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GROSS PROFITS? QUESTIONS ABOUT LAWYER BILLING PRACTICES

*Lisa G. Lerman**

I met a lawyer at a conference who had become an associate in a large Northeastern law firm soon after graduating from law school. I will call him "Henry Newman."¹ A few months after he started work, "Henry" began to notice that the partners who were billing the largest numbers of hours were not the ones who were working the hardest. So, he said:

I had to figure out whether I [was also supposed to bill more than I was working]². I went to the manager of my section, he was a partner in the firm and a member of the Executive Committee. He put his hand on my shoulder in this very fatherly sort of way and he said, "[Henry] if you want to make it in this firm you've got to learn how to double bill. *That's* the key to success here. You bill them, and then you bill them again, and if you can, you bill them again."³

* Associate Professor, The Catholic University of America, The Columbus School of Law. This paper is based on a talk given at the Annual Meeting of the Association of American Law Schools in Orlando, on Florida, January 7, 1994, at the program of the Section on Professional Responsibility. I am grateful to Philip Schrag, Roy Simon, William Ross, Duncan McDonald, John Marquess, for sharing ideas with me about these issues, and to the unnamed lawyers and paralegals who have reported their experiences to me. Editor's note: This speech was part of a conference on Gross Profits organized by the Association of American Law Schools Section on Professional Responsibility.

1. I have assigned fictitious names to each of the sources whose stories appear in this paper. I have not identified the law firms where they work or worked. Some participants in the Orlando program asked whether I had an obligation to report the professional misconduct described in these stories to the disciplinary authorities. To address this question briefly: the purpose of my confidential conversations is to study ethical dilemmas that affect some practicing lawyers. I gather and retell stories to help the profession to identify and discuss problems that might otherwise remain behind closed doors. This is accomplished better by examination of real facts than by discussion of hypotheticals. Most of those who shared these stories with me would not have given me permission to publish them absent a commitment from me to keep their identities confidential. One cannot simultaneously conduct interviews as a scholar and act as an officer of the court. Furthermore, I question whether these third-hand reports constitute the kind of "knowledge" that would oblige me to report.

2. Brackets indicate that the speaker's language has been paraphrased.

3. Conversation with "Henry Newman", former associate at a large law firm (Fall

"Chris Warden" was an associate at a large firm in DC for several years. Here are a few things Chris remembered:

I used to prepare the bills for a client I was working on a bill . . . and . . . one of the managing partners of the firm was written down [as having spent] ten or twenty hours [working for that client that] month. I went in to my boss . . . and said, "Did [Steve Whitman] work on this case?" . . . And he said, "No, no. He didn't He . . . [explained] that [Steve] spends so much time managing the firm and not doing client business, that in order to justify his existence and salary every month, he just sort of [picks] some clients that are decent-sized clients and throws a few hours onto their bills. This was known in the firm as the [Whitman] Tax. Someone later [asked], "Oh, you didn't know about the Whitman Tax"—"Oh, that was the first time you got socked with the Whitman Tax?" And you had to hide it in the bill. You couldn't put this guy's name [down] at a billing rate of \$285 an hour—and you just sort of had to swallow it. There were lots of things like that where you were really in a tough spot. You were told to do it, . . . you couldn't run and tell the management of the firm . . . because *they* were the ones doing it. And if you tattled to the client, . . . [you would get] fired. So you really were really [stuck].⁴

Another partner that I worked for [he was the billing partner]—used to . . . just twiddle his thumbs most of the time and read magazines in his office. [Occasionally he really worked hard, but not most of the time.] . . . At the end of the month, he would ask for my time sheets and [those of] another associate who worked on cases for him He would manufacture his own [time sheets] based on how many hours we were working and when our peak times were—just sort of pro-rated and figured what his own time should have been. A total fabrication, but sort of "What would be a reasonable thing for me [to charge for] . . . supervising these two?" And that's how he would construct his month.⁵

[A third partner I worked for] used to have . . . a sort of warped sense of the value of his services, [which] had nothing to do with hours or time, which is, of course, what the client was

1990).

4. Interview with "Chris Warden", former associate at a large firm, conducted by Christine Stevenson, research assistant (Summer 1993).

5. *Id.*

being told they were billed for. So, for example, if we had a really good phone call with the Department of Energy⁶ . . . and felt it furthered the client's cause, that was a ten hour phone call. Sometimes, curiously enough, there were more than twenty-four hours in a day if he'd had a really good day [He had grandiose] notions . . . [about] the value of [his work].⁷

This reminded me of another story I heard from "Winston Hall", who was an associate at another big firm. There was a partner in his firm whom Winston referred to as "the fraud":

[He] would brag about how a client asked him a question, and he knew the answer, so he wrote the answer in a letter and billed ten hours for research time. This was a guy who thought the goal was to work less and bill more hours.⁸

"Winston" also told me a story about having set up a "very simple trust" for a "very rich [Asian]."

We billed way over the amount that was indicated on the billing sheet The partner came into my office and said, This guy . . . is bitching about the bill. I hate when they do that." . . . and I said, "[It was] a lot for the little bit of work we did on this" And he said "Yeah, but these people are so rich, and besides . . . [the guy at] the investment bank wants to send them a big bill too, so I couldn't send them a small bill"⁹

"Martin Richards" a former paralegal at a large law firm, worked for a partner whose ability and integrity he really respected. Then something happened that made him wonder. He said:

In preparation for litigation . . . on behalf of [one client], I was sent on a trip . . . to the client's headquarters to review document files The partner [I was working for] . . . asked that I take some . . . depositions [relating to another client] with me and digest them while on the road. He also said something [like] "Besides, it will give you something to do on the plane." . . . [I knew I should bill the travel time to the first client, and] I asked how I should bill the time I spent digesting the depositions He responded that I

6. Some facts, such as which agency the speaker used as an example, have been changed to protect the identity of the speaker.

7. Interview with "Chris Warden", *supra* note 4.

8. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 711 (1990) (Interview with "Winston Hall", former associate at a large law firm.). The referenced interviews were conducted by the author unless another interviewer is named in the reference.

9. *Id.* at 712.

should bill the total transportation time to [the first client] and the time spent digesting depositions to [the second client]. In other words, double bill

[L]ater, in similar situations, the senior paralegal in charge of assignments let it be known that this is how billing was to be handled.¹⁰

Another paralegal who worked at a large New York law firm, I will call him "Julian Mitchell", told me about the instructions he received about how to bill his time. He was told that when he came into the office on a weekend, he should record eight hours of work, even if there was no work for him to do. He said that when he worked on Sundays, he recorded double the number of hours he would have normally have recorded. And he also mentioned that the paralegals were paid bonuses based on the number of billable hours that they recorded. So if he stopped in to the office on a Sunday, his office might bill a client for sixteen hours of Mitchell's time, even if he didn't do any work.¹¹

In addition to misrepresentations in the recording of hours, some lawyers are not honest with clients who ask for itemization of the time and expenses reflected in a bill. "Alison Price", described what she did and what she was instructed to do when a client questioned the bill. She said:

The client calls up and . . . asks about the bill, and you are saying, "Oh yeah, on [January 26, 1988] I spent x amount of time, and you go through as if you had kept to the minute time records, when in fact each week you've been fudging . . . and padding . . . because you were required to have 1800 to 2200 billable hours [per year] This is so common. I have many friends working in large firms—it is the practice."¹²

One last story. Last summer a law student called me one evening at home. He had begun work at a law firm, and because of his accounting background, he had been asked to put together some billing records for a fee petition. The problem was that he was being asked to create records out of thin air. He called for advice. "Should he do this?" he wanted to know. After some discussion he told me that he was working for two partners who were in different departments in

10. Lerman, *supra* note 8, at 710 (Letter from Martin Richards, former paralegal at a large firm (Dec. 12, 1989)).

11. Interview with "Julian Mitchell", former paralegal at a large firm (1991).

12. Lerman, *supra* note 8, at 717 (Interview with "Alison Price").

the firm, one of whom had given him the assignment. He believed that the other one, who had not given the assignment, would share his discomfort with this method of preparing a fee petition. He decided to go to this partner and ask him to intervene to request that the student be relieved of this particular assignment. This was successful. Presumably the preparation of the fee petition was assigned to another clerk.

Most of the people who told me these stories are, or at the time the stories happened were, employed at some of the largest and most respected law firms in the United States.¹³ The stories probably worry me more than they might worry you, because I know who these people are and where they work. My question is, if it is *those* firms that are engaged in this sort of billing practice, then where are the lawyers who *do not* lie to their clients? As far as I know, none of the lawyers about whom these stories are have been subject to discipline or criminal prosecution, or any other sort of process in response to this behavior. Neither has any of this behavior become public.

Some lawyers are disciplined or prosecuted for billing fraud. Most of them are either solo practitioners or lawyers in small firms. I recently noticed that two lawyers who represent many indigent criminal defendants and are paid by the government were prosecuted for fraudulent billing. Each was billing over three thousand hours a year for court-appointed work. One, a Philadelphia lawyer named William Perrone, reportedly billed the city for twenty-four hours a day or more on eighteen days in 1991. He plead guilty to charges of theft by deception, and agreed to refund \$130,000 to the city government. Also, he was suspended from handling any further court-appointed cases.¹⁴ The other, Arthur Carter, a Miami lawyer, was reported to have billed in excess of fourteen hours a day for 116 consecutive days, and on six occasions exceeded twenty-four hours a day. Carter urged that his billing was sloppy but not dishonest.¹⁵ The reported conduct of the court-appointed lawyers involves such blatant fraud that they got caught. The billing fraud of the lawyers in the other stories recounted above would be difficult to capture in an audit and would be unlikely to be detected unless the lawyer did something

13. "Alison Price" was an associate at a small firm. I do not know where the law student was working.

14. *Courts Probe Lawyer's Fees; Court-Appointed Lawyer Paid \$358,000 Over Three Years*, PA. L.J., Jan. 18, 1993, at 11.

15. Pat Dunnigan, *37 Hours a Day*, AM. LAW. Jan./Feb. 1993, at 82.

obvious, like billing twenty-seven hours to one client for one day. A remarkable amount of padding and double billing can be hidden.

Another arena in which I have noticed that this issue comes up is in judicial review of fee petitions. There have been many cases in which judges have expressed disbelief that the lawyers worked the number of hours that were represented to have been worked. Some judges then reduce the number of hours for which the lawyers get paid, but do not initiate disciplinary proceedings against the lawyers or refer the matters for criminal investigation. The lawyers just get paid less for that matter.

The stories recounted above offer some examples of some pretty disturbing behavior, but my conversations with lawyers and paralegals represents an extremely small sample, and those interviewed were not randomly selected. These stories offer little insight into the scope of the problem of fraudulent billing by lawyers. A subsequent article by Professor William Ross¹⁶ begins to answer questions about how many lawyers are not fully candid about their billing practices.

Professor Ross sent a questionnaire on lawyer billing practices to 500 practitioners, and received 272 responses. Ross asked how many of his respondents had ever billed two clients for the same period of time (as in Martin's airplane trip). *Forty-nine percent* of the respondents said that they *double billed* "rarely", or "occasionally", whereas 1.2 percent of these two hundred and seventy two people admitted "frequent" double billing. One of Ross' respondents reported billing 3,600 hours a year. Professor Ross asked how often respondents thought that *other* lawyers padded their hours; 7.3 percent said "never"; 80.4 percent said either "rarely", or "occasionally"; and 12.3 percent said other lawyers pad their hours "frequently". These lawyers were less reluctant to charge other lawyers with such practices than to admit them themselves.

Professor Ross asked whether the lawyers thought that double-billing was ethical. Thirty-eight percent of the respondents said that even if the client is not informed that the lawyer is billing two clients for the same time, it is not unethical for the lawyer to do so. He asked whether the lawyers thought it was ethical to bill a client for work that had been done for (and presumably, billed to) another client, and then recycled for a second client. Twenty percent of his respondents thought this was ethical, even if the client was not in-

16. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 *RUTGERS L. REV.* 1 (1991).

formed that another client had already been billed for this work.

These statistics suggest that a substantial proportion of the practicing bar may be engaged in some misrepresentation of the time they tell their clients they have worked and are entitled to be paid for. If half the bar does some double-billing, it is important to find out more about the magnitude and depth of this conduct. It may be that these billing practices are most common in big cities, perhaps with New York leading the pack. Also, these practices probably peaked in the late eighties and may have diminished in recent years because of the contraction of the demand for legal services, increasing client scrutiny of bills, and the emergence of the lawyer bill auditing industry. Even if the feeding frenzy of the late eighties is over, this problem is still with us.

Some lawyers who developed expertise in writing fictitious time sheets in the late 1980s are still in active practice. Their clients may have trimmed their sails, but it is unlikely that these lawyers have recently decided to be fully candid with their clients about whether and how they record their hours. Meanwhile, a whole generation of younger lawyers were introduced to hourly billing during the eighties and have been required to accept and to participate in some questionable practices. Also, in a climate of economic scarcity for the legal profession (relative to the late eighties, that is), corrupt behavior may tend to increase, not to decrease.

Some of my students say:

This is just how lawyers get their money. Everyone knows that hourly billing does not really mean that the bill is calculated by the hour. Besides, lawyers are not doing anything too different than other businesses, they are just stuck with a billing system which needs to be updated. Once lawyers switch to flat fees and value billing, they will make the same amount of money without engaging in this sort of deceptive behavior.

I disagree. If lawyers are deceiving their clients to increase their own earnings, this raises fundamental questions about the integrity of the profession. The expectation that lawyers should be scrupulously truthful in billing their clients is not naive or unreasonable, but is absolutely basic to the establishment and maintenance of a relationship of trust and confidence between lawyer and client. The practices that I have described represent a real crisis in the profession. The harm caused by billing fraud is very serious. Clients are harmed by being charged too much for legal services, and by being charged for services they do not need. Clients and lawyers are harmed by the dishon-

esty of lawyers who lose track of the difference between truthfulness and rationalizing. One of the lawyers I talked to described the erosion of his own integrity and said he could not really think of anything anymore that he would not be able to justify doing.

Obviously, there also is harm to the legal profession. Dishonest billing feeds public concerns about lawyers' lack of candor and greed, and demonstrates that the financial self-interest increasingly tends to dominate other professional values. Also, there may be substantial harm to the economy from the wasted services that are provided to our federal government and to our corporations. The legal bills of large institutions are ultimately paid by taxpayers, shareholders, consumers, and employees.

There is no simple solution to this problem. It must be addressed from several different angles. Clients who have the means to do so must set boundaries on what they will pay for and demand information about services for which they are being billed. Journalists, scholars and government agencies must continue to investigate misconduct in billing practices. Lawyers in private practice need to explore how time is recorded by other lawyers in their own law firms, and to establish policies and systems to monitor billing practices and identify false records. The profession must set clearer standards about billing practices.¹⁷ More vigorous enforcement of criminal law against lawyers who steal from their clients by inflating their hours would assist the bar in deterring other lawyers from "creative" time-keeping.

Finally, law teachers should consider our own responsibility to educate our students about the ethical questions presented by choices about billing practices. Many of our students working as paralegals encounter ethical dilemmas about billing practices before they arrive at law school. Some of them begin law school with some fairly cynical ideas about what is appropriate behavior toward a client by a lawyer or a person working for a lawyer. I would ask you to consider adding material on billing practices to your course materials.¹⁸

17. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (December 6, 1993), is an example of an attempt to articulate clearer standards as to some questions about billing practices. Though this opinion was issued in December, it was not available to me at the time of the Orlando conference. I will publish a commentary on this opinion as part of another article which expands on the ideas presented in this lecture.

18. One exercise I do in my course in Professional Responsibility is to convene the class as members of a new law firm having a meeting to establish billing policy. I make a series of proposals to the class of policies the firm should adopt (e.g., "Time sheets should

A peek behind a few closed doors leads me to wonder whether our profession may deserve its tarnished reputation. Rather than hiring consultants to improve the image of the profession (as the ABA has done), we might be better advised to reexamine some basic issues about integrity, and about the economic conflict of interest between lawyer and client.

be filled out at least once a day"; "Time recorded should be accurate within 1/2 hour"; "Employees should record all time worked, even if it was unproductive"; "Annual target for associates this year should be 1900 hours rather than last year's 1850"; "All time spent in transit is billable"; "While on travel, a lawyer may bill a client at least 12 hours per day regardless of the number of hours actually worked") and invite their reactions. Other topics on my list include when a lawyer can bill for sleeping or eating, billing for time spent preparing bills or recording time, billing for time spent doing work that could be done by a secretary or a paralegal, and so on. Some of the proposals are deliberately provocative. These tend to elicit a wide range of opinions from the students, some reflecting the norms of their current employers, some taking a hard-line position on accuracy. I would be happy to share other teaching ideas.

