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INVENTING BILLABLE HOURS: CONTRACT v. FAIRNESS IN CHARGING ATTORNEY’S FEES

Carl M. Selinger*

At least since Professor Lisa Lerman published her fascinating 1990 study of lawyers lying to their clients,1 it has been pretty clear that some lawyers who have agreed to charge clients on a per hour basis actually bill them for hours not spent on the particular client’s work.2 In a 1991 survey by Professor William Ross, thirty eight percent of the private practitioner respondents said that lawyers occasionally “deliberately ‘pad’ their hours to bill clients for work that they do not actually perform,” and 12.3 percent said it happened frequently.3 And in 1993, the American Bar Association (“ABA”) Standing Committee on Ethics and Professional Responsibility issued a formal opinion condemning several practices involving the double billing of hours that it said had been the subject of “frequent inquiry.”4

Thus, the question is not whether lawyers are in fact inventing hours, but whether, and why, they think they are entitled to do so.

In her article, Professor Lerman emphasized the pressures put on lawyers to bill at least the minimum number of hours established by their firms, which are often unrealistic.5 In response, Professor Carrie Menkel-Meadow suggested that the real issue may be “actual greed”;6

* Professor of Law, West Virginia University College of Law. B.A., University of California (Berkeley), 1955; J.D., Harvard University, 1958. Editor’s note: This article is a response to comments made at the conference on Gross Profits. Professor Selinger was in the audience that day.

5. Lerman, supra note 1, at 713-14.
6. Carrie Menkel-Meadow, Lying to Clients for Economic Gain or Paternalistic Judg-
and in the same vein, a recent op-ed column by the communitarian philosopher, Amitai Etzioni, accused the ABA Committee of writing as if “a significant number of lawyers had failed to progress beyond . . . [the] infantile state” of not being able to “tell right from wrong.”" But Professor Etzioni was also inclined to blame the “utilitarian’ or ‘consequentialist’” morals of the law school ethics professors who taught the lawyers in question. At the 1994 Annual Meeting of the Association of American Law Schools (“AALS”), a program of the Section on Professional Responsibility on inventing billable hours, and related fee practices, ended with a similarly inconclusive, but surprisingly heated, “Who’s fault is it?” dialogue.

In my view, this discussion has overlooked another important consideration: the fact that the ethics rules that govern lawyers’ fees have never really made clear to what extent the propriety of a fee charged to a client should be evaluated according to contract/free market principles and to what extent according to principles of fairness. The upshot of this uncertainty has been, I fear, that some lawyers have felt free to use fairness arguments to excuse blatant contractual violations and others to use contract arguments to excuse a lot of unfairness.

Consider, for example, one of the fee practices uncovered by Professor Lerman, asked about in Professor Ross’s survey, and condemned by the ABA Committee: charging a client for the hours that it would have taken to find the answer to a legal question, but were not actually spent because the lawyer happened to already know the answer since the lawyer had looked it up for a previous client, who paid fully for the time it took.

Now, it may well be that the temptation to engage in this practice should never really arise, at least if the lawyer could have foreseen that the answer would be useful to future clients. Ethical Consideration 6-3 in the ABA’s old Model Code of Professional Responsibility said that becoming qualified to handle a matter that is new to the lawyer “through study and investigation” should not “result in unreasonable delay or expense to his client.” Consequently, the

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8. Id.
9. Lerman, supra note 1, at 710.
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lawyer in question might have decided to charge to the first client only some of the hours that it took to find the answer,\textsuperscript{13} and to amortize the remainder over other clients—by charging them a higher hourly rate, by engaging in "value billing" that is not strictly linked to hours put in,\textsuperscript{14} or perhaps by billing each of them for a portion of the as yet uncompensated time that the lawyer originally spent. However, our example assumes that none of those things occurred.

If the lawyer has agreed to charge the present client for hours put in, inventing hours is a clear breach of contract. A former Chairman of the ABA's Standing Committee on Professional Discipline has concluded with regard to billing for hours that were paid for earlier that,

[i]f we have communicated to the client in writing what our basis for charging fees is going to be, and we reach an agreement with the client on that, and let's assume for this purpose that it's an hourly charge, I think that one is going to be hard-pressed to rationalize charging for anything more than actual time spent.\textsuperscript{15}

Additionally, inventing hours constitutes a misrepresentation, which the ethics rules say a lawyer is never supposed to make, to anyone.\textsuperscript{16}

On the other hand, the rules dealing specifically with fees seem to be relics of the days when lawyers tended to do the work first, and decide what to bill later; and clients were generally willing to go along with this arrangement and pay up. "The ... paradigm was a haughty, single page bill on thick, cream-colored bond paper that came no more often than quarterly; it simply bore the words 'For Services Rendered — $150,000.'"\textsuperscript{17} While the ABA's current Model Rules of Professional Conduct encourage lawyers to give new clients written information about their fees "before or within a reasonable

\textsuperscript{13} "We're assuming you spent a lot of time initially because it was a case of first impression or you were unfamiliar with the problem. The first client may well have been overcharged . . . ." Richard C. Reed, \textit{quoted in} Goldberg, \textit{supra} note 2, at 59. "A better course is to discount the second client's fee, explaining that the research was already done, or else give the first client a rebate." Doe, \textit{supra} note 2, at 42.

\textsuperscript{14} Cf. Ross, \textit{supra} note 3, at 38 (discussing the "recycling" of interrogatories). "Rather than basing the bill [to the second client] strictly upon hours, this would seem like an appropriate instance for the application of so-called 'value billing.'" Id. Ross explains that, "[u]nder 'value billing,' an attorney bills a client for an amount of money that the attorney believes represents the fair value of her services." Id. at n.162 (citations omitted).

\textsuperscript{15} Robert P. Cummins, \textit{quoted in} Goldberg, \textit{supra} note 2, at 59.

\textsuperscript{16} MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983).

\textsuperscript{17} Robert L. Haig & Steven R. Caley, \textit{What's a Fair Fee for a Litigator?}, 20 \textit{Litig.} 37 (1993).
time after commencing the representation," even this is explained not in contract terms but simply as a way to reduce "the possibility of misunderstanding." Model Rule 1.5, which is the main rule governing fees, says that they should be "reasonable"; and it treats "the time and labor required" of the attorney as just one of the factors that may be considered in deciding if a fee is reasonable. Among the other listed factors are such problematic ones as "the amount involved and the results obtained," and several that are arguably relevant to the fee practice we are considering: "the difficulty of the questions involved, and the skill requisite to perform the legal service properly," and the "experience, reputation, and ability of the lawyer."

On the basis of this rule, a lawyer tempted to double bill for earlier research may feel that it is legitimate to ask himself or herself: If this is a difficult question that few other lawyers would know the answer to without doing paid research, and the client did not pick me because I would know the answer right off, why is it reasonable that the client should get the knowledge for free? And if I am not charging a higher hourly rate than other lawyers, how else besides billing again for those hours do I get paid for my expertise?

Speaking of a closely related practice, Professor Ross observed that,

If an attorney who has spent one hour editing a set of interrogatories bills a client ten or eleven hours for drafting interrogatories that originally took ten hours to draft in another case, the attorney clearly has defrauded the client. If, however, the attorney bills only for one hour of work, the attorney may not be receiving a compensation that reflects the value of his services, even if the original client fully paid its bill. Moreover, the client appears to receiving a windfall.

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1983).
19. Id. at Rule 1.5(b) cmt.
20. Id. at Rule 1.5(a).
21. Id.
22. Ross, supra note 3, at 37-38. Another double billing practice uncovered by Professor Lerman is that of billing clients who have agreed to pay for hours spent in air travel for all such hours even when the lawyer has used some of the time to do work that will be billed to other clients. Lerman, supra note 1, at 710. To justify this practice, a lawyer might well ask why he or she should be "penalized" for working instead of relaxing, which might be the result if additional compensable work were not available to fill the later time freed up. See roundtable discussion in Goldberg, supra note 2, at 59.

The claim that, "I just deserved it," can have considerable appeal as an excuse not
And Professor Ross goes on to report the results of his survey:

[A] remarkably large minority [of respondents] would appear to countenance the practice of duplicative billing for work that originally was developed for another client. Some 20% of the private practitioners agreed with the statement that they believed that "it is ethical for an attorney to bill a client for work (e.g., research or drafting) that originally was undertaken for another client and has been 're-cycled' for the second client" even if "the second client is billed on the basis of time and is not informed that the work was 're-cycled.'"\(^\text{23}\)

Obviously, the fact that the Model Rules put a reasonableness ceiling on attorneys' fees does not have to be taken as permitting an attorney to unilaterally put a reasonableness floor under fees, irrespective of any contractual agreements to the contrary. But the potential for conflicts between the "reasonable fee" provision in Rule 1.5 and contract/free market principles was seen when the Model Rules were first promulgated, in the concern expressed by the Antitrust Division of the Justice Department that the rule could be utilized anti-competitively as an ethical prohibition against "unreasonably low" fees.\(^\text{24}\)

The unfortunate other side of the coin of contract/free market vs. fairness uncertainty is evident, for example, in the problem of excessive contingent fees, which is currently being addressed by a group of distinguished legal scholars.\(^\text{25}\) The temptation here is for some lawyers to use contract/free market arguments—"[i]t's none of their business how much clients pay me,"\(^\text{26}\) one lawyer was quoted as saying.

\(^\text{23}\) Ross, supra note 3, at 39.
\(^\text{24}\) See Amy Tarr, Do ABA Model Rules Violate Antitrust Laws?, NAT'L L. J., Oct. 15, 1984, at 8. Subsequently, the ABA's Committee on Ethics and Professional Responsibility issued an opinion stating that Rule 1.5 prohibited only unreasonably high fees and did not prohibit lawyers from charging less than usual fees or waiving fees, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1509 (1984), and the Antitrust division responded that it was in agreement with the clarification. See Paul McGrath, ABA Largely Agree on Fees, Communications; Clash on Ad Bans, Daily Rep. for Executives (BNA) No. 11, at A-3 (Jan. 16, 1985).
\(^\text{26}\) Id.
in a New York Times story—to excuse the unfairness of taking high percentages of client recoveries in situations in which the lawyers did little work, gained little for the clients above what they were offered by the defendants to begin with, and never did bear any significant risk of not being paid a fee at all.

To get out of this worst-of-both-worlds situation, the ethics rules for lawyers should, I think, stop talking about fairness or reasonableness, and just tell lawyers to live up to their contracts—no ifs, ands, or buts.

What, after all, is so obviously reasonable about charging clients vastly different fees for doing exactly the same simple (or hard) conveyancing work, based solely on the relative values of the properties concerned ("the amount involved")? What exactly is reasonable—not just practical (what the market will bear), but reasonable—about rewarding, or penalizing, an attorney for outcomes attributable to the underlying legal strength, or weakness, of a client's case ("the results obtained")? And how much real point is there in continuing to talk in the ethics rules about "the difficulty of the questions" and the "ability of the lawyer," when, for example, attorneys have long been encouraged by experts in law office management to try in the first instance to calculate their hourly rates based on their desired annual net income.

Moreover, the danger of seeming to legitimize dishonesty in the practice of law generally is simply too great to give lawyers excuses to invent hours.

Although... misrepresentations [of hours in recycling research situations] may seem relatively venial, such misrepresentations are fraudulent and never should be excused...

[I]naccurate billing in this context is apt to encourage a moral laxity that may spread to other billing practices that are less justifi-

27. In my own view, it was hardly surprising that the Supreme Court held that bar promulgated minimum fee schedules violated the antitrust laws in a case involving a minimum fee for a title examination of one percent of the value of the property involved. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Attempts to justify such unequal, money-making machine fees by reference to the need to carry higher malpractice insurance limits if one handles more expensive properties seem to me more than a little strained.


Professor Roy Simon has reminded me that the fairness language in our present ethics rules could also be used by clients against their lawyers, to get out of perfectly clear attorney fee contracts, and that that prospect could lead to an excessive investment of resources by the parties in scrutinizing the contracts at the outset of the attorney-client relationship.
Given continuing strong marketing pressures to keep hourly rates unrealistically low, and the reduced probability today that attorney-client relationships will last long enough to balance things out, as it were, a need to strictly adhere to fee contracts would tend to make it difficult for lawyers to continue to charge only on a per hour basis when there was any likelihood that the actual hours they put in might not reflect the professional benefits received by their clients. Flat fee, or partially flat fee billing might well become much more prevalent.

And what about lawyers contracting to charge too much? Here, I think that the now well-accepted concept of unconscionability provides the appropriate ethical as well as contractual limitation—a limitation that was arguably embodied in the prohibition in the old Model Code against charging fees that were "clearly excessive," which was abandoned in the Model Rules in favor of talking only about reasonableness.

The Comment to a special Texas rule on unconscionable attorneys' fees is particularly helpful I believe. It states that, "[e]xcept in very unusual situations . . . the circumstances at the time a fee arrangement is made should control in determining a question of unconscionability." And it points out two factors that may indicate that a fee was unconscionable: "The first is overreaching by a lawyer, particularly of a client who was unusually susceptible to such overreaching. The second is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated."
Beyond the general unconscionability limitation, if the public believes that lawyers are charging too much in some circumstances, like some involving contingent fees, it should insist that courts or legislatures enact specific limitations.37

37. See, e.g., Passell, supra, note 25.