Scenes from a Law Firm

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INTRODUCTION

What follows is one lawyer's description of his experiences at a law firm where he worked for fifteen months from the fall of 1993 through 1994. The lawyer, whom I call "Nicholas Farber," offered to share these stories because he was troubled by many things that had happened at this law firm. He agreed to allow me to publish the stories only if neither he nor the firm would be identified, because some of the stories involve serious misconduct. Farber determined not to report the firm to the disciplinary authorities, but instead to recount some of what happened at his law firm so that these practices could become the subject of discussion and policy development. Small factual changes have been made to obscure the identity of the

* For other windows into otherwise private worlds, see generally Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (exploring whether and when lawyers deceive clients, using examples from confidential interviews with twenty lawyers); Michael Meltsner & Philip G. Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1 (1978) (describing a law school clinic in which students are able to explore in-depth personal and group relationships with clients, colleagues, and teachers); *Scenes from a Marriage* (directed by Ingmar Bergmann, produced by Lars-Owe Carlberg 1973) (exploring the private conflicts between one husband and wife).

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firm and the lawyers discussed. In every important respect, however, this narrative is faithful to Farber's account.¹

I have not sought or received corroboration for any of these stories because I could not do so and continue to protect Farber's anonymity. I know Farber to be a person of integrity, and I believe the account is truthful.² Farber was motivated to tell these stories by a desire to improve the legal profession. After Farber's stories I offer some comments on some of the questions raised by this account.

"Nicholas Farber" graduated from law school in 1990. He clerked for a judge for a year, and then spent a couple of years at a small insurance defense firm in a medium-sized town. Then he got a new job at a larger insurance defense firm located in a big city on the East Coast. The firm had about fifty lawyers, roughly three associates for each partner.

THE INTERVIEW

An idealistic beginning

When I started at the firm it was ten years old. The firm began as an offshoot of another firm that had been downtown... The founding partner at my firm disagreed with the philosophy of the firm he came from. One of his main concerns was that he didn't think that they were promoting young associates to equity partner quickly enough. He thought he could do a better job of building a firm where people would have lives as well as jobs. He... and four or five associates from this firm... became equity partners at the new firm... The idea was there would be a five-year partnership track for others.

¹ The interview with "Nicholas Farber" was conducted on May 8, 1996. I reproduced portions of the transcript of the interview with minor editing. I altered verb tense for consistency and omitted many connecting words such as "and," "so," and "because." I changed some pronouns from singular to plural, and sometimes substituted a noun for a pronoun. Other omissions are noted by ellipses.

² I do not mean by this statement to assert that all of these stories are "true" in an absolute sense. Farber may have had wrong or incomplete information in some instances. I believe his account to be truthful in that he lacked any intention to deceive. Sissela Bok defines deception to include "messages meant to mislead [others]... through gesture, through disguise, by means of action or inaction, even through silence." SISSELLA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 14 (1979).
I worked at this firm as a summer associate between my second and third year of law school. . . . At that point, it was a wonderful place to work. But things changed. In the ten years from when they started the firm till I came on board, the equity partnership track increased from five years to seven years. When the first associate came up for equity partner, they instituted a two-tier partnership track. So they made the associate a non-equity partner after seven years. Then it was four more years before they made him a full equity partner. To date he is the only one who has been made an equity partner since the firm started.

What has happened to others who came up for partnership?

Most have been let go . . . . Six others have been made non-equity partner, and of those six one was fired later. . . . The non-equity partners have no voting rights. They don't go to all the partnership meetings. . . . The partners also created an advisory committee, which consisted of the initial equity partners. I've been told by other associates at the firm that the initial equity partners are the only ones who can vote. Even the newest equity partner can't vote. The attitude of the partners was like little boys. A "you have to worship us" mentality. I was told frequently that I had to come in before the first partner shows up, and I had to circulate a couple of times a day throughout the firm so that all the partners would see me. I wasn't supposed to leave until the last partner went home. Several people told me that when the partners pull into the parking lot they should see my car there.

How many hours were associates expected to bill each year?

2000 hours for associates. Partners always billed at least 2000. 2000 was your target. They would always say, "If you fall short it's no big deal." But that was a lie. If you fell short you were not eligible for a merit bonus. They had an elaborate set of criteria to determine who would receive a merit bonus, and they said it would not be tied strictly to billable hours. However, the partner I worked for said they had to acknowledge associates who were billing lots of hours and bringing all this money into the firm, so they certainly would get bonuses. Those who got significant bonuses typically billed well over 2000. . . . I heard the highest number of hours a lawyer at the firm billed in a year was 2600.
Why did you leave the firm?

I quit without having lined up another job because I got fed up. Every time somebody who had worked at the firm longer than I had quit, their work would land on my desk. I would be left holding the bag on a bunch of cases that somebody had not done a great job on because they knew they were leaving anyway.

I was the fourteenth associate in fifteen months to resign. After eighteen months had passed from the date that I began, 50 percent of the associates had quit or been fired.

You've got to "add value"

From the very beginning... I was told that "We are not out to churn out five Cadillacs or Mercedes-Benzs a year, what we are here to churn out is 150 Fords." "We'd rather that you would do a C job on 150 cases than an A job on fifty cases." "You have to 'add value' to the firm." That comment came in repeatedly. . . . "We're paying you X amount of dollars and it's costing us this much to keep you on board, so you have to find a way to make yourself profitable." Much of this instruction came from associates with seniority; they were trying to tell me how to survive at the firm. The partners never said these things to me, but it was clear that the partners rewarded those who worked by this philosophy.

That usually meant handling a large number of cases and doing a B grade job. It had nothing to do with doing quality legal work, or client maintenance, or establishing long-term relationships with clients. "Adding value" meant churning out as many billable hours as you could and doing as much marketing as you could.

A "discount law firm"

We were told by the partners... that we could do a lot of this billing that we did... because our rate was so low... . The client was only paying $75 or $80 per hour for associates, so what did you care if you padded the bill for three times that because that is what we are worth. The firm was a "discount law firm" for this one insurance company. That is why we got so many of their cases... . We were supposed to be billing at rates much lower than most places.

Some of the partners in the firm reluctantly acknowledged that the way the firm was being managed fell short of their ideals... . but they felt compelled to run the firm this way in order to survive economically. No firm is perfect, and these lawyers believed they were providing expertise to their clients at ridiculously low rates, so they did whatever they had to do to survive. If they didn't do it, the firm would not survive, and some other firm would get the business.
How much money were the lawyers earning?

The starting salary for associates was $48,000. There were supposed to be automatic $4,000 raises for the first three years to avoid competition among new associates. After the first three years, there were supposed to be merit increases. The firm changed the automatic increase policy after I came on without telling the associates. The step increase was only $2,000. So after a year my salary went up to $50,000; I didn’t get a bonus, I think mainly because I didn’t bill nearly 2,000 hours.

Do you know how much the partners were earning?

Some non-equity partners made somewhere around $100,000 their first year. The lowest on the equity totem pole was making in excess of $200,000, and the highest was making close to half a million. . . . That’s what I was told by other associates who had been there awhile. I have no way of knowing whether this is true.

What criteria were used in evaluating associates?

The evaluation was partly substantive but they would always tell me that my billings were too low. They said I needed to find ways to improve that, because that’s very important.

Why were yours low?

I billed honestly. . . . I billed 1600 to 1800 hours a year. . . . At one point they told me that I had the lowest billable hours in the firm. I didn’t think that was possible, because I had just had a conversation with another associate who told me that her hours only added up to 1450. But that was part of their game, . . . to tell you that you are the lowest in your group and maybe the lowest in the firm. I guess they thought that news like this would shame me into billing more hours.

I was always in the office by seven and I tried to leave by five-thirty. I rarely took a full hour for lunch. I just closed my door and tried to work as much as I could. I didn’t want to spend evenings and weekends there if I didn’t have to. Nobody spent as much time at work as I did, but they billed more. When I asked, “I’m here all the time, why don’t my hours add up to as much as the other associates’ do?” The partners would say, “Well they are taking work home.”
"Okay, here's the deal"

The partners were very careful not to instruct us to do dishonest billing. Early on, a partner came to see me and said, "Your hours are the lowest in the practice group, maybe the lowest in the firm." The partner said: "So and so's billing 2200 hours, why don't you go and talk to him? See if he can show you anything. Maybe you are not writing things down, or maybe you are not billing for things that you should be. Go find out what he's doing." And . . . they sent me to the most senior associates in the group, who had played the game. . . . I went to see two people. They each closed the door behind me and said, "Okay here's the deal."

The first lawyer gave me this tip: "You have . . . fifty or sixty files. . . . You need to find a reason to make a telephone call to somebody involved in each file." He said something like: "You think about it, you've got the client, you've got experts, you've got opposing counsel. Think of all the people you can call. Find a reason to call somebody. Make the call. You bill for the call. When you hang up the phone you immediately do a confirmatory letter. Then you bill for the letter. And if the adjuster will let you, you do a memo to the adjuster . . . on what transpired during the call. Then bill for the memo. So you bill three times per call." And he said, "A month shouldn't go by without this happening at least once to every case." In other words, create a reason, and then create a bunch of work to go with it, and it looks like you are just being on top of the situation.

If you billed in tenths of hours, did two minutes count as a tenth?

The timekeeping wasn't really that accurate. You'd get on the phone and talk, but . . . you'd bill the telephone call and confirmatory letter . . . at .5. Some people would actually put .6 for this, the senior associate told me. .5 you could get away with, .4 would be unquestioned. . . . He was telling me how to gauge how much I could squeeze out of each piece of work by thinking about how it looked rather than how much time it actually took.

The magic number

The other associate said . . . he just kept a list of the tasks that he did each day and tried to keep an estimate of the time it took for each task. At the end of the day he would add it all up. If it didn't equal 8.6, he would just inflate it so that it did. I said, "Why the magic number 8.6?" He said, "Well, that's the number of hours you need to bill every day in order to get three weeks paid vacation and all your holidays off. That's how you make sure you make your 2000
hours. So if you just make sure that every day that you come into work you bill at least 8.6 hours, you're fine." So there's a technique.

Crank out the forms

Many people told me that a good technique to increase one's billable hours was to crank out these forms—discovery requests, interrogatories, requests for production of documents—they are on the machine. . . . We use them for every single case. You change a few things specific to the case that you are working on and you bill as if you had created it from scratch. . . . You could really make some money billing there.

How did you decide how much to bill for each task?

Habit. . . . I would ask another lawyer: "How much did you bill for that?" and he would say "Oh, .8." I would ask: "Well how did you arrive at that?" The other lawyer would say, "That's just what we bill. Everybody does." I think if you bill too many .5s and 1.0s, it looks as if you are faking it. Therefore they used smaller fractions.

Easy billing

One lawyer told me . . . he was happy because he was involved in one case in which there were a lot of parties. He would get a lot of pleadings that didn't require him to do much of anything except to read them and know what was happening. . . . If one party filed a motion . . . and he was not going to oppose it, . . . he would read the documents, and bill for that time. Sometimes . . . they would serve discovery on other parties, and he wouldn't even read the documents, but he would bill for it: . . . "receipt and review of the following:" That's how he made up his time, by whatever came in the mail. He could bill as if he had read it.

This associate got the highest merit bonus that year. He got a $16,000 bonus. They are grooming him. . . . He's playing the game the way they wanted him to play it, so he'll be made a non-equity partner at some point.

Triple billing

I was routinely told to double and triple bill my time. If I spent an hour doing one thing, the partner would urge me to find a way to do three things in that hour. Then I could bill three different hours to three different clients. For example, the partner told me that he wanted me to get a car phone and carry a dictaphone with me all the time because I spent a lot of time driving . . . to depositions, court
hearings, and things like that. That time in the car, he said, was wasted time. I said, "I bill for the travel time." He said, "You could be billing for the travel time, reviewing things at stop lights, making telephone calls, or dictating deposition summaries. You could be billing for all of that."

This happened in 1994. The 1993 formal opinion by the ABA on hourly billing practices was out. I had heard about it from the judge I clerked for. . . . I showed it to the partner. I said, "This isn't legal anymore."

What did he say?

Nothing. It was just kind of . . . danced around. His attitude was that his recommendations . . . would save me time. . . . These tasks were going to have to get done, so why should you have to do it on the weekend when you could be doing it in the car. I remember this very distinctly. I said, "I kind of thought the rule was if you didn't do the work you can't bill for it. How can you ever bill for more time than you actually spent working?" I never got answers.

I didn't want to get a dictaphone and a car phone. . . . I didn't want to have a traffic accident. I felt I had enough on my mind going to and from court. . . . I didn't want to have to be doing deposition summaries and making phone calls while I'm driving anyway. . . . But beyond that, I need to think to do work well. I can't think while I'm in traffic driving back from court. I can't do a good depo summary. I wanted to be sure of what I was doing. I wanted to be able to close the door and sit down in my office and do a good solid depo summary. . . . Because I was inexperienced, I wanted to think things through, do a thorough job. It seems all they were concerned about was volume.

Their response was, again, that analogy. You are trying to make a Mercedes and we want you to make a bunch of Fords. I never did get a car phone. They mentioned that in my review: "This is the information age, you've got to take advantage of it if you want to be successful."

A few helpful suggestions

There was one senior associate who was up for non-equity partner that year. He came in my office and asked me about a personal injury case that I was working on. I thought he was being helpful . . . he

was the firm "schmoozer."... I thought he was asking me questions about the case because he was trying to get to know me and help me out. He'd give me pointers about what I might consider doing on the case. I welcomed the help because I couldn't get answers from other partners and associates. They were all so busy.... He would pop in and ask me about this one single case. I would follow his suggestions.... He was the senior-most associate.... He was in a different practice group from me.

I later found out that he was getting a percentage of every billable hour... because he had brought the case to the firm.... If you brought that case to the firm, the firm would pay you... say 10 percent of whatever the billables were. So he was helping *his own* interests. He wanted me to bill as many hours as possible because he was getting a check.

I'd go do this stuff thinking, "Look, well, he may be right," and "I never thought of that."... So I'd be billing and billing and billing, and he'd be going $800, $900, $1,000. This was going on for a long, long time.... He'd come in every month.

I don't think he ever asked me to do something that should not have been done. But it was certainly at odds with the firm's mentality that we are not trying to turn out a bunch of Cadillacs.... I thought... that he was telling me what was expected of me at the firm.... I thought... I'll do a good job on this case. I'll show it to my partner.... He'll say, "This is great!" He won't know how I figured out how to do this.

When I was leaving the firm, he said, "Who is going to handle that case?" I said, "I'm not really sure. Why?" He said, "Well, I've got to figure out how much money I'm going to be making each month." I said, "What are you talking about?" He said, "Well, I brought that case in." That is when I finally put two and two together.... He became a non-equity partner.

Just 150 photocopies

Sometimes I'd be reviewing a pre-bill and I'd look under "costs" and I'd see "150 copies." I didn't make 150 copies.... Someone had used the code for that particular case.... Every once in a while you'd pick up a file and the file was paper thin. There hadn't been any activity on it for a year, and yet there are 150 photocopies charged to that file.... I'd go back to the partner and say, "Look somebody's been using the wrong code." And he would say, "Well, there's nothing we can do about that." I'd say, "Are we going to charge it to that client?" He goes, "Well it's the same client.... It's the insurance company that pays the bill, so whether it is on that file or another.... What difference does it make?" It's a big faceless,
giant insurance company. What's 150 copies at twenty cents a page? Well, it's exactly that amount.

_Fifteen hours of paralegal time_

There was a rule for this particular client that no more than fifteen hours of paralegal time could be billed for a single case. If you had to use more than that, you had to get permission in advance from an adjuster. . . . The lawyers often got too busy and they asked paralegals to do work that lawyers were supposed to do. . . . In some cases the paralegals would come in and say, "I've hit my fifteen hour limit" and stop. . . . Other times they would work and work and work, and bill and bill and bill. Then you'd get a pre-bill that said "Paralegal time: 65 hours." If the bill went to the insurance company that way, the adjuster would just . . . subtract fifty hours. . . . So when the pre-bill came out, if there were more than fifteen hours of paralegal time, we were told to turn them into attorney time. In other words, you didn't do the work, but just say you did.

I am not sure whether the client was billed at attorney rates for the same number of hours worked or whether the firm computed the difference in the billing rate and reduced the number of hours accordingly . . . but I think they didn't bother to change the rate. One of the outgoing associates who had resigned as I was coming in mentioned to me: "You know this place is so ridiculous, it's so unethical. They routinely . . . bill any paralegal time over fifteen hours to the attorneys, and they don't even change the rate."

On one occasion I went to my partner and said, "There's all this paralegal work on the pre-bill that is over the fifteen hour limit. . . . What should I do about it?" He said, "Well whatever is over, just make sure that the narrative describing the work reads properly and then change the initials to yours." I said, "But I wasn't even at the firm when this work was done!" He said, "Well then, bill it as the attorney who was here during that time period so there won't be any question."

He wasn't thinking. He didn't even realize that I wasn't working there during that time period. We couldn't put my initials on it. . . . I said, "Who's going to do the math?" He gave me this really scared blank look. I said, "There's a difference in rate between attorneys and paralegals." He said, "Oh, oh yeah, bring it to accounting. They will do it." I did bring it to accounting. I have no idea whether they ever did anything about it or not.
Billing off the secretaries

People routinely billed off their secretaries. They'd give their secretaries a list of phone calls to make and tell them to keep a list of how long it took for each call. Then at the end of the day, the secretary would hand the attorney a list of telephone calls. The attorney would bill his time sheets for all of them as if he had done the work.

Are you sure?

Absolutely.

How do you know?

They told me how to do it. In fact, I shared a secretary with another associate, and she said, “Do you want me to keep track of my time?” I said, “Why would you keep track of your time?” “So you can bill on it,” she said.

Did they bill for secretarial time?

No.

So the only reason that a secretary would have been keeping time...

... would be so that her attorney could bill for the time.

That’s when I said, “Correct me if I’m wrong, but if you don’t do the work, you can’t bill for it.” That seems like a really easy rule. But it wasn’t that cut and dry there. Their position was that “you would have done the work anyway, so what’s the difference if she tells them what time a deposition is or if you tell them?” The difference is law school and the bar exam. It’s as simple as that. That’s how they made their 2000 hours.

Pressure to pad

The associate merit bonus program was completely tied to billable hours. The partners denied that. They would say, “It’s a wide range of factors that we take into consideration... pro bono work,... bar functions,... community service,... marketing,... all these wonderful things that make you a well-rounded spirited participant here at the firm.” But when the list came out, anybody under 2000 didn’t get a bonus, and almost everybody over 2000 got a bonus. The more an associate’s hours exceeded 2000, the bigger the bonus. The associates who got the biggest bonuses were not the
ones who worked the hardest. That was really clear. They were some of the ones who had taught me some of these tricks.

Did you pad your bills at all in response to that pressure?

I did, to a certain extent. I remember thinking, “I’m going to have to do something here so I don’t get fired.” . . . I’d pad them enough that I felt I wasn’t going to get fired but . . . it wasn’t going to put me in contention for a massive bonus. I was just going to skate the line till I could get out of there.

I had called the judge I clerked for and talked to him about the situation. He said, “Don’t even do that.” I said, “But the reality of it is that they are going to fire me.” His response was “They are probably not going to fire you, at least not right away. What you need to do is decide that you don’t want to work there and get another job.”

I immediately started looking for another job. Then it got to a point where I said, “I don’t want to have to go to work every day and play tug of war with my conscience.” . . . That’s when I decided to get out as soon as I could. It was a survival technique at that point. And that’s what made the work every day so miserable. I knew what I was doing was ripping the company off. The other lawyers were okay with it because it was this big faceless insurance company. . . . I found some solace in the fact that it was a huge corporate giant.

I knew three months into my time there that I wanted out. . . . Others advised me that “You’ve at least got to find a way to stick it out for a year. If you quit before a year, it looks like you got fired.” The only reason I stayed longer than a year is that I thought I would get a bonus, so I waited until the bonuses were announced. That got delayed a couple of months. I resigned after they were announced.

Is there anybody who wasn’t padding bills?

Oh yes. They were usually the lawyers who quit on their own, or who were constantly being harped on (like I was) for not meeting the billing requirements. It usually took people about a year to figure out what it is that they were trying to get you to do. And then you either stay and play the game or you leave.

There were two partners who billed honestly. They routinely billed in the 2000-2100 range each year. But they had no lives—they worked seven days a week, ten to twelve hour days most of the time. I heard that one of the partners even had to come home from a vacation in Europe to handle some matter—the work became their entire focus in life. And some of the associates who “played the game” even made disparaging comments about the honest-billing partners behind their backs.
Call it "research"

We were instructed very early on that you should never bill for a conference with another attorney in the firm because the client won't pay for attorneys talking to each other. . . . You had to bill it as legal research or as something else.

This was something they specifically told you?

Yeah. Again, most of the time it was other associates relaying these instructions. But there were partners who told me this as well.

Twelve reasons to file a motion

When I was clerking for the judge . . . we would have as many as 120 civil motions a week. It became really clear to me that a lot of lawyers who bill by the hour . . . would rather file a motion than pick up the telephone. . . . You can only bill once for a telephone call, but if you file a motion, you can bill for drafting it, researching it, finalizing it, and filing it, and then for scheduling the hearing, preparing for the hearing, traveling to the hearing, waiting for the hearing to begin, conducting oral argument, traveling back to the firm, calling the client, and sending a confirmatory letter. Twelve things you could bill for that you would never have had to do if you just picked up the phone and said, "When can you get those discovery responses?"

There are rules that require you to . . . communicate before filing a motion, but the lawyers . . . just go through the motions. They send letters saying: "If I don't have discovery responses within seven days of the date of this letter, I'm going to file a motion." Then they bill for the letters. And then seven days go by and they file the motions.

Discovery motions are usually on forms on your computer. You just blurt those out and bill however many hours it takes you to do it. But it takes you no hours because it's a form. You change the caption, make a few factual adjustments, and file it. That one was really evident to me and to the judge. We saw these things repeatedly.

From the bench he would say, "Couldn't we have solved this without wasting all this time by making a phone call?" . . . and the lawyer would . . . claim that the work was legitimate. We all knew what was going on.

Billing for tickling

Our malpractice insurance . . . required that we have a tickler system in place. I have no problem billing for the tasks that I was required to do as a result of the file being tickled by a partner, but
partners would routinely pick up files and tickle them, and bill for the tickling. . . . They would say, "review the file," .2, .3, .4, or whatever. I felt that was kind of crossing the line. . . . I was already billing for the time I spent on the case. . . . This is part of their responsibility to their malpractice insurance carrier, not to the client. But they figure they are going through the files, so they are entitled to bill the client for that. I think everybody was trying to find a way to . . . make money instead of lose valuable income-producing time.

_Hit it for .5_

If you thought about a file while you were mowing the lawn over the weekend, you were to come in Monday and bill it .5, because you were thinking about that file. . . . If you woke up in the middle of the night because you were worrying about a case, and you couldn't get back to sleep because you were thinking about things that had to be done, . . . the first thing you were supposed to do when you woke up in the morning was "hit" that file for .5 . . . . Half an hour. "Well, what do you call it?" I would ask. "Review of file, plan strategy for discovery," I was told.

If you and some of the other associates at the firm went to a ball game, and at the ball game you talked about a file, in other words if something productive came up . . . .

_Someone told you this?_

Yeah. . . . if you talked about a case at the ball game you could bill for that time. Just because you didn't do the work in the firm doesn't mean that it shouldn't be billed.

_Thwarting the auditors_

We were told to bill for travel time. . . . None of us were supposed to bill more than 8.6 hours in any given day. . . . The insurance company would be very suspicious of an eleven hour day. So we were told sometimes to move hours. If you did the work on that Thursday but Friday was a lower day, then move some of those hours over there. But make sure it's not a letter, because the date has to match. But if it's legal research, then move it, but you need to fit it in so that the client doesn't become suspicious.

One insurance company client had hired a company to go over its bills. All of the time manipulation was designed to thwart the guy checking the bill.
Billing envy

This is how warped I became there—I remember thinking it would be so wonderful to work on one of the other litigation teams because they had really huge cases that lasted five years. The lawyers in that group would routinely bill eight hours a day to nothing but legal research. Their bills would never be questioned because there was so much research to be done that you could bill a forty hour week to legal research. When they had to file a motion for summary judgment, the whole group spent three weeks living at the firm. That was the first real legal work that they ever had to do. They used to just sit around and read a few articles and bill eight.

If I had worked in that group it would have been so much easier to meet my billables. There wouldn't have been so much pressure. . . . I remember telling the partner when I was resigning that I felt like 80 percent of my time there was spent doing administrative things, . . . and the other 20 percent was spent on legal work.

This other group didn't have to do any marketing either, because they had a huge revenue coming in. They billed at higher rates than we did too. You were considered lucky to be in this group because not only would you meet your billables without a problem, but you would be making the firm lots of money! Consequently a lot of the people who were making non-equity partner were from this group.

A revolving door

At one point I was handed a file, because someone above me had left. I was only there fifteen months, and when I left I was the second associate from the top in my group of eight attorneys . . . . There were four others below me, all looking to me for guidance on how to do things. I had never tried a case.

On one case, I was one in a long line of attorneys who had handled this file in four years. . . . It had been on the other attorneys' desks for the same reason. Someone had quit, and it had just been passed down and passed down. . . . I had the joy of calling the client and calling the adjuster and saying, "I'm . . . going to be handling the X case." They laughed. Like "Oh who are you?" Picking up the Rolodex card and changing yet again. In my initial review of the file it dawned on me that there had never been a status conference on this case. . . . We couldn't be assigned a trial date until we had a status conference. . . . I kept thinking "That's bizarre. No wonder this case isn't progressing." . . . I called the court . . . to get a hearing set. Two months later, at the hearing, I settled the case. My client was thrilled . . . because I got him a bunch of money, and he was happy to have the thing done, because it had been four years.
Wasn't your client the defendant?

We were defendants and we were counter-suing for property damage.

Thinking I had done a really good thing, I went to the partner in charge, and said “You won’t believe it, but I finally settled the X case. The client’s thrilled, I got them tens of thousands of dollars.” And the comment was, he’s “glad the client’s happy,” but he gave me a list of all the things that I could have done that would have been “more thorough,” that would have achieved a “more favorable result,” or would have made the client “even happier.” What I read was “You could have billed for this, this, this, this, and this and still achieved the result, and that’s why the file had been open for so long.”

I remember saying, “I can’t believe the thing’s been open for four years and there hasn’t even been a status conference yet.” And he said, “Well what business is it of yours if there is a trial date in the case? You’re the defendant. Isn’t it the plaintiff’s responsibility to prosecute his case?” I said, “Well sure, it’s his responsibility, but if my client is sick of having a file hanging over his head for four years and there is a way to dispose of it quickly, doesn’t he kind of call the shots on that? Aren’t I supposed to do what the client wants me to do?” And his response was “You could have achieved a favorable result for this client and kept this file going for a while.”

The client is the one who pays the bill

We handled lots of cases for an insurance company. As to those cases, I didn’t know who the client was till I had been at the firm three or four months. I thought the clients were the individuals we represented. But from my firm’s perspective, the client was the insurance company because the company paid their bills. You are serving two masters. I thought it bordered on malpractice that they didn’t explain that very carefully and then supervise me until I was comfortable with that relationship.

I started at the firm at the end of September, and by early November, I had eighty files on my desk. . . . They dumped on my desk the caseload of a fifth-year associate who left on maternity leave. Their thought was, “Well, who else is going to do it?” I got seventy or seventy-five files from her, and I was involved in five or six others with a partner.

There was one specific incident I will never forget. I was told by “my client,” the defendant, that I was not to settle a case without her permission . . . . She said, “I don’t give a damn what that adjuster says. The contract says they can’t settle anything without getting my permission first.”
I remember calling the adjuster from the judge's chambers and saying, "I need to know how much authority I have to settle this case." He said he thought $5,000. I remember saying, "I need to call my client." They said, "No you don't." I said, "Yes I do. She told me that she didn't care what the insurance company said, we need her permission." And he said, "I'll deal with her. You settle the case."

I caught all sorts of hell for that later on. Not from the defendant, . . . [b]ut it ruined my relationship with that adjuster, and the partners were not happy with me because I wasn't making their client happy. . . . It was awful.

Whipsaw

When I came on board I got a frantic call from a partner. He needed me to draft a motion for summary judgment. . . . The motion was due relatively soon. It was a really big case, and it had kind of fallen through the cracks. It required me to read everything in the file from beginning to end, including approximately twenty depositions. . . . I had to synthesize what I was going to pull together. I was told to bill for everything . . . I think that it was about thirty-five or forty hours of billable work. I didn't bill for everything because I was conscious of the fact that some things might have taken me longer because I was new there . . . .

The client got the bill and called the firm and complained about the hours spent on the motion for summary judgment. So the partner who oversaw the case called the other partner on the case and said . . . "How come it took Nick forty hours to write this motion for summary judgment?" And the partner came back to me and said, "Why did it take you forty hours?" I just looked at him. I showed him this pile of stuff, and said, "That's the record in this case. I've only been here three weeks. I haven't worked on this case. I knew nothing about it. I had to get up to speed. I've probably spent 120 hours on it, but I'm only billing for forty."

So he said, "Well, the client's not happy with it. A bunch of other people have worked on this file . . . . The client has figured out that this isn't working out the way it was supposed to." Even so we billed them for every penny . . . . We won the motion, so the client didn't complain any more. But I question the propriety of . . . billing for the time it takes you to get up to speed in a file because the firm has lost yet another associate. . . .

We billed for every single thing we could possibly bill for. Then if somebody blew the whistle, we'd talk about finding a way to scale back our time. But if we thought we could make it fly and it flew, great. That became the standard.
Denial

The partners would tell you that the departing associates all had very good reasons for leaving. Some wanted to stay home with their children. Some were moving to Florida. Some of them just got offers they couldn't refuse. The partners would tell you that no one ever said a bad thing at their exit interviews.

I talked with some of the people who left. “What did you tell them?” I asked. They would say, “Well, I told them every single thing.” I was astonished to hear what other associates had said to partners in their exit interviews. If you believed the partners, the exit interviews were always complimentary—no complaints, nothing but good things. But there was this constant state of denial. It was always “Put on your game face.”

I wish I had a nickel for every time this one partner said, “I want you to be out there talking to the other associates and saying how great this place is. Be an ambassador of goodwill.” We... put on a facade that there was great morale and that this was a wonderful place. ... Whenever anybody left the partners would say “Isn’t it lovely that he found this or she found that?” My reaction was “Yeah. They woke up and smelled the coffee and said, ‘I don’t have to live like this’.”

Bill—don’t talk

There were so many secretaries who came and left. The partners treated the secretaries worse than they treated the associates. ... They always told the secretaries that their pay was commensurate with what other secretaries in town were making. But it just wasn’t. ... Some secretaries had been there for a long time, but they were partners’ secretaries. Partners found ways to reward their own secretaries. ...

I even was told at one point by a partner that I was blurring the line between attorney and support staff and I needed to be conscious of the importance of that line.

What were you doing?

Socializing. Asking them how their days were. Coming out and sharing a quick “hello” before I buckled down to get to work. Treating them like humans. “How was your weekend? What’d you do this weekend?” The partners hated that. They wanted a very strong demarcation between us. Otherwise ... the secretaries would expect special treatment, or would expect you to bend the rules. ...

The partners’ favorite method of operation was to avoid face-to-face contact. The important information was never told to anybody. It
was always relayed through a memo. If you didn't understand the memo, then you had to go to the partner. That's how I found out that my salary increase was going to be lower than what was promised and delivered in the past.

A partner could dial directly into your voice mail box. You would be sitting at your desk, and all of a sudden your message light would be blinking. So you would check your messages, and it would be the partner who was three doors down, who didn't want to talk to you but left you a message.

A number of times I came in at seven o'clock in the morning, and my message light was blinking. I would check the time that the message was left, and it would be 11:30 pm from the partner at home the night before. It would be in a low monotone “Hi Nick. By the way, can you do the following:” . . . Once you had dumped it on somebody else's voice mail, it was their responsibility and you didn't have to worry about it.

**Passing the buck**

*Why didn't they want to talk to each other?*

They didn't want the buck to stop at them. For example, if you didn't come in one day, a partner might say, “Well, I left you a voice mail, why didn't you check?” It was kind of, “Well, we passed the buck, it is off my desk. Now it's your responsibility.” That was another reason I hated going to work there every day. I never knew what was going to be thrown on my desk at the last minute. And . . . I would be responsible because I was the last one left holding the bag.

There was one partner whose initials were similar to mine. If you were dyslexic, or simply careless in reading it, you could put the wrong thing in the wrong box. That is exactly what happened on one memo. I remember calling the group leader and telling him, “In this case I want to do the following four things.” And . . . he sounded very strange. He kept saying, “That's fine,” you know, “That's good,” like “Yeah, I told you this.” But I never received a memo until a partner who had been out of town for five weeks came back and went through his mail. Even though the memo was addressed to NF it went to FN; someone didn't look at it carefully enough.

So . . . the partner who sent me the memo . . . was thinking: “You idiot. That's what the memo says to do.” . . . You'd think the partner who mistakenly got the memo would have said “Sorry. This was in my box.” Instead . . . someone slipped it in my box. . . . I looked in my inbox, and I read this memo, thinking, “This is really bizarre. He's written me a memo today about all the things I've been doing
for the last month. Then I looked at the date and realized what had happened. . . . I had been through my “inbox” every day. Every day.”

I never said that

I wrote memos to the file every chance I got. You couldn’t get anybody’s ear long enough to really analyze a case or talk about strategy. You would pass a partner in the hall, and he would blurt something out to you. You would do exactly what the partner said to do. Later on, when what you did didn’t achieve a favorable result, the partner would say, “I never said that. You must have misunderstood me.” At first I thought, “No, I didn’t misunderstand you.” Because when a partner speaks, my antennae go up. I’m thinking, “This is who I have to please, I’m going to get this absolutely 100 percent correct.” But after it happened a number of times (because in my work I could never do anything thoroughly), I began to doubt whether maybe I did hear them wrong.

After that I never left my office without a pad of paper. If I happened to pass somebody in the hall and he started blurtng out directions, I could start jotting things down.

Whenever I talked with anybody . . . within the firm or with an adjuster on the telephone, I took contemporaneous notes, and wrote a memo to the file and gave them copies. The memos always said: “If this is not your understanding, contact me immediately.” I found that I was not only covering my own butt but I also was passing the buck . . . . That was when I realized I was playing their game. I didn’t want to practice law that way. And so I left.

What made the experience difficult for me was that I liked the people I was working for. On a personal level, they were fun, intelligent, energetic. They were the kind of people I could enjoy in a social setting. But upon closer scrutiny, it dawned on me that, if partnership was the ultimate goal for me, I didn’t want to be partners with these people, because I wasn’t comfortable with where they drew the line on ethical issues. If I made partner, I would be held responsible for the actions of my partners—and I didn’t feel comfortable with many of the practices that they either allowed or encouraged at their firm.

Contrast

At my new firm, I can’t tell you what a shocker it was to have the partner I work for seeking me out two to three times a week to talk. “What’s going on in this case? . . . We should look into this. Call so and so.” . . . I’m working on a large plaintiff case, so we don’t bill by
the hour, but it's clear to me that it is the legal work that is the primary concern. It is the work itself.

In another case... we still don't know if there is insurance coverage for our client, but we are working.... We filed an answer on his behalf, and if there is no insurance coverage, we are representing him pro bono.... He can't afford to pay us.

My old firm didn't operate the way I have described a few years ago. When I was a summer associate, there were only thirty-three lawyers in the firm then. They were not trying to make as much money as they possibly could. Then they got a taste of how much money they could make.... and their whole philosophy changed. They didn't care about keeping associates.

I probably quit sooner than they wanted me to. They probably hoped to get another year or two out of me before they got rid of me. They don't want anybody staying five years, because then it costs them too much. They like the idea of chewing them up and spitting them out.

It's all about money.

*What would cause this firm to trim its sails? What would cause the lawyers to bill more honestly?*

The sure-fire thing is to slap them with a lawsuit... and have an investigation to prove they are overbilling. That's why people have audits. The fear of an audit is the thing that deters people from cheating on their taxes.

I'd love... to see an ethical rule saying that nobody can bill more hours than they work. Punch a clock. What time did you come in, what time did you leave? You can't bill more than that many hours in a day. Chances are you can't bill even close to that many hours.

*But if you had people punch a clock, these guys would have their secretaries punch the clock for them. Right?*

I guess if people are determined to act unethically, they will always find a way to do so. My judge told me, "You've got to remember that when you get into a courtroom just about everybody is lying." And I said, "Why can't you do something about it?... Why doesn't anyone get prosecuted for perjury?" He said,... "Not too many judges are willing to do that." There is a fear of being the one who blows the whistle.

I worked at a small law firm... before I went to this firm.... Those attorneys were incredibly ethical. I think it has to do with the size of the firm. The bigger the firm, the bigger the opportunity for billing misconduct. And the greater the need for it to cover your
expenses, your overhead, and all those other things. The opportunity is greater and the demand to produce is greater. Each feeds on the other.

The small firm also did insurance defense work. I never once was questioned ever about hours. You just do the work and bill what you do. . . . I called them when I started having questions about the ethics of this firm. They started laughing, and said, "We tried to subtly say to you 'Are you sure you want to go work for such a large insurance defense firm?'" . . . As a young lawyer I didn't know what they meant. . . . It had to hit me in the face with a two-by-four to make me understand it.

The other firm is in a very tight-knit community. Everybody knows each other. Many of them have been practicing together for thirty-five years. I don't think you could get away with this type of practice in that community. . . . The firm I quit was in so many different jurisdictions and so many different courtrooms and had so many different attorneys working for it, people didn't know what was going on.

I spent a lot of time during the fifteen months I was at the firm I've been describing talking to people at other firms, asking, "Have they asked you to do this yet?" or "What do you guys do about that?" It wasn't a lot of people, . . . probably about a half dozen. Some worked at very large firms, some at small firms. . . . I didn't come across anybody who was in the same mess that I was in, where three months after you begin work there, and you can barely work your voice mail and your computer, you have eighty files on your desk and they are sending you to court.

Scrambling

I can't tell you the number of times I answered the phone and somebody started talking to me about a case. I would be furiously writing down notes, because I had no idea who I was talking to or what case it was. I had this technique of asking general questions and massaging the conversation so something would trigger. There were times when nothing was triggered. I would hope that I had enough information . . . even just the telephone number of whom to call back. I would start through the files and think, now what case could this possibly be? Here's one I haven't looked at in three months. Maybe it's this one.

If it was the adjuster on the phone it didn't matter. The adjuster knew there were 120 cases sitting on my desk. But if it was a client, it drove me crazy because I kept thinking, "These people expect their lawyers to be working hard for them. They have a right to expect that."
I was a fireman... Everything I did was reactive.
I know plenty of ethical attorneys... I know people who... cut their bills just to be fair to clients. There are people out there like that, but you have got to search for them. They are not so common.

Did you ever consider reporting the lawyers in your firm to the disciplinary authorities?

Not really. It's clear to me that practically nobody reports unethical behavior. Attorneys have a strong self-preservation instinct. It's the exceptional attorney who will put justice and integrity before saving his own hide. No attorney wants to acquire the reputation of being a snitch. Some attorneys probably don't report unethical conduct because they are concerned they will then become targets themselves. Others just don't want the complication and hassle to interfere with their lives—it's easier to just look the other way and assume that someone else will address it.

It's not just attorneys, either. I know a couple of attorneys who have a long history of reprimands from the disciplinary agency. These attorneys were recently found negligent in yet another case—a case which was heard by a judge sitting as a finder of fact. The judge's opinion states the attorneys committed malpractice. Yet none of the attorneys involved in the case, nor the judge who made the decision, bothered to report the attorneys to the disciplinary agency. These attorneys are still practicing law.

The obligation to report misconduct is a sham. The rules don't have any teeth, and as a result, the rules do little or nothing to deter improper behavior.

COMMENTARY

A. What can we learn from Farber's story?

Farber's story does not tell us anything about the prevalence of the type of firm culture he describes. I observe that ethical standards at law firms vary enormously. I do not suggest that the type of conduct Farber describes is typical, but neither is it altogether uncommon. But the point of this narrative is not to address the question of prevalence. The point is to consider the events that Farber describes, and to think about what they mean.

It is useful to name the problems identified in these stories. The central one is that it appears that for many lawyers in the firm, professional values have been subordinated to financial aspirations. The lawyers are engaged in pervasive deception of clients, pretending to be doing work that they are not doing, pretending to spend more time than they are spending, pretending that work needs to be done
which in fact does not need to be done. The delivery of legal services is conceptualized principally as a billing opportunity to be manipulated and expanded. The relationships among the lawyers are more predatory than collegial. Farber described a “mentoring” relationship with the one lawyer in the firm who seemed interested in helping him to become a better lawyer. But this one turned out to be a charade, yet another billing-driven interaction.

The law firm Farber describes is a moral wasteland. Every member of the legal profession should shudder that we allow this type of predatory behavior to occur under the guise of selling legal services. We are supposed to be a self-regulated profession. Obviously in this case the system is not working very well.

Nicholas Farber’s account highlights the importance of our attempting to discover the depth and breadth of the moral rot that has taken hold of some portion of the legal profession, and to discover the causes of this moral rot. Is this language too strong? I don’t think so. A lawyer who represents to a client that he has made a phone call that was made by his secretary is deliberately deceiving the client for the purpose of increasing his income. Likewise, a lawyer who bills a client for half an hour’s work for a phone call that took five minutes and did not need to be made is deliberately deceiving a client for the purpose of increasing his own income. Any self-respecting second-grader could tell you that such behavior is wrong.

This firm, like so many others, started with laudable professional aspirations. What happened? Apparently some of the partners lost track of all but their personal financial goals, and gradually developed a culture in which the practice of law is primarily oriented toward the generation of income. Our profession has developed a fairly elaborate system by which to identify and address potential or actual conflicts of interest between clients, but has yet to develop such a system by which to address the basic financial conflict of interest between lawyer and client.

While the lawyer regulators have been slow to attend to ethical problems relating to lawyer billing practices, institutional clients and some law firms have taken steps to develop such systems. Clients have begun routinely to hire auditors to review lawyer bills, and have adopted policies on what they will or will not pay for from their outside counsel. Firms have established ethics committees and ethics counsels to ensure that there is an institutional mechanism for review of questionable practices. One firm even hired a full-time auditor to monitor the billing practices of the lawyers in the firm.  

Disciplinary authorities and criminal prosecutors are increasingly active in this arena. The disbarment and criminal prosecution of several high-profile lawyers for billing and expense fraud has focused attention on these issues and undoubtedly had some amount of cautionary impact. While some progress is being made, most law firms bill clients with little or no oversight or regulatory guidance. Opportunities for undetected billing fraud abound. Institutional clients may have the means to protect themselves, to some extent, but the auditors detect only the most flagrant abuses. Individual clients are even more vulnerable.

Nicholas Farber declined to allow himself to be corrupted by his firm, but instead found the door, and now has found some voice for his concerns. But among the casualties of our professional preoccupation with billing hours are many other lawyers who are more vulnerable to institutional or financial pressure than he was.

B. How serious is the misconduct described by Farber?

Some of the stories Farber recounts involve serious misconduct.

♦ One senior associate told Farber to find a reason to make a phone call and write one or two memos per month on each of his files whether they did or did not need attention in order to generate more billable hours. He was reporting that he used this method to inflate his own hours and he was encouraging Farber to do likewise.

♦ Another lawyer told Farber that he added up his hours each day and inflated them if necessary to ensure that they totaled 8.6. He did this to make sure he got his bonus and his vacation time. He encouraged Farber to use this method to increase his total billable hours.


6. See Lisa G. Lerman, Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, GEO. J. LEGAL ETHICS (forthcoming 1999) (study of seventeen cases of billing and expense fraud by partners at elite law firms); see, e.g., Randall Samborn, Fairchild's Sudden Fall Ends with Drop of a Gavel; Former Head of Winston & Strawn Earns 24 to 30 Months for Embezzlement, NAT'L L. J., Jan. 9, 1995, at A11 (discussing disbarment of high-profile lawyer for stealing $780,000 from his firm and from five clients over a nine-year period); see also A Scandal that Rocked Chicago Legal Circles May Make Wider Ripples Before Settling, NAT'L L. J., Dec. 26, 1994, at C4 (discussing disciplinary charges of overbilling).

7. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).
A common practice in the firm was to bill for creating a document using a form as if the document had been written from scratch. The lawyers would not bill for actual time spent, but for the amount of time they thought they would have spent if the document had been prepared solely for the client billed.

A partner instructed Farber to change a pre-bill to list paralegal time as attorney time to avoid a client ceiling on paralegal time per month per case. This resulted in a misrepresentation of who did the work, and probably resulted in the work being billed at a lawyer rate rather than a paralegal rate.

Many attorneys billed at their own rates for work that was done by their secretaries. The clients apparently had not consented to pay by the hour for secretarial time, especially not at the hourly rates charged by lawyers.

The lawyers were often instructed to represent time spent in conference as time spent doing research to avoid client objections to paying for this time. Likewise the lawyers were told to manipulate their time sheets to misrepresent what was done when in order to avoid client suspicions.

The style of supervision in the firm, far from encouraging compliance with ethical rules, often encouraged unethical behavior.

These are only some examples of the misconduct Farber described. The misconduct at Farber's firm arguably violates several different ethical rules. 

Model Rule 1.4 requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information," and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The comments following this rule note that "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests . . . . A lawyer may not withhold information to serve the lawyer's own interest or convenience."

This rule does not make clear exactly when a lawyer must come forward with information, and is framed in terms of client requests for information, but the rule should not be read to justify deliberate deception of a client as long as the client does not ask a direct question of the lawyer. Such a reading would suggest that a lawyer's
obligation to be candid toward a client is limited to avoiding deliberate false statements, and that deception of clients is acceptable as long as it can be accomplished by nondisclosure. The assumption underly ing the rule is that lawyers must act in their clients' best interests. If the lawyer has reason to know that a client would want to know certain information, the lawyer should disclose the informa tion to the client whether or not the client asks for it. A client of this law firm who learned about the firm's billing practices would likely make an informed decision to get a new lawyer.

Model Rule 1.5 requires that "[a] lawyer's fee shall be reasonable." The rule also provides that, "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." While the rule does not specifically prohibit any of the practices Nicholas Farber described, the rule appears to contemplate that the reasonableness of a fee depends not just on the amount charged, but on disclosure to the client of the method by which the fee is to be determined. The purpose of requiring disclosure of billing method is to give the client information about how the fee is to be determined. If hours are fabricated or padded, and the lawyer has contracted to bill on the basis of actual time worked, the lawyer is subverting the disclosure requirement.

The ABA Committee on Ethics and Professional Responsibility issued a formal opinion on hourly billing practices, interpreting Rule 1.5. The opinion explains that an hour is an hour and that if a lawyer is billing a client by the hour, the lawyer who works one hour only earns one hour's worth of fees. The lawyer may not bill more time than was actually worked, and may not bill two clients for a single hour unless each is billed for a fraction of the hour. The opinion explains:

A lawyer [who has promised to bill by the hour] may not bill more time than she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour) . . .

A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. . . .

11. Id. Rule 1.5.
12. Id.
It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended.14

The opinion notes that "a lawyer who agreed to hourly compensation is . . . free, with full disclosure, to suggest additional compensation because of a particularly efficient or outstanding result."15 This does not mean it is permissible to represent a premium as a block of fictitious hours. Indeed, the opinion makes clear that the lawyer may not charge any premium without explicit client consent. The point of the ABA opinion is that lawyers should be honest with their clients about the basis on which they calculate their bills.

Model Rule 3.3 requires lawyers to be truthful in dealing with judges and other finders of fact.16 Model Rule 4.1 requires truthfulness in statements to "persons other than clients."17 There is no explicit rule requiring truthfulness in statements to clients. The absence of such a rule is based on the assumption that lawyers would of course be truthful with their clients, and that the temptation to deceive would be on behalf of a client.

Model Rule 7.1 addresses communication concerning a lawyer's services.18 It is written principally with an eye to communication with prospective clients. The drafters of the rule appear not to have perceived a need to require candor toward existing clients. However, the language is broad enough to cover both prospective and present clients. The rule says "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it . . . contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."19 Many of the practices described by Nicholas Farber would violate Rule 7.1. If, for example, a lawyer billed a client at $250 per hour (the lawyer's hourly rate) for an hour of time that actually was spent by the lawyer's secretary, and the lawyer failed to disclose that he was billing at his rate for secretarial time, this would be a false or misleading communication about the lawyer's services. If the client has prohibited billing for in-firm conferences, and the lawyer bills for that time but represents the time as "legal research," this also is false or misleading. In both instances the information is withheld.

14. Id.
15. Id. .
17. See id. Rule 4.1.
19. Id.
because if disclosed, the client probably would decline to pay that portion of the bill.

Model Rule 8.4(c) makes it professional misconduct for a lawyer to engage in "dishonesty, fraud, deceit or misrepresentation." The sweeping prohibition of this rule, while general, perhaps offers the clearest standard against which to measure the conduct described by Nicholas Farber. This rule has been the basis of disciplinary action for a wide range of lawyer misconduct that is not specifically prohibited by other rules. The comment following the rule indicates that misconduct that involves "dishonesty" or "breach of trust" are among those that "reflect adversely on fitness to practice law." The comment notes that "[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." The misconduct described by Nicholas Farber might be considered by some lawyers to be inconsequential if one looked at each incident separately. But the cumulative picture clearly reflects adversely on the fitness of some of the lawyers in the firm to practice law.

One might wonder if the ultimate fee seems reasonable, whether it matters how the lawyer calculates the fee. Does it matter, for example, if some hours are billed that are not actually worked? In fact, it does matter. Many lawyers are habituated to representing all fees in the form of hours worked, even if some of the hours listed are a proxy for the lawyer's assessment of the value of the work rather than the time spent. The "billable hour" has become a sort of fiction in some firms. This misrepresentation contributes to the perpetuation of a practice culture in which other types of deception are likewise treated as normal. Even if a client representative is informed about the mischaracterization of time on a billing statement as several extra hours worked. On another occasion a lawyer might seek client consent to represent some hours worked as expenses to be reimbursed directly to the lawyer. The lawyer and the client might see no harm in this arrangement because the client would pay the same number of dollars. Through this "consensual"

20. Id. Rule 8.4(c).
21. Id. Rule 8.4 cmt.
22. Id.
23. In a previous article I discussed this "slippery slope" problem, in which a lawyer's integrity can be eroded by developing facility in the rationalization of small deceptions, and that then larger deceptions cease to be the object of moral reflection and instead become subjects for rationalization. See Lisa G. Lerman, Lying to Clients, 138 U. PA. L. REV. 659, 680-682 (1990).
deception, the lawyer might divert fees that should have been paid to the law firm into his personal checking account, and, by representing these fees as reimbursements, might not declare this payment as income, and this lawyer would be engaged in tax fraud.\textsuperscript{24}

Second, consider the implications of consensual misrepresentation. If the client who consents to representation of a premium as hours worked is an individual who pays her own bills, and the bills never become the subject of any billing dispute, representation of premiums as hours might deceive no one. But what if the client is a corporate entity and the consent is obtained from the usual contact in the general counsel's office? Even if the corporate representative consents, corporate managers, accountants, or auditors who review bills might be deceived by the representation that hours were worked that had not been worked. Suppose further that the services are rendered in a bankruptcy proceeding or in another context in which a judge or an auditor would review and approve the legal fees. Any reviewer of the time records who was not in the consent loop would be deceived by the mischaracterization.

Perhaps this is an easy problem, a minor bad habit of many lawyers. The problem is that in the practice of law, billable hours are the coin of the realm. A lawyer's value to his law firm is most often assessed primarily by the number of hours he bills. If a lawyer works four hours on a matter that achieves a particularly good result and after consultation with the client adds a $25,000 performance fee to the bill, that portion of the fee might not be reflected in the number of hours the lawyer had billed at the end of the month. At the end of the year the lawyer's draw, raise, or bonus might not credit him for having produced an extraordinary result in a trivial amount of time. Firms that wish to discourage misrepresentation of premiums as hours need to credit lawyers who generate firm income in the form of premiums. Even better would be to shift to a system of evaluation of lawyers that focussed on the quality of their work rather than on their generation of income for the firm.

C. Does Farber have an ethical obligation to report his firm to the disciplinary authorities? Do I?

"Nicholas Farber" reported numerous incidents that involved clear and serious violations of ethical rules. Both Farber and I might be charged with having failed to comply with ethical rules requiring

\textsuperscript{24} One lawyer who pled guilty to criminal charges that included allegations of just this sort of shifting fees to expenses was H. Lawrence Fox, who was a partner at Winston & Strawn. See Jonathan Groner, Ex-Lawyer Pleads Guilty to Mail Fraud, Tax Charge, LEGAL TIMES, Jul. 20, 1992, at 16.
attorneys to report serious misconduct to disciplinary authorities. I have not identified the jurisdiction in which Farber was practicing at the time, but let's assume he was in a jurisdiction that had a mandatory reporting rule that mirrors ABA Model Rule 8.3 and a rule on responsibility of associates just like Model Rule 5.2.25 I am a member of the DC Bar, which has a mandatory reporting rule identical to Model Rule 8.3.26

Rule 8.3 requires reporting of violations of disciplinary rules that raise "a question as to the honesty, trustworthiness, or fitness of the person to be a lawyer."27 The conduct Farber recounts involves chronic patterns of purposeful dishonesty for the purpose of financial gain. Some people would call it stealing. Reporting is arguably obligatory. Even so, I do not fault Farber for having failed to make a report to the disciplinary authorities, nor have I reported him for having failed to report lawyer misconduct. (Nor, we might note, has the judge he clerked for, whom he consulted repeatedly during his work at this firm.) In fourteen years of teaching, I have consulted with scores of law students and attorneys about ethical dilemmas that they have encountered in practice. Those who sought advice often were troubled by the misconduct that they had observed and took their ethical responsibilities very seriously. I have on many occasions raised the question of whether there was a reporting obligation with respect to the reported misconduct. Those who consulted me often agreed that the misconduct in question was serious enough to satisfy the 8.3 standard. But as far as I know, none of these law students or attorneys ever decided to report the misconduct.28

Why not? For a law clerk or an associate to report allegations of unethical behavior by a lawyer in his or her firm to a disciplinary agency is tantamount to professional suicide. Our profession requires reporting but provides no protection to those who comply with the rule. Howard Wieder was fired by his firm for insisting that the firm report misconduct by another lawyer in the firm. After years of litigation, the New York Court of Appeals decided that the firm's right to fire an at-will employee did not include the right to fire him for insistence on compliance with an important ethical standard.29

28. The one exception is that in a few instances, students or colleagues who consulted me about academic misconduct then complied with a reporting obligation imposed by a law school rule similar to 8.3.
29. See Wieder v. Skala, 609 N.E.2d 105, 109 (N.Y. 1992) (reversing dismissal of wrongful discharge claim of attorney who alleged he was dismissed for insisting that his law firm report misconduct by another associate in the firm; court held
Texas Supreme Court just considered a similar question raised by Collette Bohatch, who was fired after she tried to persuade her partners to investigate her allegations that another partner was engaged in massive billing fraud. The Texas court upheld the firm’s firing of Bohatch.\textsuperscript{30}

\textit{Wieder and Bohatch} did not go directly to the disciplinary agencies, but had the courage to urge their firms to comply with the rules. They were courageous enough to litigate their rights. How many law clerks or associates, most of whom have at least $80,000 of student loans to repay, would display such courage? Far from ducking his ethical responsibilities, “Nicholas Farber” has a high level of ethical sensitivity and a powerful sense of professional responsibility. He quit his job without having another. Even telling the stories anonymously, he is taking professional risks by participating in this discussion. Most lawyers who find themselves in situations like Farber’s would be too intimidated to speak about the problems, except in private.

The question of my own reporting obligation has been raised by others who have read my previous anonymous reports from other attorneys.\textsuperscript{31} Query whether those who raise this question would prefer that the legal profession and the public not look too closely at the ways that lawyers exercise their discretion in billing clients.

Might Farber be relieved of his obligation to report misconduct by an obligation to protect client confidences? I think not. The alleged misconduct is by lawyers, not clients, and could be disclosed without revealing client confidences. If anything, he might have an additional obligation to report the billing fraud to his clients as well as to the disciplinary authorities.

Do I have an obligation to report to disciplinary authorities the misconduct that was reported to me by Nicholas Farber? Maybe not. I do not know the names of the lawyers whose conduct is described in the interview. This purposeful ignorance is not an attempt to manipulate my way around a reporting obligation, but is rather an effort to be vigilant in the protection of confidences that I have received from Farber. It is easier to avoid inadvertent revelation of information that one does not possess. However, one consequence of my not knowing the identity of the lawyers or the firm is that I do


\textsuperscript{31} I have not told other stories in such depth as this one, but I have published other unattributed stories in \textit{Gross Profits: Questions About Lawyer Billing Practices}, 22 Hofstra L. Rev. 695 (1994), and \textit{Lying to Clients}, supra note 23.
not have the "knowledge" that would trigger a reporting obligation. As far as I know, I have no obligation to investigate. Am I obliged to report Farber for not reporting his colleagues? I don’t think so. I do think he has violated Rule 8.3, but this violation does not raise a question about his "honesty, trustworthiness, or fitness as a lawyer in other respects." Far from it.

D. Was Farber unduly scrupulous in his billing practices?

Is Farber sometimes hyper-ethical? Farber expressed concerns about billing a client for time spent thinking about a case while mowing the lawn or sitting on the bleachers at a ball game. If this time is productive, is it properly billable? The problem is that if the lawyer is billing on the basis of productive time worked, the judgment of productivity is left entirely to the subjective discretion of the lawyer. A lawyer who has a high opinion of his own productivity might bill twice as many hours as one who was just as productive but had a more modest ego. A lawyer who is more adept at rationalization can define productivity more broadly and thereby justify billing more hours. This standard sidesteps the question of whether the client should be consulted or informed about what the lawyer is doing while billing hours. How many clients would be happy about paying $300 per hour for time their lawyers spent “thinking” while mowing the lawn?

If a lawyer is permitted to bill for time spend thinking or talking about a client matter while engaged in another activity, the system incorporates no discount for the diminution in productivity that might result from doing two things at the same time. A lawyer who is thinking while in the shower or driving a car generally cannot make notes or consult sources. A lawyer conferring with a colleague during a baseball game might be distracted by a home run, the popcorn salesman, or the weather. Some clients might agree to pay for time spent working in these circumstances, but most would object. Given the hourly rates lawyers charge, it is unfair to charge for time when the lawyer’s attention is divided unless the client consents after full disclosure of the circumstances.

Did Nicholas Farber worry needlessly about billing for time spent reading files that were transferred often because of the rapid turnover of associates in the firm? The question is whether a firm should disclose to a client that a matter was transferred two or three times and give the client a voice in the judgment of what is proper. A client of Farber’s firm, for example, might have found that a substantial

portion of the time billed on some matters was for associates reading the files when the cases were passed on to them. 33

Many lawyers assert that it is proper for them to bill intra-office conferences among attorneys and then criticize clients who object to this. While collaborative work is undoubtedly better quality than solitary work, it is not always more efficient. Some clients might elect for more efficiency even if some sacrifice of quality is involved. But the principal reason for client complaints about billing for intra-office conferences is not about the value of the time, but the ease and frequency of inflating this type of billing time either by marking up the time spent or by simply chatting longer. Many clients are struggling to find some tools by which to limit the “blank check” phenomenon inherent in agreeing to be billed by the hour. A more effective method of accountability might be for more legal clients to negotiate fees (not billing methods) in advance of receiving legal service. Those who continue to work with lawyers who bill by the hour worry with good reason that lawyers exercise unfettered discretion about how much time to work and how much time to say that they worked.

Perhaps many clients would prefer dishonest or inflated billing to incompetent service from their lawyers. But clients should not be asked to choose between competent service and honest billing. Lawyers who believe that they are undercompensated by hourly billing arrangements should propose alternative methods to set their fees. As long as firms evaluate lawyers based on the number of hours they bill, this is easier said than done. But just as clients should not be expected to tolerate deception by lawyers, lawyers should not be asked to participate in a billing system that rewards both inefficiency and dishonesty.

E. Should lawyers stop billing by the hour?

One obvious solution to the problems of deception, mistrust, and abuse that arise in connection with hourly billing would be for lawyers to abandon hourly billing and use a different method to determine their fees. Perhaps they should follow the example of auto mechanics, and provide each client with a written estimate of the cost of the work before undertaking representation. Like car mechanics, lawyers could commit to charge no more than the amount estimated. Then clients would have price information at the outset and might have an opportunity to negotiate the fee to be charged.

33. If the high turnover of associates was caused by poor work conditions or by discontent with unethical behavior, should a client be asked to absorb the extra cost?
Some lawyers argue that the problems with hourly billing have been caused by cost-conscious clients. Corporate clients are accused of having lit or at least fed the fire of billing fraud by setting up in-house counsel's offices which began to demand from outside counsel detailed information about the basis of the fees being charged.

It is true that many clients have become mistrustful of lawyer billing practices. But their concerns are simply the product of a billing practice that gives lawyers total discretion over how much to charge and which provides little disclosure to clients or opportunity for clients to negotiate fees.

Hourly billing became popular among lawyers because lawyers found it more lucrative than the methods they had previously employed. Professor William Ross notes that the move to hourly billing was prompted principally by a recognition that this method would increase the incomes of the lawyers who used it. Ross reports in his excellent book, *The Honest Hour,* that

> [s]tarting as early as the 1940s, management experts concluded from various studies that lawyers who kept time records earned more than attorneys who did not. Management experts advised lawyers to raise their compensation by selecting a target annual salary and dividing that figure by the number of hours that they could bill to a client during a year and factoring in overhead costs in order to arrive at an hourly billing rate.\[34\]

While most lawyers do not set out to bill dishonestly, the choice of billing methods in the legal profession has long been driven by concerns about the lawyer's pocketbook, not the client's. Viewed from this perspective, clients are unhappy with hourly billing for the same reasons that lawyers prefer it—it leads to higher bills and gives lawyers discretion over how much to charge.

Legal audit firms and corporate policies restricting billing emerged in response to a feeding frenzy of overbilling that developed in elite law firms during the late 1980s. Many lawyers find it burdensome to deal with client billing policies and legal auditors, but the profession made this hard bed for itself by tolerating and encouraging bill padding, fabrication of time records, and other deceptive practices. The

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34. See William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 17 (1996) (noting that many American lawyers began billing by the hour during the 1950s, and quoting one management consultant who wrote in 1960: "lawyers who do keep personal time records have a net income which is almost equal to the gross income of lawyers who do not keep time records. Need more be said!" (quoting Eugene C. Gerhart, *The Art of Billing Clients, 1 Law Off. Econ. & Mgmt.* 29, 37 (1960))).

35. *Id.* at 16 (citations omitted).
assessments of what is good legal service and how much should be billed for that service is not a judgment to be made by lawyers alone. Many lawyers feel aggrieved by the restrictions imposed by clients on the number of hours that a firm may bill for particular activities. Some perceive corporate clients of the 1990s as penny-pinching; they believe that the restrictions are unnecessary. The restrictions on billing that Nicholas Farber describes (e.g., fifteen hours of paralegal time per matter) might better be characterized as a desperate and often ineffectual attempt by corporate clients to set some boundaries on the “blank check” otherwise represented by an hourly billing contract. As long as lawyers bill by the hour, these problems will persist.

36. The ABA opinion on hourly billing practices states that while lawyers should not bill for more hours than they work, clients should not impose unreasonable restrictions on how many hours lawyers can bill them. “An unreasonable limitation on the hours a lawyer may spend on a client should be avoided as a threat to the lawyer’s ability to fulfill her obligation under Model Rule 1.1 to provide competent representation to a client.” Formal Op. 379, supra note 3. Perhaps this exhortation is couched in passive voice because it would be awkward to argue that clients are bound by the rules of professional conduct.