service, loss of collegiality, and loss of focus on efficiency. In his foreword to the same report, no less an authority than U.S. Supreme Court Associate Justice Stephen Breyer weighed in on the side of dumping the billable hour, writing:

The villain of the piece is what some call the “Treadmill”—continuous push to increase billable hours. . . . How can a practitioner undertake pro bono work, engage in law reform efforts, even attend bar association meetings, if that lawyer also must produce 2100 or more billable hours each year, say sixty-five or seventy hours in the office each week.

Creating a method of practice that permits lawyers, particularly younger lawyers, to lead lives in which there is time for family, for career, and for the community is difficult. Yet I believe it is a challenge that cannot be declined, lest we abandon the very values that led many of us to choose this honorable profession.

In “The Skinny on Flat Fees” (*ABA Journal*, July 2008), David Galianella opines that “flat fee billing will become the commonplace way to run a law practice.” The article includes five steps to making the conversion to flat fee billing:

1. Examine your past cases to see what generates cost in a case.
2. Find a new measure for evaluating lawyer and staff performance.
3. Stick to your guns in quoting the large fee up-front.
4. Become a “business geek.”
5. Stop keeping track of time.

Many reporters and prognosticators on the future of the profession believe that the transition to alternative billing is a key element of success. In “Ten Traits of ‘Successful’ Firms” (*LawyersUSA*, July 28, 2008) Nancy Byerly Jones writes that “creative fee structures are the norm and hourly billing is applied when no other options make sense. From a client’s per-

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Incorporate value pricing to create a “win-win” scenario for both you and your clients.

spective, the multiple unknowns arising from a billable hour fee arrangement can foster distrust, confusion and downright shock when the bill arrives.”

The Current Economic Climate

A January 29, 2009, *New York Times* article by Jonathan D. Glater, entitled “Billable Hour Giving Ground at Law Firms,” quotes Evan R. Chesler of Cravath, Swaine & Moore in New York as stating, “This is the time to get rid of the billable hour. . . . [C]lients are more concerned about budgets, more so than perhaps a year or two ago.” In the same article, Glater quotes Frederick J. Krebs, president of the Association of Corporate Counsel, as stating that the current economy may “well be a tipping point” in forcing firms to abandon the billable hour.

In the August 24, 2009, edition of *The Wall Street Journal*, Nathan Koppel and Ashley Jones report that “with the recession crimping legal budgets, some big companies are fighting back against law firms’ long-standing practice of billing by the hour. The companies are ditching the hourly structure—which critics complain offers law firms an incentive to rack up bigger bills—in favor of flat fee contracts.”

K. William Gibson discusses the future

of law firm prosperity in his “Ask Bill” column from the June 2009 issue of *Law Practice Management* magazine:

[B]ecause of the economic shifts “clients are powerful enough to demand effectiveness and efficiency” [quoting law firm consultant William Cobb]. Thus, according to Cobb, firms must create a new model: “The new business model requires project management skills and the ability to manage the delivery of legal services with fewer people.” And, he adds, “lawyers must now move to what all other professional services firms have had to institute—fixed price and incentive fee services. Lawyers can no longer place the risk on the client with hourly billing.”

Conclusion

Once the lawyer learns how to handle cases efficiently and constructively, then value pricing can be incorporated to create a “win-win” scenario for both lawyers and the clients. Clients will be happy because their cases have been settled expeditiously and constructively for a fixed price of which they were aware from the beginning. Lawyers will benefit from increased client satisfaction, reduced or eliminated receivables, and reward for efficiency. **GPSOLO**



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