The New Law Firm Economy, Billable Hours, and Professional Responsibility

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I. INTRODUCTION

The last year has seen a dramatic increase in law firm associate salaries across the nation. The jump in starting associate salaries has been described as "stunning" and "insanity." Huge jumps in starting salaries ripple up through the associate ranks as senior associates' salaries have to be raised in proportion to starting salary increases, increasing associate compensation exponentially, and worsening the already significant financial effect on law firms.

Many observers both within and without the profession shrug off the associate salary wars. Some law firms have always paid more than others; some firms can afford high salaries while others cannot. But the analysis cannot stop there, for these increases carry with them very real

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2. Orey, supra note 1 ("Stunned by the run-up in [starting] salaries ... many law-firm partners are huddling to consider moves that could fundamentally restructure the law business.").

3. Brash, supra note 1 (quoting an assistant general counsel of E.I. du Pont de Nemours and Co., who "call[ed] these fabulous salaries 'insanity' ").

4. See Orey, supra note 1 (describing this effect on one national firm); John L. Trunko, Legal Audits: A Valuable Tool for the Control of Legal Costs, MEALEY'S ATT'Y FEES, Mar. 2000, at 18, 18 ("The impact of such increases on the economics of a law firm can be dramatic. When starting salaries are increased, the law firm must also make similar increases to the salaries of more senior associates.").
concerns about professional responsibility. Law firms can compensate for their increased associate costs in three ways: by increasing their hourly rates, by partners accepting reduced profits, or by requiring their associates to bill more hours.\(^5\) Many clients probably will resist attempts by their lawyers to pass along associate salary increases in the form of higher hourly rates.\(^6\) Corporate clients now routinely insist on discounts from lawyers’ standard hourly rates.\(^7\) Partners are unlikely to accept reduced compensation as the price of generosity to their associates.\(^8\) That leaves higher billable hour requirements for associates as the means of offsetting such significant salary increases and, in fact, this appears to be the way that law firms are headed.\(^9\) Billable hour requirements far exceeding 2000 hours seem destined to become the norm. Many of the new salary structures are tied to billable hours, with associates required to bill as many as 2400 hours annually in order to achieve the highest compensation levels.\(^10\)

The problem, of course, is that there are only so many billable hours in a day, and there is only so much billable work available. Further, in addition to the new economic incentive to bill hours, associates typically are evaluated, at least in part, on the number of hours they bill.\(^11\) Associates’ reputations within a firm and their progress toward partnership are influenced by their productivity. The increased pressure on associates to bill hours may, in turn, increase the temptation to engage in unethical billing practices, such as inflating the hours actually spent on tasks, euphemistically referred to as “padding,” and double billing.\(^12\) As Chief Justice Rehnquist once observed, “if one is

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5. See Trunko, supra note 4, at 18.
6. See Jennifer Bier, GCs Wary as Rates Rise: Firms May Feel Heat from Clients as Salaries Spur Billing Rate Hikes, LEGAL TIMES, Nov. 20, 2000, at 1, 22; Brash, supra note 1; Rosenberg, supra note 1.
8. See Rosenberg, supra note 1.
9. See Orey, supra note 1; see also Mark Hansen, Trickle-Away Economics?: Cost of High First-Year Salaries May Be Borne by Pro Bono Recipients, A.B.A. J., July 2000, at 20, 20 (quoting executive director of the National Association for Public Interest Law as saying that “associates will be expected to bill more hours in return for those higher salaries”).
10. See Trunko, supra note 4, at 19.
expected to bill more than two thousand hours per year, there are bound to be temptations to exaggerate the hours actually put in.\textsuperscript{13}

It would be unfair to suggest that only associates are tempted to engage in unethical billing practices, or actually do so. First, partners also may be required to bill more hours to offset increased associate salary costs. If clients will not accept sufficiently increased hourly rates, or if associate hours cannot be increased to the point that collections will offset salary increases, partners will either have to bill more hours or risk seeing their compensation decrease. Second, partners have a long history of questionable billing practices.\textsuperscript{14} An alarming number of partners from blue chip firms have been criminally prosecuted or professionally disciplined, or both, for billing fraud.\textsuperscript{15} Michael Lazaroff, a partner in a large St. Louis firm, recently admitted to "inflating the bills of about 50 clients to pay for more than $380,000 worth of entertainment and merchandise that the clients believed were gifts."\textsuperscript{16} Lazaroff falsified telephone and fax charges, as well as charges for legal services and witness preparation.\textsuperscript{17} He pleaded guilty to two counts of mail fraud.\textsuperscript{18}

Third, anecdotal evidence suggests that any number of relatively senior partners (those in their fifties and sixties) simply do not understand or appreciate that falsely recording time is professional misconduct.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{14} A partner at a major law firm ridiculously claimed to have worked 6022 billable hours in one year, and to have exceeded 6000 billable hours in each of four consecutive years. See Karen Dillon, \textit{6,022 Hours}, AM. LAW., July-Aug. 1994, at 57, 57; Amy Stevens, \textit{Top Chapman & Cutler Partner Chalked Up Astronomical Hours}, WALL ST. J., May 27, 1994, at B1.
\item \textsuperscript{16} \textit{Ticker}, NAT'L L.J., June 26, 2000, at A4.
\item \textsuperscript{17} See id.
\item \textsuperscript{18} See id.
\item \textsuperscript{19} An example drawn from personal experience illustrates this phenomenon. I was asked to speak to the associates at a regional office of a major Midwestern law firm about billing practices. I was invited to speak by a partner and a staff member who were organizing an associate-training program. When the firm's managing attorney (a partner in his fifties) learned of my intended presentation, he angrily canceled it. Why? He apparently felt threatened when he learned that I planned to tell the associates that they should record their telephone time accurately: to use the timing feature on their telephones when possible and to remind them that most telephone calls probably should be billed at one-tenth (0.1) of an hour. This partner claimed that he never had a telephone call that lasts less than three-tenths (0.3) of an hour. How can this be? He reasons that telephone calls are a distraction and that by the time he stops what he is doing to answer the telephone, talks to the caller, and then returns to what he was doing, even the shortest telephone call takes at least three-tenths of an hour. In other words, the person calling should have to pay for his lawyer's inability to switch intellectual gears.
\end{itemize}
Lawyers who would never steal funds from clients' trust accounts freely inflate their time.

It is time to re-examine ethics in the hourly billing context. That does not mean that this Article should be read as a criticism of lawyers or of the billable hour system. Lawyers are no less honest or trustworthy as a group than are other professionals. Billing by the hour is, as a matter of principle and practice, both fine and fair. In the litigation context, billing by the hour forces clients and their counsel to think carefully about strategy and the need to perform certain tasks when budgeting a project, thereby controlling costs and preventing needless expenditures. Indeed, "properly managed hourly-fee arrangements are the most fair and efficient method of compensatory outside counsel in litigation matters." When it comes to litigation, there is no consistently reasonable substitute for the billable hour. Most clients reject the concept of "value billing" and similar alternative billing arrangements, and so-called "flat fees" have their own ethics problems. Critics of hourly billing nonetheless argue that hourly billing discourages efficiency and prolongs litigation.

Hourly billing and advanced technology are natural enemies. Computer technology for lawyers gets faster and more sophisticated every day. Yet most lawyers today continue to bill solely by the hour. This creates a disincentive to take advantage of opportunities for efficiency. Using the hourly billing system, the inefficient, slow attorney makes more money than the knowledgeable, high-tech attorney who can turn out quality work quickly. Something is wrong with this picture.


21. "Value billing" describes "a variety of [alternative fee] arrangements whereby the client bases payment upon the extent to which mutually agreed goals are achieved by counsel, who thereby shares both economic risks and rewards with the client." Committee on Lawyer Business Ethics, Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements, 54 BUS. LAW. 175, 184 (1998). With a few exceptions, both clients and lawyers say that alternative fee arrangements are not satisfactory. See Peter D. Zeughauser, Alternative Billing: Clients Aren't Biting, LEGAL TIMES, May 1, 2000, at 24.

22. A "flat fee" means that the fee encompasses all work to be done by the attorney or law firm, regardless of the complexity or duration of the matter. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Apland, 577 N.W.2d 50, 55 (Iowa 1998). Because a flat fee is nothing more than an advance fee payment, a lawyer must deposit it into his client trust account until it is fully earned, or risk being charged with misappropriating client funds. See id. at 56. Flat fees have been held to be unethical in the insurance defense context, where they are seen as a potential disincentive to zealous advocacy. See, e.g., Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 572 (Ky. 1996).

23. But see discussion infra Part IV (explaining the absurdity of this argument).

24. Snyder, supra note 7, at 25.
Hourly billing also may be a concern in transactional practice. Corporate lawyers can inflate their hours, and transactional matters are capable of being over-lawyered.

Regardless of the context, hourly billing is accompanied by a number of professional responsibility issues, many of which are the subject of renewed concern in light of skyrocketing associate salaries. Part II of this Article examines the American Bar Association ("ABA") ethics rules and opinions generally applicable to hourly billing practices, as well as related cases. Part III details particular billing concerns.

II. ETHICS RULES AND PROHIBITIONS

The Model Rules of Professional Conduct25 ("Model Rules") are a logical starting point for any discussion of ethical billing practices. Several Model Rules generally apply to billing, varying in application depending on the case. For example, Rule 1.2(a) provides that an attorney "shall abide by a client's decisions concerning the objectives of representation."26 An attorney must therefore respect a client's decisions concerning cost control, and the performance of tasks for which the client will be charged. For some clients, cost control is a critical element of responsible representation. Rule 1.4(a) requires an attorney to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."27 An attorney must inform a client about the expense of the subject representation, and about the relationship between the attorney's fees and the services provided. Rule 1.4(a) requires a lawyer to provide his client with sufficient information for the client to decide whether the lawyer's services are worth the price, and whether the pursuit or continuation of a matter is worth the cost. Rule 7.1 provides that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."28 Rule 7.1 thus forbids fraudulent billing.29 Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."30 Courts regularly rely on Rule 8.4(c) to discipline attorneys for billing

26. Id. R. 1.2(a). Further, an attorney "shall consult with the client as to the means by which they are to be pursued." Id.
27. Id. R. 1.4(a).
28. Id. R. 7.1.
29. See State ex rel. Okla. Bar Ass'n v. Leigh, 914 P.2d 661, 666 (Okla. 1996) (stating that "[a] lawyer's . . . billing statement . . . is a communication within the meaning of Rule 7.1").
30. MODEL RULES OF PROF'L CONDUCT R. 8.4(c).
and expense fraud.\textsuperscript{31} Similarly, Rule 8.4(d) prohibits "conduct that is prejudicial to the administration of justice,"\textsuperscript{32} which has been held to include fraudulent billing.\textsuperscript{33}

Only Rule 1.5 specifically addresses attorneys' fees. Rule 1.5(a) provides that "[a] lawyer's fee shall be reasonable."\textsuperscript{34} The Rule lists eight factors to be considered when determining the reasonableness of a fee. These factors are:

\begin{enumerate}
\item the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
\item the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
\item the fee customarily charged in the locality for similar legal services;
\item the amount involved and the results obtained;
\item the time limitations imposed by the client or by the circumstances;
\item the nature and length of the professional relationship with the client;
\item the experience, reputation, and ability of the lawyer or lawyers performing the services; and
\item whether the fee is fixed or contingent.\textsuperscript{35}
\end{enumerate}

Attorneys incorporate some of the Rule 1.5(a) factors into their hourly rates.

\begin{itemize}
\item \textsuperscript{31} See, e.g., People v. Kotarek, 941 P.2d 925, 925-26 (Colo. 1997) (suspending lawyer for submitting fraudulent mileage reimbursement requests and for falsifying time entries); In re Lassen, 672 A.2d 988, 992, 1003 (Del. 1996) (suspending attorney who submitted false expense reimbursement requests to firm and who attempted to charge clients for fictitious hours); In re Hallock, 702 A.2d 1258, 1258-59 (D.C. 1997) (imposing reciprocal discipline on lawyer who inflated hours billed by her associates); In re Scimeca, 962 P.2d 1080, 1083-84, 1092 (Kan. 1998) (suspending lawyer for billing fraud and other offenses); In re Brown, 931 P.2d 664, 664 (Kan. 1996) (disbarring lawyer for fraudulently billing clients for time and expenses, and for submitting false meal and travel expenses); In re Dyer, 99-1652, p.9, 11 (La. 10/19/99), 750 So. 2d 942, 948, 949 (disbarring lawyer for inflating charges and falsifying expenses, among other offenses); Toledo Bar Ass'n v. Batt, 677 N.E.2d 349, 351-52 (Ohio 1997) (disbarring attorney for padding bills); In re Disciplinary Proceeding Against Haskell, 962 P.2d 813, 815, 824 (Wash. 1998) (suspending lawyer who switched timekeepers' initials on bills and inflated hourly fees as a result); In re Disciplinary Proceedings Against Gilbert, 595 N.W.2d 715, 721, 730 (Wis. 1999) (suspending lawyer for fraudulently billing client for meetings that did not occur); In re Disciplinary Proceedings Against Glynn, 591 N.W.2d 606, 609-11 (Wis. 1999) (suspending lawyer for paying himself excessive and unauthorized fees in guardianship and conservatorship).
\item \textsuperscript{32} Model Rules of Prof'l Conduct R. 8.4(d).
\item \textsuperscript{33} See, e.g., In re Jennings, 468 S.E.2d 869, 871, 874 (S.C. 1996).
\item \textsuperscript{34} Model Rules of Prof'l Conduct R. 1.5(a).
\item \textsuperscript{35} Id.
\end{itemize}
For example, attorneys’ varying abilities, experiences, and reputations account for the range of hourly billable rates found in most firms. Firms’ maximum and minimum rates are often determined by comparing the rates charged by other firms in the community. The nature of the professional relationship with a client may well bear on the hourly rates at which a firm charges.

What constitutes a reasonable fee varies with the facts and circumstances. There is no precise measure of reasonableness. A key element in determining the reasonableness of a fee is whether the lawyer disclosed to the client the "material elements of the fee agreement and of the lawyer’s billing practices." The attorney bears the burden of establishing the reasonableness of a fee. Whether an attorney’s fee is, in fact, reasonable, is a matter committed to the trial court’s sound discretion.

A lawyer’s fee can be unreasonable without being unconscionable. A fee obtained or procured through fraud obviously is unreasonable under Rule 1.5. A fee also may be unreasonable where charges are the product of a lawyer’s poor judgment or overly-optimistic assessment of his professional worth. A lawyer can violate Rule 1.5, and thus be guilty of professional misconduct, even if his unreasonable fee is not the product of fraud or misrepresentation. A lawyer who negligently violates Rule 1.5 may receive a lighter punishment than a lawyer who intentionally defrauds a client, but negligence will not turn an excessive fee into a reasonable one. Similarly, the fact that a client is satisfied with a lawyer’s work will not cure an unreasonable fee.

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41. See In re Boelter, 985 P.2d at 337.
42. See, e.g., People v. Kotarek, 941 P.2d 925, 926 (Colo. 1997); People v. Sather, 936 P.2d 576, 578 (Colo. 1997); In re Disciplinary Action Against Moe, 1999 ND 110, ¶¶ 16-18, 594 N.W.2d 317, 320-21; In re Jennings, 468 S.E.2d 869, 874 (S.C. 1996); In re Disciplinary Proceedings Against Glynn, 591 N.W.2d 606, 607-10 (Wis. 1999).
43. See Model Rules of Prof'L Conduct R. 1.5(a) (1999).
44. See In re Moe, 1999 ND 110, ¶ 16, 594 N.W.2d at 320.
45. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Hoffman, 572 N.W.2d 904, 909 (Iowa 1997).
The lawyer in *In re Comstock* accepted a $7500 retainer from his client. He agreed to bill against the retainer at a rate of $100 per hour. He later charged the client “his full rate for travel time to and from a distant law library to work on the civil case when another suitable law library was only minutes away.” The client ultimately terminated his representation. The lawyer, in turn, charged the client to review the letter terminating his employment. The *Comstock* court easily concluded that the lawyer’s fees were unreasonable under the Indiana version of Rule 1.5(a). The court suspended the attorney from practice for one month based in large part on his “heavy-handed attempt to secure an inflated fee.”

In *Shaffer v. Superior Court*, a California court considered the relation between a firm’s profit margin and the alleged unconscionability of the firm’s fee. The real party in interest in *Shaffer* was Jeremy Simms, who sued Gibson, Dunn & Crutcher (“Gibson”) for malpractice. Simms alleged that Gibson’s fees were unconscionable. Simms deposed Marcy Shaffer, a former Gibson contract attorney who worked on his case. Simms asked her for her work on his file. Defense counsel instructed her not to answer the question. Simms then moved to compel Shaffer’s answer, asserting that the information requested was relevant because it bore on the unconscionability of Gibson’s fees.

The California Rules of Professional Conduct specify eleven factors to be weighed when determining the unconscionability of attorneys’ fees. These factors are:

“(1) The amount of the fee in proportion to the value of the services performed.
“(2) The relative sophistication of the member and the client.

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46. 664 N.E.2d 1165 (Ind. 1996).
47. See id. at 1166.
48. See id.
49. Id. at 1168.
50. See id. at 1167.
51. See id. at 1168.
52. See id.
53. Id. at 1169.
54. 39 Cal. Rptr. 2d 506 (Ct. App. 1995).
55. See id. at 511-12.
56. See id. at 508.
57. See id.
58. See id. at 509.
59. See id.
60. See id.
“(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
“(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
“(5) The amount involved and the results obtained.
“(6) The time limitations imposed by the client or by the circumstances.
“(7) The nature and length of the professional relationship with the client.
“(8) The experience, reputation, and ability of the member or members performing the services.
“(9) Whether the fee is fixed or contingent.
“(10) The time and labor required.
“(11) The informed consent of the client to the fee.”

The Shaffer court noted that nothing in the California rule suggests that an attorney’s or firm’s profit margin is relevant to the alleged unconscionability of a fee.63

Indeed, . . . if a law firm’s profit margin were relevant to the analysis of the conscionability of its fees, a veritable Pandora’s Box of questions and problems would be opened. For example, how are we to define “profit margin.” Is it gross revenues minus total costs? If so, are those numbers measured on an accrual basis, a cost basis, or some other basis? Are they to be evaluated in absolute dollar terms or in terms of a percentage of its costs[?] Is every single item of cost incurred by a firm (e.g., both capital expenditures and costs of operations) to be part of the calculation? What special rules must be adopted in order to avoid punishing law firm efficiency or a firm’s skill or luck in negotiating favorable leases or vendor contracts? Is every single item of revenue received by a firm to be included in the calculation (e.g., what about investment income)? How will the quality of the legal services be incorporated into the analysis? What about other intangibles, like professional reputation and goodwill? Will the firm be forced to disclose the compensation it pays to every lawyer and staff member? Will it be forced to disclose the amounts it pays for office space, equipment, supplies, furniture or utilities? Will it be forced to disclose the individuals or entities to whom it makes these payments? What portion of the attorney’s overall costs of doing

62. Shaffer, 39 Cal. Rptr. 2d at 511 n.6 (quoting Rule 4-200 of CAL. RULES OF PROF’L CONDUCT).
63. See id. at 511.
business should be allocated to the particular case in which the fee dispute arises?64

What was relevant to Simms’ claim, the court reasoned, were the amount of the fee in proportion to the value of Shaffer’s services; Shaffer’s experience, reputation and ability; and Simms’ consent to the fee.65 Did Simms get what he paid for?66 Were Shaffer’s services worth the hourly fee Gibson charged?67 These “question[s] can be answered by analyzing the quality and necessity of her services and then comparing their cost with” the fees charged for like services by attorneys in the community with similar experience and ability.68

The Shaffer court concluded by observing that the determination of a reasonable attorney’s fee based on profit margin is inappropriate and impractical.69 Examining attorneys’ profits in fee disputes would unfairly penalize efficient attorneys, and reward those who are inefficient.70 Additionally, to shift courts’ focus away from market prices to profit margins “would be an unwarranted burden and bad public policy.”71

Rule 1.5(b) also applies to hourly billing. It provides: “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.”72 Rule 1.5(b) should be read in conjunction with Rule 1.4(a), such that the client is fully informed about all aspects of the cost of the representation from start to finish. It is wrong to read Rule 1.5(b) to require only a statement of the lawyer’s hourly fee, although some commentators suggest that the bare language of the rule may require no more.73

Rule 1.5(b) is intended to permit the client to be fully informed of the terms of his fee agreement and to know the extent of his financial undertaking, as well as to prevent overcharging by the lawyer.74

64. Id. at 511-12.
65. See id. at 512.
66. See id.
67. See id.
68. Id.
69. See id. at 513.
70. See id.
71. Id.
72. MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (1999).
73. See, e.g., WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 49 (1996). This view is borne out by the comment to Rule 1.5, which states: “It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee.” MODEL RULES OF PROF’L CONDUCT R. 1.5 cmt. 1.
Consistent with basic contract law principles, any ambiguities in a written fee agreement will be resolved against the lawyer.75 Once a lawyer and a client agree to a particular billing arrangement, the lawyer cannot unilaterally modify the terms of their agreement. Beatty v. NP Corp.76 is an exemplary case.

In Beatty, the law firm of Sullivan & Worcester ("Sullivan") represented NP Corporation ("NPC") in an excise tax case that spanned six years.77 Sullivan billed NPC for its services on an hourly basis, adding charges for disbursements and expenses to its bills.78 Sullivan obtained a very favorable result for NPC, obtaining an excise tax refund plus interest totaling $7,218,889.79 Sullivan then sent NPC a bill for $721,888, representing ten percent of the recovery, in addition to charging for remaining disbursements.80 Sullivan essentially reasoned that it was entitled to charge a premium for its successful services because its fee agreement with NPC, spelled out in correspondence, was silent on the topic.81 The court disagreed.82

The Beatty court reasoned that if the fee agreement between Sullivan and NPC was ambiguous, contract law required the court to construe it against the law firm, as drafter.83 The principle of contra proferentem "surely counts double when the drafter is a lawyer writing on his or her own account to a client."84 To the extent that Sullivan thought it was entitled to a premium fee based on its stated intention "to render a fair and reasonable bill," the firm's "subjective and unexpressed expectations" could not refute its objective agreement to charge hourly.85

It is important to note here that attorneys and clients are free to consent to most billing arrangements or practices so long as the client is

77. See id. at 1312.
78. See id. at 1313.
79. See id. at 1314.
80. See id.
81. See id. at 1314-15.
82. See id. at 1314.
83. See id. at 1315.
84. Id.
85. Id. (citing Pahlavi v. Palandjian, 809 F.2d 938, 945 (1st Cir. 1987), and RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981)).
fully informed. A lawyer cannot obtain client consent to an unreasonable fee or to fraudulent billing, of course, but many billing practices that would fail judicial muster in any case where fees are to be awarded by a court may be permissible with client consent.

A. ABA Formal Opinion 93-379

In 1993, the ABA’s Standing Committee on Ethics and Professional Responsibility (“Committee”) expressed concern about “the discouraging public opinion of the legal profession” attributable to “the billing practices of some of its members.” The Committee thus “decided to address several practices that are the subject of frequent inquiry, with the goal of helping the profession adhere to its ethical obligations to its clients despite economic pressures.” One of the subjects the Committee focused on was billing more than one client for the same hours worked, commonly referred to as double billing.

The Committee premised much of its analysis and opinion on Rule 1.5. The Committee also observed that attorneys should disclose the basis for their fees and any other client charges at the outset of each representation. As a corollary to the duty of initial disclosure, attorneys have a duty to provide clear and informative statements so that clients understand the application of agreed billing practices.

In an engagement in which the client has agreed to compensate the lawyer on the basis of time expended at regular hourly rates, a bill setting out no more than a total dollar figure for unidentified professional services will often be insufficient to tell the client what he or she needs to know in order to understand how the amount was determined. By the same token, billing other charges without breaking the charges down by type would not provide the client with the information the client needs to understand the basis for the charges.

86. See Ross, supra note 73, at 49.
87. A lawyer’s fiduciary duty to his clients prevents him from charging excessive or fraudulent fees under any circumstances. See Cripe v. Leiter, 703 N.E.2d 100, 107 (Ill. 1998).
88. For example, a client might consent to “block billing” or to time entries that a court would deem impossibly vague. Whether clients should so consent is a question best answered by individual clients depending on their relationships with their lawyers.
90. Id.
91. See id. at 210, 213.
92. See id. at 210.
93. See id. at 211.
94. See id. at 212.
95. Id.
In sum, both initial disclosure of the basis for the fees charged and subsequent understandable bills foster the attorney-client relationship. 52

1. Billing More than One Client for the Same Hours Worked
In exploring the ethical ramifications of double billing, the Committee offered three examples: (a) simultaneous appearances on behalf of multiple clients; (b) working on one client’s matters while traveling for a second client; and (c) recycling work product. 97 When addressing the propriety of these practices, the Committee analyzed them focusing on the amount of billable hours the lawyer actually earned.

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. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. 93

Attorneys who bill clients for the same time or work product necessarily earn an unreasonable fee, thus violating Rule 1.5. 99 An attorney who agrees to bill a client on an hourly basis obviously cannot charge the “client for hours not actually expended.” 100 Any economies associated with the representation must be passed on to the client. Attorneys billing by the hour may negotiate additional compensation for particularly efficient or superior work; however, attorneys cannot enhance their fee arrangements by billing “client[s] for more hours than were actually expended.” 101

2. The Error in Formal Opinion 93-379
The Committee correctly concluded that clients should not be asked to pay for an attorney’s entire time when the attorney simultaneously

96. See id.
97. See id. at 213.
98. Id. (emphasis added).
99. See id.
100. Id.
101. Id.
appears for multiple clients. Nor should a client pay full price for recycled work product. The Committee erred, however, in its decision concerning work performed for one client while traveling for another client. The Committee determined that attorneys who bill solely for time spent are obliged to pass on to their clients the savings associated with fortuitous scheduling. The Committee is partly correct. If an attorney flies cross-country for depositions on Client A’s behalf, he cannot prepare for those depositions on the plane and then double bill Client A. If the flight lasts six hours, the attorney did not earn twelve billable hours by working on the flight. Under those circumstances, the attorney should only bill Client A for six hours.

When the clients involved are different, the same principle does not apply. For example, if an attorney revises an appellate brief for Client B while flying six hours to attend depositions for Client A, each client received independent value for the attorney’s time. Client A wants the attorney to appear for the depositions, while Client B wants the attorney to prepare a superior appellate brief. Although the attorney’s scheduling may be fortuitous, his travel for Client A has likely precluded other billable activities. Client B does not care whether the attorney writes the brief on a plane or while sitting at his desk, so long as his work is of high quality. Assuming that his work on Client B’s behalf is of acceptable quality, the attorney has “earned” twelve billable hours while traveling for Client A. Under these circumstances, neither client has been charged for hours not actually expended. The fees both clients are charged are reasonable. This is not double billing.

Client A might argue that it is being charged an unreasonable fee because the attorney should be preparing for the depositions on the plane, rather than working on Client B’s brief. The attorney should have worked on Client B’s brief back at his office, saving his deposition preparation in Client A’s case for the related trip. Granted, that clearly is the best practice, and attorneys should strive to create such efficiencies

102. See id.
103. See id.
104. See id.
105. Attorneys’ charges for travel time are often premised on lost opportunity cost. "When a lawyer travels for one client he incurs an opportunity cost that is equal to the fee he would have charged that or another client if he had not been traveling." Henry v. Webermeier, 738 F.2d 188, 194 (7th Cir. 1984). Because time spent traveling represents lost opportunities, there is no justification to compensate attorneys at less than their full hourly rate, as some clients and courts do. See, e.g., Guidelines for Attorneys Providing Legal Services to Reliance Insurance Company, at 9 ("Reliance Insurance Company will agree to compensate attorneys for travel time at one-half the approved hourly rate.") (on file with author).
for their clients, but that does not necessarily make the attorney's conduct unethical. It remains that neither client was charged for hours that were not worked for them. Neither client was double billed. Moreover, it may be that time constraints or other factors beyond the attorney's control prevented him from preparing for the depositions on the plane, and effectively required him to work on Client B’s brief while flying instead. Clients’ economic interests ought not to be elevated to the point that an attorney must forego compensation on facts such as these.

III. SPECIAL BILLING PRACTICES AND PROBLEMS

Any time a lawyer bills a client for his services, the attorney has a fiduciary duty to deal fairly with the client and to safeguard the client’s money. As the *Haines v. Sophia* court observed:

> While lawyers are necessarily entitled to compensation for their services, they are also fiduciaries for their clients. The mere fact that the client is not standing over their shoulders as each time entry is logged does not allow them to inflate the time spent on their client’s behalf. Nor does it allow duplicative services by multiple members of the firm and staff. . . . The ethics of the legal profession demand that the attorney’s right to bill a client for legal services rendered be exercised with a healthy restraint for the client’s economic interests, [and] that doubts be resolved in favor of the client rather than the firm . . . .

While an attorney’s compensation in any particular case is determined primarily by the terms of his agreement with the client, the attorney’s fiduciary relationship with the client prevents him from charging an excessive fee. Excessive or fraudulent billing violates the attorney’s fiduciary duty to his client.

Some billing practices or problems are unreasonable because they so obviously amount to fraud or deceit. For example, the lawyer in *Toledo Bar Ass’n v. Batt* “padded his bills by increasing the time billed above the amount of time he actually worked.” The *Batt* court harshly criticized the lawyer’s conduct, finding his bill padding “equivalent to

108. *Id.* at 212.
110. *See id.*
111. 677 N.E.2d 349 (Ohio 1997).
112. *Id.* at 350.
misappropriation of the funds of a client,” and observing further that such conduct warrants disbarment.\(^{113}\) The lawyer in *Office of Disciplinary Counsel v. Zingarelli*\(^{114}\) gave his client at least four inconsistent explanations for the hours he billed and the fees he charged.\(^{115}\) The Ohio Supreme Court considered the lawyer’s inconsistent statements to be acts of dishonesty,\(^{116}\) and indefinitely suspended him from the practice of law.\(^{117}\) In *In re Jennings*,\(^{118}\) lawyer Kathleen Jennings routinely doubled the time worked by a subordinate lawyer, Tom Bruce, to compensate herself for her time allegedly spent “supervising and directing Bruce and finalizing the work.”\(^{119}\) In disbarring Jennings for these and other incidents of fraudulent billing, the *Jennings* court stated that the “repeated practice of increasing or doubling Bruce’s hours when billing without justification amounts to misconduct,” and it further observed that “guessing or using a fixed rule to double time is not a proper way to keep track of hours which are billed to clients.”\(^{120}\) The associate whose conduct was scrutinized in *In re Hyde*\(^{121}\) repeatedly billed clients for preparing discovery and pleadings that he never in fact prepared, and for attending depositions at which he never appeared.\(^{122}\) Saying that “[d]ishonest conduct by lawyers will not be tolerated,”\(^{123}\) the New Mexico Supreme Court suspended the young lawyer indefinitely.\(^{124}\)

There are other unreasonable billing practices that may or may not be so obvious as the fraud in *Batt, Zingarelli, Jennings, and Hyde*, but that merit discussion in connection with the new law firm economy. These include misrepresenting the personnel who are handling a matter and double billing. Other billing practices that may be unreasonable depending on the situation include minimum billing increments, charging clients for internal conferences, vague time entries, duplication of effort, inefficient staffing, and the use of so-called “transient billers.”

113. *Id.* at 351-52.
114. 729 N.E.2d 1167 (Ohio 2000).
115. *See id.* at 1171.
116. *See id.* at 1176.
117. *See id.* at 1177. The lawyer was charged with other acts of misconduct, as well, such that his false and misleading statements to his client about his billings were not the sole basis for his suspension. *See id.* at 1168-73.
119. *Id.* at 871.
120. *Id.*
121. 1997-NMSC-064, 950 P.2d 806.
122. *See id.* ¶¶ 5-17, 950 P.2d at 807-09.
123. *Id.* ¶ 19, 950 P.2d at 809.
A. The Bait and Switch

The attorney whose conduct was challenged in In re Disciplinary Proceeding Against Haskell,128 practiced in the area of insurance defense.126 At least two of the liability insurers that regularly employed Haskell to defend their insured expected him to take all depositions, make arguments at hearings, and try cases.127 While the carriers knew that clerical work on their files would be done by others in Haskell’s firm, they wanted to approve in advance the involvement of any other attorneys in their cases.128 Haskell knew that his insurance company clients expected him to personally handle their cases.129

Haskell nonetheless delegated work to his associates without the insurers’ knowledge.130 He then had his staff alter the bills for those matters, substituting his initials and hourly rate for those of the associates who actually performed the legal work identified on the bills.131 Because the associates who performed the legal work for which Haskell took credit billed their time at lower hourly rates, transferring the time to Haskell by switching the attorneys’ initials resulted in the clients being overcharged.132

It was undisputed that Haskell’s motivation in switching lawyers’ initials on bills was not financial gain, but rather the retention of the insurance companies as clients.133 Regardless, the conduct was determined to violate Rule 8.4(c).134 For these violations and incidents of expense fraud, the Washington Supreme Court suspended Haskell from practice for two years.135

Similar conduct was scrutinized in In re Disciplinary Proceedings Against Dann.136 The lawyer in that case, Wade Dann, switched subordinates’ initials on bills to conceal who was actually working on clients’ matters.137 Dann also substituted his own initials on a bill for another lawyer’s initials in his firm, thereby increasing the charges to the

125. 962 P.2d 813 (Wash. 1998).
126. See id. at 815.
127. See id. at 816.
128. See id.
129. See id.
130. See id. at 815-16.
131. See id. at 815.
132. See id. at 815-16.
133. See id. at 816.
134. See id.
135. See id. at 824.
137. See id. at 417-18.
client by way of his higher hourly rate. Dann denied any alleged overbilling, reasoning that the work for which the clients were billed was actually done.

The Washington Supreme Court suspended Dann from practice for one year. In imposing the sanction, the Dann court reasoned that it was upholding its obligation “to protect the public from dishonest, deceitful lawyering.”

Haskell and Dann are interesting cases. Looking first at Haskell, what if the insurers had not required Haskell to personally handle their cases? What if they would have freely permitted other lawyers in the law firm to work on their files without advance approval? Would Haskell’s initial switching still have run afoul of Rule 8.4(c)? The answer clearly is yes, so long as the initial switching resulted in the insurers being charged a wrongfully inflated hourly rate. Such inflated bills cannot be justified. But what if the bills had not been inflated as a result? What if all Haskell did was swap an associates’ time laterally, i.e., substitute one associate’s initials for another’s, so that the clients never felt an increased hourly rate?

In Dann, the lawyer wrote off time so that one of the clients who was the victim of the lawyer’s “initial switching” was actually under billed rather than over billed. A problem, of course, was the client’s desire not to have a particular law firm employee working on his matters. The client was thus deceived by Dann’s alteration of timekeepers’ identities on the bills, and an arguably incompetent employee was foisted on the client without his knowledge.

But what if the client had not cared who worked on his case? If Dann then substituted his own time at a higher rate, as he did, but still wrote off time recorded by other lawyers or staff so that the client was actually charged less overall than he might have been otherwise, is the fee then reasonable or unreasonable?

The “bait and switch” that the Haskell and Dann lawyers pulled off—leading their clients to believe that they were receiving what they expected and instead delivering perceived inferior substitutes—has become part of the new law firm economy in the form of “staff

138. See id. at 418.
139. See id.
140. See id. at 424.
141. Id. (quoting In re Discipline Proceeding Against Vetter, 711 P.2d 284, 292 (Wash. 1985)).
142. See id. at 418.
143. See id.
Staff attorneys are paid less than associates and are not on the partnership track. By employing staff attorneys, law firms can do work at lower hourly rates without sacrificing profit.

Assume, for example, that a Midwestern law firm pays new associates $90,000 and requires them to bill 2000 hours annually. If those associates bill their time at an average hourly rate of $130, an associate who fulfills his hourly model produces income of $260,000. Subtracting the associate’s salary, and without calculating the associate’s benefits and related overhead, the law firm has realized a gross profit of $170,000 on the associate’s time. If the law firm can do that same work with a staff attorney who earns $45,000 per year, however, it sees its gross profit increase to $215,000 as a result of the salary savings. Also, if a law firm hires lower-paid staff attorneys, it can afford to compete for business at discounted rates that it would otherwise have to forego.

The problem with staff attorneys from a client’s perspective is that you get what you pay for. Law firms pay staff attorneys less than associates because they typically lack the academic qualifications and personal and professional skills that associates possess. Many law firms do not, however, charge staff attorneys’ time at lower rates. They bill staff attorneys’ time at their regular associate rates. Clients thus pay for talent they think that they are getting when, in fact, they are receiving an inferior substitute. Supervising lawyers who assign staff attorneys to matters without obtaining the clients’ consent, or without charging a lower hourly rate for the staff attorneys’ time, may be charging an unreasonable fee under Rule 1.5 and may be engaging in dishonest, deceitful, or fraudulent conduct prohibited by Rule 8.4(c).

The critical variable, of course, is the particular staff attorney’s skills. While staff attorneys might be presumed to be less able than associates, that is not necessarily so. There are many able staff attorneys. If a staff attorney provides legal services comparable to associates who might otherwise receive the assignment, there is nothing unethical about the staff attorney’s involvement. The staff attorney’s time can be charged at an associate’s rate. Because the staff attorney is delivering comparable value, the fee charged for his services is

144. See Orey, supra note 1 (observing that some firms facing associate salary increases are planning to shift some work to staff attorneys).
145. See id.
148. See Johnson & Coyle, supra note 146, at 371.
reasonable and there is nothing dishonest, deceitful, or fraudulent about his involvement in the matter in question. If the staff attorney is, relatively speaking, an inferior lawyer, the law firm must either: (a) disclose his status and involvement to the client, and obtain the client’s consent to charge his time as though he were an associate; or (b) charge his time at a discounted rate. Arguably, the staff attorney’s hourly rate should be discounted in the same ratio or proportion that his salary bears to that of an associate of like seniority, although so rigid a formula certainly is not required, and many factors may influence a staff attorney’s reasonable hourly rate. Regardless, a law firm cannot, in colloquial terms, sell hamburger at a steak price.

Some law firm leaders will no doubt argue that the approach outlined above is unworkable; that even “real” associates of like experience have widely varying skills and abilities that are not accounted for by differences in their standard hourly rates, and that a law firm’s profit margin is not a factor in determining the reasonableness of its fees. This position is flawed on several levels. First, as a matter of professional responsibility law, Rule 1.5(a) requires law firms to consider lawyers’ experience and abilities when fixing their hourly rates. Rule 8.4(c) requires lawyers to be truthful with their clients. Lawyers cannot avoid these obligations in the name of inconvenience or profit margin. Second, as a matter of fact, law firms routinely evaluate their associates. Associates who are viewed as superior lawyers, or who have special skills, routinely bill at hourly rates higher than those charged for other associates in the same class. There is no reason that staff attorneys cannot be similarly treated.

B. Double Billing

Double billing allows an attorney to expand the workday through fortuitous scheduling or coincidental assignments. Assume, for

149. See generally Model Rules of Prof’l Conduct R. 1.5(a), 8.4(e) (1999).
150. See Johnson & Coyle, supra note 146, at 371 n.40 (noting that “[l]ower salaries for staff attorneys result in ... keeping client bills down”).
152. See Model Rules of Prof’l Conduct R. 1.5(a)(7).
153. See id. R. 8.4(c) (stating that “[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).
154. This statement is based on my personal experience as a law firm associate and partner and on my conversations with other lawyers.

http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss1/4
example, that an attorney flies to another city for depositions and the trip takes four hours. The attorney prepares for the depositions while on the plane. The attorney then bills the client for eight hours: four hours for travel and four hours for deposition preparation. Consider the attorney who schedules court appearances for three clients on the same morning docket and then spends three hours in court, just as he would have for any one of the clients had he not been able to schedule the three matters on the same day. He therefore bills each of the clients for the full three hours, meaning that he has billed a nine-hour day before lunch. Perhaps an attorney spends eight hours preparing a research memorandum that will benefit three clients. The attorney thus puts a copy of the memorandum in each client’s file and bills each client for the full time spent preparing the memorandum, generating twenty-four billable hours.

Double billing makes it possible for an attorney to bill more than twenty-four hours in a given day. Days stretching beyond twenty-four hours are a recurring, if unfortunate, billing phenomenon. For example, North Carolina bankruptcy lawyer Mark Kirby billed clients an average of almost 1200 hours per month in 1990 and 1991, a remarkable accomplishment in light of the fact that there are only 744 hours in a thirty-one day month. Not to be outdone, St. Louis lawyer Forriss Elliott billed eighty-two hours in a single day, putting him on pace to bill 1640 hours in a month with only twenty working days.

C. Minimum Billing Increments

Some firms bill attorney time in minimum quarter hour (0.25) increments, a practice that can lead to artificially large billable hour totals. Four one-minute telephone calls become one billable hour in a firm that bills in quarter hours. Even firms that bill in acceptable one-tenth of an hour (six minute) increments may mandate minimum times for certain tasks. For example, a firm might require that telephone calls

156. See id.
157. See id. (branding this practice “deceptive”).
158. See, e.g., In re Disciplinary Proceedings Against Aven, 564 N.W.2d 326, 326 (Wis. 1997) (suspending attorney who repeatedly billed more than twenty-four hours per day).
159. See Emily Barker, Now That’s Alternative Billing, AM. L. W., Apr. 1994, at 23, 23.
be billed at no less than two-tenths of an hour. Several courts have disallowed or limited attorneys’ fees for telephone calls that were so short that the attorneys who received them recorded no time. 162

There is nothing inherently unethical about the use of any particular billing increment. 163 Attorneys “have the right to establish whatever minimum billing period they wish, cognizant that marketplace pressures will ensure that they are not unreasonable in their practices.” 164 A lawyer may not, however, bill more time than he actually spends on a matter, except to the extent he rounds up his time to the minimum billing period agreed to by the client. 165 Clients are wise to insist that their attorneys bill in one-tenth of an hour increments, which is the lowest reasonable measure of time, and to reject any other minimum times for particular tasks.

D. Internal Conferences

Internal conferences spark a sharp divergence in opinion between many clients and attorneys in private practice. 166 Many corporate clients refuse to pay attorneys for time spent conferring with other attorneys in their firms. 167 Clients and courts are offended by internal conferences in large part because they are expensive. 168 It is also difficult for clients to verify whether internal conferences actually took place and, if so, how long they actually lasted. Such conferences thus create rich opportunities for billing fraud. 169 Clients also dislike internal conferences because they are perceived to be evidence of inadequately trained staff or attorneys. 170

163. See, e.g., In re Scimeca, 962 P.2d 1080, 1092 (Kan. 1998) (“We agree . . . that billing for quarter hours is not a violation if that time is spent on a client’s business. The violation is in not spending the time billed to the client on the client’s business.”).
166. See Ross, supra note 73, at 157, 163.
In fact, internal conferences may promote efficiency, help prevent confusion, and allow attorneys to avoid redundant or duplicative work. Attorneys who talk among themselves often identify strategies, solutions, issues, or problems that would otherwise be overlooked or incorrectly evaluated. Used properly, internal conferences actually streamline and enhance client services, thereby reducing attorneys' total billable time. Attorneys who charge for internal conferences must be prepared to demonstrate that their time spent conferring was both reasonable and necessary. The best practice is for only one lawyer—generally the most senior lawyer involved or the lawyer leading the representation—to bill for time spent in conference.

E. Vague Time Entries

Vague time entries and vague bills or statements are a recurring problem. In Sherrets, Smith & Gardner, P.C v. MJ Optical, Inc., the law firm sued MJ Optical to recover over $60,000 in unpaid fees. One of the issues was whether the law firm's fees were fair and reasonable. In rejecting the firm's claim that its fees were fair and reasonable, the Sherrets court took particular exception to the manner in which the firm documented its efforts.

Even if an agreement for billing on an hourly basis existed, this record does not include the total number of hours spent in providing legal services during each billing period; the identity or level of experience and expertise of the attorneys who performed the services; or the hourly billing rate utilized in arriving at the fees charged. In many

171. Courts routinely struggle with conference time when evaluating the reasonableness of attorneys' fees, as illustrated by Chamberlain Manufacturing Corp. v. Maremont Corp., No. 92-C-0356, 1995 WL 769782 (N.D. Ill. Dec. 29, 1995). In significantly reducing the attorneys’ fee request for time spent in internal conferences, the Chamberlain court explained:

Inter-office conferences among the attorneys coordinating various aspects of a case . . . are not per se unreasonable. [Controlling case law] only forbids excessive numbers of hours being billed to such conferences. Indeed, some time for conferences and the drafting of memoranda to the file is necessary in order to help the attorneys working on the case avoid repeating their efforts. Nevertheless, we frown upon regular billing by multiple attorneys for the same conference. Generally speaking, only the attorney most involved in the case should bill for these conferences . . . .

Id. at *9 (emphasis added) (citation omitted).


174. 610 N.W.2d 413 (Neb. 2000).

175. See id. at 415.

176. See id. at 417.

177. See id. at 419.
instances, the description of the services performed is brief and cryptic. For example, the statement dated April 1993 includes an itemization of 32 services for which $27,712.13 was billed. Five items are described simply as “attention to acquisition” and two as “continued attention to acquisition.”

Vague time entries do little to inform clients whether the services for which they are charged are either reasonable or necessary. As a general rule, attorneys should provide adequate detail and analysis of each task performed so that the client can discern the nature, necessity, and substance of the service. Absent contrary agreement with the client, a proper time entry should include the date the services were rendered, the identity of the billing attorney, a detailed description of the services rendered, and the time actually expended. Lawyers must itemize their time by task when seeking judicial approval of their fees. Lumping—assigning one time charge to multiple tasks—is generally deemed to be impermissible because time entries that are lumped together cannot be reasonably analyzed or evaluated for fairness and accuracy.

“Review’ is a somewhat ambiguous term that often turns up in attorneys’ time records.” It is sometimes seen as evidence of excess or as “a signal for the padding of hours.” Accordingly, attorneys who bill for time spent reviewing materials must be careful to specify the materials being reviewed and the reason for their review.

F. Duplication of Effort, Inefficient Staffing, and Transient Billers

Attorneys must staff their cases efficiently and avoid duplication of effort. Two attorneys should not do the work of one. For example, if two

178. Id. at 419.
180. See, e.g., H.J. Inc. v. Flygt Corp., 925 F.2d 257, 260 (8th Cir. 1991) (noting that a “fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates”) (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).
181. See In re Sturgeon, 242 B.R. 724, 725, 727 (Bankr. E.D. Okla. 1999) (discussing telephone calls that were not itemized).
184. Id. (quoting In re Wicat Sec. Litig., 671 F. Supp. 726, 735-36 (D. Utah 1987)).
attorneys attend a hearing or trial, both should fully participate in the event. There is nothing wrong with having a "second chair" at trial, so long as the second lawyer delivers value to the client. Duplication of effort can also be a problem where one attorney substantially reviews and revises the written work of another, or where two attorneys perform extensive research on the same issue.

The pressure to leverage work and to make under-utilized lawyers profitable often leads to inefficiencies that increase clients' costs. For example, the use of younger lawyers with lower hourly rates may actually end up costing clients more than the services of experienced lawyers who charge higher hourly rates because the inexperienced lawyers take far longer to complete particular tasks than would a lawyer with acquired expertise. *In re Recycling Industries, Inc.* is an illustrative case.

The *In re Recycling* court scrutinized the fees of a law firm which relied on summer associates to perform tasks that would have been more efficiently handled by more senior lawyers. The resulting problems were obvious. For example, one summer associate billed 7.3 hours for the preparation of a "simple and routine" deposition notice. Another summer associate duplicated research performed by lawyers in the firm. While noting "that summer associates can be valuable and worthy of billing clients at reasonable rates," the court nonetheless concluded that the summer associates' time was unreasonable. The court thus reduced the law firm’s fee request for its summer associates’ time by seventy-five percent.

In *Haines v. Sophia*, a lawyer handling a family law matter sued his client to recover $42,000 in fees beyond the $56,521 that his firm had already been paid. The trial court concluded that the $56,521 already paid constituted a reasonable fee and denied the lawyer's request for additional compensation. The lawyer appealed.

186. See *In re Recycling Indus.*, 243 B.R. at 405.
187. 243 B.R. 396.
188. See id. at 404-05.
189. See id. at 403-04.
190. See id. at 405.
191. Id. at 404.
192. See id. at 405.
194. See id. at 210.
195. See id.
196. See id.
The firm attempted to support its position on appeal by referring to its billing summaries and time sheets. The *Haines* court drew exactly the opposite conclusion, stating that the "time sheets vividly demonstrate the soundness of the trial court's ruling." The court was harshly critical of the law firm's billing practices.

The time sheets contain numerous examples of excessive and unreasonable entries. As the trial judge herself noted, in one entry on July 7th Martin Haines charged 35 hours, which he describes as essentially reviewing files. Apart from the obvious rewriting of the laws of physics so that it took the earth 25% longer to rotate on its axis that day, there is nothing in the context to suggest such the necessity for such an extraordinary expenditure of time. Haines argues that the 35 hour entry actually encapsulated all the time he had spent on that holiday weekend working on the file. Some other time sheet entries, however, suggest a different conclusion. On June 30th he claims to have spent 10 hours reviewing the file. On July 3rd he claims 9 hours preparing for and attending a "bifurcation" hearing. On July 4th (which is apparently part of the same long holiday weekend) he claims to have spent 2.5 hours reviewing records and preparing an order.

There are many other questionable entries on these time sheets. For example, on July 2nd one associate billed 6.9 hours, while another billed 4.8, essentially for reviewing and organizing the file. On that same day, an associate billed 4.8 hours for research, while a paralegal billed 3 hours for research on retaining liens and substitution of counsel and 2 hours for other research. On July 10th the same associate and law clerk spent 4.2 and 4.5 hours researching the same legal issue. Two days later the law clerk charged 11 hours drafting a position paper, which the same associate charged 3.4 hours to redraft, while still another associate charged 3 hours to continue reorganizing papers from the client. On July 15th Haines charged 6 hours preparing for a hearing. Later in the month Haines, the associate and the paralegal all charged for working on a petition for certiorari. Indeed in the month of July alone the firm's attorneys and paralegal racked up more than 194 hours!

Not all work that appears at first glance to be duplicative or redundant is in fact so. For example, a partner may review and revise a memorandum supporting a dispositive motion prepared by an associate.

197. *See id.* at 210-11.
198. *Id.* at 211.
199. *See id.*
200. *Id.*
The partner's review and changes presumably improve the memorandum and enhance the client's chance of success. The client saved money by having the associate prepare the memorandum at his lower hourly rate. The partner and the associate are a team, and their fees are not unreasonable simply because they both worked on the same document. Such task overlap is reasonable and, indeed, is often desirable.

"[T]ransient billing" refers to having a lawyer work on a matter "on a limited basis' without accomplishing a discreet task and with no apparent continuing involvement with the matter." Reliance on transient billers—lawyers who drift in and out of a matter for unknown reasons—increases the cost of the representation because each new lawyer must "get up to speed" in order to accomplish anything. Unfortunately, that learning time adds little or no value to the case or project. Unless the client causes or consents to repeated staffing changes, the cost of educating lawyers new to a matter is rarely compensable.

IV. PARTING THOUGHTS

The recent nationwide increase in associates' salaries likely will rekindle smoldering concerns about ethical billing practices. What it should not do, however, is prompt renewed condemnation of the billable hour as a means of compensating attorneys for their professional services. The problem is not the billable hour, but the few dishonest, misguided, and incompetent attorneys who misuse it. Clients who believe that their lawyers are handling their cases inefficiently, or are prolonging litigation for personal gain, should hire different lawyers. Clients simply should not retain lawyers who they do not trust. By way of analogy, a corporate litigation manager would never say about one of his company's accountants, "you know, John sure is a great accountant— if only he would stop embezzling." Or, "I sure wish that Bob would stop stealing from us, because otherwise he is a fine employee." No responsible company expects or accepts employee dishonesty. Why, then, does that same litigation manager condemn hourly billing as a disincentive to efficient litigation practice? Why does he employ lawyers who he apparently distrusts? Good lawyers handle cases as efficiently as possible because it is best for their clients and their own schedules

require it. Honest lawyers do not fraudulently bill their time. To the extent that hourly billing is a problem, it is not the measure of time, but the lawyer involved.

Attorneys must accept responsibility for ethical billing practices. They must recognize their fiduciary duty to charge their time fairly and accurately. Attorneys who are actually reviewing and sending bills to clients (as compared to simply rendering services) must exercise "billing judgment." That is, they must delete from bills and fee applications hours that are excessive, that were accumulated through redundant work, or that are otherwise unnecessary. Billing attorneys cannot allow their colleagues to falsely bill time, to bill excessive time, or to bill for valueless work or services, in the pursuit of profit or to improve their standing in the firm. "The fiduciary duty owed to a client is breached when an attorney fails to exercise billing judgment and overcharges for services rendered." With respect to unreasonable hourly billing practices by associates—a potentially increasing threat given the pressures that seem sure to accompany associates' newfound wealth—significant responsibility for preventing and eradicating problems rests with supervising partners. Indeed, partners are ethically bound to prevent and remedy billing abuses by their associates. How partners fulfill their supervisory responsibilities may "depend on the firm's structure and the nature of its practice," but their responsibilities exist regardless.

204. See, e.g., Cripe v. Leiter, 703 N.E.2d 100, 107 (Ill. 1998).
205. See In re Recycling Indus., Inc., 243 B.R. 396, 405 (Bankr. D. Colo. 2000) (quoting In re Associated Grocers of Colo., Inc., 137 B.R. 413, 421 (Bankr. D. Colo. 1990)). In Case v. Unified School District No. 233, 157 F.3d 1243 (10th Cir. 1998), the Tenth Circuit defined "billing judgment" as "winnowing the hours actually expended down to the hours reasonably expended." Id. at 1250 (citing Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir. 1983)).
206. Law firm managers routinely criticize and penalize billing lawyers who are believed to write off too much time.
209. Id. R. 5.1 cmt. 2.