

The Catholic University of America, Columbus School of Law

CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

1998

Regulation of Unethical Billing Practices: Progress and Prospects

Lisa G. Lerman

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Lisa G. Lerman, Regulation of Unethical Billing Practices: Progress and Prospects, 1998 PROF. LAW. 90.

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Regulation of Unethical Billing Practices: Progress and Prospects

Lisa G. Lerman*

During the last ten years billing fraud by lawyers has been recognized as a serious problem that undermines clients' trust of lawyers and the reputation of the profession as a whole. It used to be thought that lawyers who wanted to steal their clients' money would just take money out of the trust account. In recent years it has become clear that dishonest lawyers' methods of misappropriation are far more diverse than that.

The focus of this paper is on billing misconduct by lawyers who contract with their clients to bill by the hour. I will not talk about lawyers who borrow from their trust accounts or manipulate contingent fees. One description of the problem we are looking at was a jingle published in the *Wall Street Journal*:

These newfound legal terms today,
You know they've got me reeling.
What lawyers now call overbilling
I thought was simply stealing.

Billing fraud takes many different forms:

- Some lawyers are just sloppy about keeping time records.
- Some systematically "pad" timesheets, or bill one client for work done for another.
- Some create entirely fictitious timesheets.
- Some record hours based on work done by other lawyers, paralegals or secretaries, representing that they did the work. This may result in nonbillable time being billed, or in work being billed at a rate higher than that of the person who actually did the work.
- Some lawyers bill for time that their clients would not regard as legitimately billable—for schmoozing with other lawyers, chatting with clients about sports or families, doing administrative work that could be done by a nonlawyer, or thinking about a case while mowing the lawn or watching television. The methods of expense fraud

*Associate Professor of Law and Director, Law and Public Policy Program, The Catholic University of America, Washington, D.C.

are equally diverse; the lawyers who engage in expense fraud may be stealing from their clients or their partners or both.

- Some lawyers represent personal expenses to be business expenses. Some limit themselves to getting reimbursed for personal expenses that have a “nexus” to the work, like getting a daily massage while in litigation, or buying a new suit while on travel. Others bill clients for extravagant gifts and vacations regardless of whether there is a work nexus.
- Some “doctor” receipts for legitimate expenses to increase the amounts claimed, or manufacture receipts for expenses that were not in fact incurred.
- Some lawyers—being “fair” to their clients—translate legitimately billable time into billable expenses, so that the payment from the client goes directly to the lawyer (tax free) rather than going to the firm.

Billing fraud is far more difficult to detect than expense fraud, unless the lawyer is stupid enough to bill more than twenty-four hours per day. But regulation of this type of conduct is very difficult because no one except the lawyer really knows how much time or money was spent and how much was billed. Because this arena involves such a wide degree of personal discretion, those tempted to cheat may perceive, quite accurately, that the odds of getting caught are close to zero.

Most lawyers do most of their billing by the hour. Firms have increased their stated and unstated annual targets and minimums for associates. Since retention and promotion within firms is affected by hours billed, the pressure to generate timesheets with large numbers of hours is high. I believe that this problem is in fact a hippopotamus under the bed. Many clients have glimpsed the hippo, or have come to worry about whether the hippo is there. Some institutional clients adopt billing policies—prohibiting billing for travel, disallowing the extra associate at the deposition to bill her time, and so on. Others hire auditors who pore over timesheets looking for irregularities.

The profession has just begun to look at the hippo. It isn't a pretty picture. Whenever I talk about this topic to groups of lawyers, some people get defensive, some deny the existence of the problem. But when I talk to lawyers in private, almost every one has a story or three or seven. Even so, our disciplinary rules do not include any specific prohibition of billing fraud, but make a general exhortation that fees must be reasonable. The ABA opinion on the topic in 1993 was a step in the direction of providing needed guidance to lawyers, but only a first step.

Regardless of the precise magnitude of this problem, we as a profession must take it on. As long as some lawyers are deceiving their clients about how much time they are spending or what they are doing, all clients worry. If clients lose confidence that there is some objective basis for the amount they are billed, or if clients lose confidence that their lawyers are being candid about the bases for their bills, who could fault a client who becomes suspicious, demanding itemization and compliance with restrictions.

Billing and expense fraud may be the number one ethical problem in our profession. The growing financial pressure in firms has gravely damaged collegial relationships and mentoring and is partly responsible for the low esteem in which our profession is held.

I got an e-mail recently that included a raft of lawyer jokes. The jokes are a thermometer of social concerns about lawyers. Let me share just a few examples:

"Why does the law society prohibit sex between lawyers and their clients? To prevent clients from being billed twice for essentially the same service."

"If you see a lawyer on a bicycle, why should you never swerve to hit him? It might be your bicycle."

"A man walked into a lawyer's office and inquired about the lawyer's rates. "\$50 for three questions" replied the lawyer. "Isn't that awfully steep?" asked the man. "Yes" the lawyer replied, "and what was your third question?"

Most of the jokes are about mistrust and about fear of stealing. I sometimes wonder if instead of talking about professionalism and civility, we should be talking about lying and stealing.

Lawyers who engage in billing and expense fraud should be fired, disbarred, prosecuted on criminal charges, sued for malpractice. If all the relevant public and private organizations that have some responsibility for this problem take it seriously, I believe that we can change the norms in the profession so that lawyers are more candid and more truthful in billing clients.

CASES OF BILLING AND EXPENSE FRAUD

I have found thirty-seven cases of lawyers who have gone to jail, been disbarred, or been investigated since 1989 for stealing by billing and expense fraud. This is a new category of cases. I found no cases of this sort prior to 1989, when this spate of cases appeared. I would like to share some information about these cases, and comment on what the legal profession might learn from them about detection and prevention of billing fraud.

DESCRIPTION OF A WIDELY IGNORED PROBLEM: BILLING FRAUD BY ELITE LAWYERS

My study of these cases confirms the views of David Wilkins, Ted Schneyer and many other scholars that the disciplinary system performs only one of several needed regulatory functions. The cases demonstrate the need for public and private regulatory responses that not only receive and investigate com-

plaints, but also provide education, prevention, proactive monitoring, and remediation.

I searched for any cases I could find involving allegations of billing and expense fraud. I found thirty-seven of them. From the thirty-seven cases I selected sixteen. I chose to study cases that involved senior lawyers at prestigious law firms, in which the alleged billing fraud exceeded \$100,000, and which have led to prosecution or discipline. My information comes from reported decisions, pleadings, and other published sources. I have talked with three of the lawyers whose cases I am studying. I hope to talk with others.

The sixteen lawyers worked at large law firms, mostly in big cities.² Six of the firms are among the fifty highest-grossing US law firms in 1996.³ One of the others is in the top 100 highest-grossing firms, two others are spin-offs from big firms: one from Cravath, the other from Piper & Marbury.

Of the sixteen lawyers, seven were managing partners, three were heads of departments, many had annual incomes over \$500 thousand, not including the amounts they stole. Most earned law degrees from prestigious schools: three from NYU (LLMs), two from each of Georgetown, Northwestern, and U. of Maryland, and one from each of Harvard, Yale, Columbia, Virginia, Michigan, and USC. One got a Ph.D from the University of Cambridge.⁴

Think about this picture for a minute. The collective image of these prominent lawyers getting caught stealing, not once, not for small amounts of money, but in patterns of fraud that went on for an average of five years, is astonishing. Their collective total proven or admitted theft is about \$16 million. These highly educated successful lawyers were at the pinnacle of the profession. And in many cases it is clear that their partners knew about and/or participated in the billing fraud.

WHAT THEY DID AND HOW THEY DID IT.

Many of the lawyers billed over 3,000 hours a year. The lawyers had a great deal of power in their firms in part because of their high billings. The lawyers engaged in chronic padding of hours, and wholesale fabrication of timesheets, billing for hundreds of thousands of dollars of time not worked and charging clients or the firms for personal expenses. Let me offer some specific examples of the conduct that was (variously) alleged, admitted, or proven in these cases.

Ed Digges made up phony time sheets for his partners and paralegals, and wrote over 100 checks from firm accounts for personal expenses, claiming that they were payments to expert witnesses and other legitimate expenses. When

2. Three in Chicago, four in New York, and three in D.C.

3. Latham & Watkins; Mayer, Brown & Platt; McDermott, Will & Emery; Hunton & Williams; Winston & Strawn; and Akin, Gump, Straus, Hauer & Feld.

4. See chart with summary of data at end of article.

Digges' client began to suspect billing fraud, Digges' partners and their wives spent a weekend in the office rewriting time sheets. (The wives helped so there would be different handwriting on the time sheets.)

Stanford Hess directed that a computer program be set up to inflate time records for one client by fifteen percent to surreptitiously avoid paying a fifteen percent discount he had promised.

H. Lawrence Fox represented as expenses some fees that should have been billed as time worked, so the amounts would be payable directly to him rather than to the firm.

Bill Duker, in his capacity as managing partner of his firm, reviewed the time sheets of other lawyers in his firm, and regularly edited them to add hours that had not been worked.

William Appler billed some clients directly, rather than through the firm, and had them send checks to his home address. He told the firm he was on vacation during some times when he was billing those clients. Sometimes he billed over twenty-four hours a day.

Tim Flato bought plane tickets he didn't intend to use, cashed them in with the airlines and then submitted the receipts for reimbursement.

Many of the lawyers got reimbursed by their firms or their clients for personal expenses: one bought an \$89,000 diamond ring at Cartier's, two got reimbursed for purchases from Victoria's Secret, one charged the firm for thousands of dollars of flowers for his childrens' weddings. Many of them got reimbursed for plane tickets and other vacation expenses, tickets to sports events, club memberships, orthodontist bills, home repairs and plumbing.

WHY DID THEY DO IT?

A few of the lawyers had mental health problems of one sort or another, bipolar illness in one case and less serious problems in the others. Some of the lawyers' judgment may have been impaired by alcohol or other drugs. A few of the lawyers seemed to be really sleazy people, greedy masters of the universe with little or no actual integrity.

What is surprising is that most of them are not like that, and quite a few of them were fine lawyers and decent honest people who slid into patterns of conduct that they may not have fully realized were improper. In some cases they may have been doing just what everyone else in the firm was doing, but someone noticed or someone was after them so they got nailed for it. What we are seeing in these cases is a process of criminalization, in which conduct that once might have led to a "dutch-uncle" talk with the managing partner now leads to disciplinary or criminal action. Because the articulated rules on billing are so vague, many lawyers are caught in a bind where they are under pressure from their firms to increase their billings, and they don't have any clear guidance telling them what is or is not okay. As a profession we are far from consensus on

what billing practices are improper. Should lawyers bill only for time spent providing professional services? Can one bill for sleeping on the plane or watching the movie, or is that only okay if your client knows that you are doing it? Do you have to tell your client that you were billing for time you spent thinking while watching *Seinfeld*, or do you only have to tell about the T.V. if the client asks?

Opportunity and lack of oversight appears to be a significant contributing factor. Many of the managing partners had unfettered discretion in their own billings and expenses, and in "editing" the timesheets of others.

Firm culture is another major culprit. Many of the lawyers appear to have been affected by competitive pressures, and by adopting lifestyles that required more income than they could generate honestly. At least a couple of lawyers were doing a great deal of public service or pro bono work, so their billable hours did not produce the incomes they needed to pay their mortgages, their childrens' tuitions, and so on.

Many law firms evaluate and compensate lawyers primarily on the basis of the number of hours they bill. The preoccupation with income has led some firms to set billable hour requirements so high that they virtually require billing fraud. In 1965 associates' annual billings averaged 1300 hours. By 1988 the average in New York had risen to 2300 hours. These numbers tell a big part of this story. Unlike a dollar, an hour in 1965 was still an hour in 1988.

CRIMINAL PROSECUTION, DISCIPLINE, AND CIVIL LIABILITY

Law enforcement and disciplinary agencies have done a good job in these cases. All sixteen cases have been investigated, and nearly all have led to discipline. Most have been prosecuted. Nine lawyers were criminally charged; all were convicted or pled guilty. Eight received prison sentences, which averaged thirty-four months. Many were ordered to pay restitution. Thirteen of the lawyers were disbarred or indefinitely suspended.

The fact that these cases have resulted in law enforcement does not mean that this problem is under control. To assess the overall effectiveness of law enforcement, one would have to know how many other lawyers are out there manufacturing fake timesheets and not getting caught. These cases may represent the tip of an iceberg.

Civil suits have been brought against many lawyers and firms for malpractice, breach of fiduciary duty or wrongful discharge. Lots of the law firms have reimbursed clients and then sued their former partners. Many lawyers have been ordered or have agreed to pay damages for their billing and expense fraud. Ed Digges' partners were found jointly liable with him for \$3.1 million for malpractice; the malpractice insurer was found not liable. A juror in the Digges malpractice case voiced his opinion that Digges' partners were held liable because "none of them gave a [expletive deleted] as long as they were getting their money." The specter of joint liability may provide a powerful disincentive to tolerance of billing fraud.

The effort involved in investigating and prosecuting these cases cannot be underestimated. Filing charges against a partner in a large firm is a resource intensive undertaking. But criminal prosecution, even of a small number of cases, may provide an effective deterrent to other lawyers. Lawyers, like other professionals, usually have jobs, families and reputations to protect. Most have never been arrested or charged with a crime. Deterrence may be more effective in dealing with white collar offenders than with criminals who have less to lose.

CHANGES IN LAW FIRMS

Prosecution and disciplinary action are necessary, but this problem cannot be solved without some other regulatory changes and dramatic changes in law firms. One way to discourage billing fraud would be to prohibit law firms from setting explicit or unspoken annual targets for associates and partners, and prohibiting the use of data on hours billed as a factor in retention, promotion, compensation or bonus decisions. This sounds preposterous, but think about it. The firms are putting enormous pressure on employees to bill more hours. Should we be surprised that some of them become cavalier about whether they actually work the hours they bill? Also notice that this reform might be as ineffective as it is unlikely. Even if law firms did not set overt targets or minimums, the expectations could be communicated informally. As long as the principal method of billing is by the hour, I fear this problem will dog our profession.

Many corporate clients and government agencies have begun auditing legal bills. But the external auditors only catch a tiny fraction of the misconduct that occurs. Also, many clients can't afford to hire auditors. In recent years many states have started random audit programs to monitor client trust accounts. It would be useful to have random audit programs to monitor billing and expense fraud. One could begin by auditing those who billed over 3,000 hours per year.

Law firms need to become more intolerant of billing fraud, and courts need to provide remedies for lawyers who are fired for raising concerns about unethical conduct. Some firms are on top of this problem, but then there are others. Four of Scott Wolas' partners at Hunton & Williams were co-investors on a multi-million dollar Ponzi scheme. Three associates began complaining to the firm about the partner's billing fraud, but the firm conducted no investigation until eighteen months after the complaints were first made, and then did not report any misconduct because the investigation did not "prove beyond a reasonable doubt" that Wolas engaged in billing fraud. The managing partner told the complaining associates that Wolas was not a "dirty rat" but merely a "sloppy pig." The associates later were fired or eased out of the firm. Now they are suing for wrongful discharge. Wolas disappeared, but before he went into hiding, he repaid his partners who had invested in his scheme.

Although nine or ten of the law firms reported the billing fraud to prosecutors or disciplinary authorities, some firms made no report of the misconduct

or delayed reporting for up to two years. At Weinberg and Green, the partners met at least eighteen times over six months to discuss what to do about Stanford Hess' computer-assisted billing fraud scheme. They disagreed about whether the conduct was improper.

One way to discourage tolerance of billing and expense fraud would be to do what has been done in Illinois, and enforce the reporting rules against lawyers who know about and fail to report such conduct by other lawyers. Lawyer reporting of misconduct increased enormously after the *Himmel* decision, both in Illinois and in branch offices of Chicago law firms.

The legal profession aspires to many ideals. Most lawyers are genuinely committed to professionalism and client service. But some lawyers don't share these values. They may or may not be educable, but even if one cannot sell them on integrity, one might be able to raise the price of misconduct high enough to change their behavior.

SIXTEEN CASES OF BILLING AND EXPENSE FRAUD
a summary of data from a work in progress

	Name, law school where lawyer earned JD & year	Firm where misconduct occurred, position	Alleged amount stolen & dates alleged	Jail sentence (months) & year imposed	Discipline or resignation
1	Edward S. Digges, Jr. Maryland '71	Digges, Wharton and Levin , Annapolis, MD, managing partner	\$3.1M 1984 - 1989	30 1989 -90	disbarred MD & US Sup. Ct. 1990
2	Harvey Myerson , Columbia '64	Myerson & Kuhn , New York, managing partner	\$2.5M 1980 - 1989	70 1992	Suspended pending hearing on sanction New York 1992
3	Wilkes "Skip" Morgan , Hastings '73	Bronson, Bronson & McKinnon , Santa Rosa office, managing partner	\$2.3M 1984 - 1991	24 1993	Resigned CA 1992
4	H. Lawrence Fox , Virginia '64	Winston & Strawn , DC office, managing partner	\$1.62M 1986 -1991	55 no parole 1992	resigned VA 1992 and US S. Ct. 1992 disbarred DC 1993
5	Maureen Walsh , Northwestern, '80	Chapman & Cutler , Chicago, non-equity partner	\$1.48M* 1991 - 1994	12 1997	Petition for Interim Suspension filed 9/97
6	William F. Duker , Yale '81	Duker, Barrett, Gravante & Markel , New York, managing partner	\$1.4M 1990 - 1995	sentencing scheduled for 11/20/97	disbarred New York 9/97
7	William Appler , Georgetown '69	McDermott, Will & Emery , DC, non-equity partner	\$1.1M 1986 - 1991	not prosecuted	disbarred DC 1995

5. Before Mr. Digges started the firm of Digges, Wharton and Levin, he was managing partner at the law firm of Piper and Marbury.

6. Before he started the law firm of Myerson & Kuhn, Mr. Myerson was managing partner and head of the litigation department at Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey.

7. Maureen Walsh Fairchild was married to Gary Fairchild. The disciplinary complaint refers to Maureen as Maureen Walsh because she was listed by that name on her license to practice law. The criminal indictment refers to her as Maureen Walsh Fairchild. I refer to her as Maureen Walsh.

8. Maureen Walsh was charged by the disciplinary agency in Chicago with having overbilled clients and her law firm by \$1.48 million. The subsequent criminal indictment charged her with mail and wire fraud of \$900,000. The discrepancy between these two amounts was not explained.

	Name, law school where lawyer earned JD & year	Firm where misconduct occurred, position	Alleged amount stolen & dates alleged	Jail sentence (months) & year imposed	Discipline or resignation
8	Gary Fairchild, Northwestern '69	Winston & Strawn, Chicago, managing partner	\$784T 1984 - 1994	24 1995 3 yrs. suspended	voluntary disbarment IL 1994
9	Michael X. Morrell, Georgetown '68	Akin, Gump, Strauss, Hauer & Feld, DC of counsel	\$500T 1985 - 1990	none reported in press	disbarred DC 1996
10	Webster Hubbell, Hastings '73	The Rose Law Firm, Little Rock, managing partner	\$457T 1989 - 1994	21 1994	disbarred by consent AR 1995
11	James T. Crowley, Michigan '68	Thompson, Hine and Flory, Cleveland, partner, chairman of litigation dept.	\$385T 1990 - 1992; one incident in 1987	none reported in press	suspended indefinitely Ohio 1994
12	Timothy Flato, USC '81	Latham & Watkins, San Francisco, partner, head of project group.	\$300 - 400T 1991 - 1994	6H ⁹ 1996	resigned from CA bar 1996
13	Richard Solomon, Harvard '79	Mayer, Brown & Platt, Chicago, partner	\$254T 1990 - 1994	none reported in press.	disbarred by consent IL 1994
14	Sherman Taub, New York Law School '71	Tenzer, Greenblatt, Fallon & Kaplan, New York, tax partner	\$225T 1991 - 1994	none reported in press	resigned New York 1996
15	Stanford Hess, Maryland '66	Weinberg & Green, Baltimore, partner	\$110T 1984 - 1987	none reported in press	Petition for Disciplinary Action filed 10/20/97; hearing held 1/20/97
16	Scott J. McKay Wolas, Fordham '76	Hunton & Williams, partner, head of litigation dept. in NY office	unknown approximately	criminal investigation pending	no action taken to date

9. Mr. Flato was sentenced to six months home detention. See Howard Mintz, *Flato Sentence: Six Months of Home Detention*, THE RECORDER 1 (July 29, 1996) (Mintz 96c).