

TIME FOR CHANGE: UNETHICAL HOURLY BILLING IN THE CANADIAN PROFESSION AND WHAT SHOULD BE DONE ABOUT IT.

Alice Woolley*
Calgary

In the United States hourly billing by lawyers has been demonstrated to lead to both inefficiencies, where clients pay for work done to generate hours rather than results, and dishonesty. While the vast majority of Canadian legal work is billed on an hourly basis no attempt has been made in Canada to analyze either whether hourly billing leads to the same ethical problems here or whether the regulatory regime governing hourly billing by Canadian lawyers is sufficient.

This essay argues that hourly billing leads to inefficiency, the temptation to be dishonest and to dishonesty, in fact, in the Canadian profession. After outlining the weaknesses in the current regulation of hourly billing – both formal and market – the essay outlines some regulatory reforms which could help to prevent and correct both the specific forms which unethical hourly billing takes and its causes.

Aux États-Unis, des études ont démontré que la facturation horaire des honoraires juridiques entraînait l'inefficacité (les clientes et clients payant pour des travaux faits en fonction des heures à facturer plutôt que des résultats) et la malhonnêteté. Au Canada, où la vaste majorité des travaux juridiques sont toujours facturés à l'heure, personne n'a cherché à savoir si la facturation horaire suscitait les mêmes problèmes éthiques ou si le régime réglementaire canadien la régissant suffisait à la tâche.

Ce texte soutient que la facturation horaire a pour conséquence l'inefficacité et la tentation d'être malhonnête ainsi que la malhonnêteté au sein de la profession juridique dans son ensemble. Après avoir esquissé les faiblesses de la réglementation actuelle - officielle et par le marché - le texte brosse un tableau de certaines réformes réglementaires qui pourraient contribuer à prévenir et à corriger les formes spécifiques de facturation horaire contraires à l'éthique ainsi que leurs causes.

* Alice Woolley, of the Faculty of Law, the University of Calgary, Calgary, Alberta. The author thanks Jonette Watson-Hamilton and Patricia Hughes for their helpful comments on earlier drafts of this paper, and Frances Woolley, Kate Morisset and Gerald Grenon for their conversations about the ideas it contains. Any errors which remain are the responsibility of the author.

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I. Introduction

The vast majority of Canadian legal work is billed on an hourly basis.¹ The ethical implications of this fact have not, however, been a matter of significant public commentary by Canadian lawyers or law professors.² Specifically, whether hourly billing results in clients paying an appropriate amount for legal services, or whether, by contrast, it creates a culture of inefficiency and dishonesty, has not been discussed. The leading Canadian texts on legal ethics either say nothing or very little

¹ An article by Anne Macaulay, “The Billable Hour – Here to Stay?” online: CBA Practice Link <<http://www.cba.org/cba/Practicelink/mf/alternatives.asp>> puts the percentage of Canadian legal work which is billed on an hourly basis at 85%. Other methods of charging clients include contingency fees, fixed fees and value billing.

² In general few Canadian legal academics write about the legal profession. See: Adam M. Dodek, “Canadian Legal Ethics: A Subject in Search of Scholarship” (1999) 50 U.T.L.J. 115; Alice Woolley, “Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer” (1996) 9 Can. J. L. & Juris. 61.

about the ethical issues arising from hourly billing,³ research has revealed no articles in Canadian legal journals on the subject,⁴ and projects such as the recent revision of the Canadian Bar Association's⁵ Rules of Professional Conduct contain no discussion of hourly billing as a significant ethical issue for Canadian lawyers.⁶

The silence of Canadian practitioners and professors is in marked contrast to the overwhelming level of concern expressed by the American profession and legal academy with the ethics of hourly billing. Since the American Bar Association identified hourly billing as an ethical issue in 1989⁷ there have been at least thirty articles,⁸ three

³ Randal N. Graham, *Legal Ethics: Theories, Cases and Professional Regulation* (Toronto: Emond Montgomery Publications, 2004) pp. 455-459; Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) at 79; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 3d ed. (Toronto: Carswell, 2001) p. 6.1; *Legal Ethics in Canada: Theory in Practice*, Donald E. Buckingham et al, eds., (Toronto: Harcourt, Brace & Company, 1996) (no discussion); Beverley G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book, 1998) (no discussion).

⁴ Supreme Court Justice L'Heureux-Dubé's commencement address to the Northern Illinois University College of Law mentioned the ethical problems with hourly billing: "The Legal Profession in Transition" (1992) 13 No. III. U. Law Rev. 93 at 99. Also, Osgoode Hall law professor Allan Hutchinson wrote a newspaper comment on point: "Justice is Greedy: The real cost of high lawyers' fees is a legal system that's unjust," *Globe and Mail* (6 February 2001) A15.

⁵ [CBA].

⁶ The only proposed amendment to Chapter XI of the CBA *Code of Professional Conduct* online: Canadian Bar Association < <http://www.cba.org> > at 25 (which governs legal fees) is the amendment to permit the charging of contingency fees which are now legal in every Canadian jurisdiction. See: "Modernizing the CBA *Code of Professional Conduct*: Final Report of the Standing Committee on Ethics and Professional Responsibility" (Ottawa: Canadian Bar Association, 1988). Younger lawyers in the CBA do appear to have some concern with the level of lawyers' fees: Janice Tibbetts, "Legal fees too much, say young lawyers" *Calgary Herald* (20 August 2000) A.1. FRO. In addition, *National*, the CBA magazine, occasionally discusses hourly billing: See, e.g., Jordan Furlong, "The Money Tree: There's more to lawyering than billable hours" *National*, (December 2003) 4; Jordan Furlong, "Are you hot or not?" (suggesting that value billing is "hot" while hourly billing is "not") *National* (June/July 2003) 4.

⁷ *Beyond the Billable Hour: An Anthology of Alternative Billing Methods*, Richard C. Reed, ed. (Chicago: American Bar Association, 1989) [*Beyond the Billable Hour*].

⁸ In addition to materials discussed below see: Adam C. Altman, "To Bill, or Not to Bill?: Lawyers Who Wear Watches Almost Always Do, Although Ethical Lawyers Actually Think About It First" (1998) 11 Geo. J. Legal Ethics 203; F. Leary Davis, "Back to the Future: The Buyer's Market and the Need for Law Firm Leadership, Creativity and Innovation" (1994) 16 Campbell L. Rev. 147; Amanda K. Esquibel, "Law and Literature: A Collection of Essays on John Grisham's The Rainmaker: Be Led Not into Temptation: Ethics Lessons from The Rainmaker" (1996) 26 U. Mem. L.

books,⁹ and a further extensive American Bar Association report¹⁰ on the subject. The clear consensus of the American materials is that hourly billing leads to both inefficiencies, where clients pay for work done to generate hours rather than results, and dishonesty.

The silence of the Canadian profession on the ethics of hourly billing is also in contrast to the significant concern expressed by the Canadian media¹¹ and

Rev. 1325; Lawrence J. Fox, "Save Us From Ourselves" (1998) 50 Rutgers L. Rev. 2189; Marc S. Galanter and Thomas M. Palay, "Large Law Firm Misery: It's the Tournament, Not the Money" (1999) 52 Vand. L. Rev. 953; Stephen W. Jones and Melissa Beard Glover, "The Attack on Traditional Billing Practices" (1998) 20 U. Ark. Little Rock L.J. 293; Margaret Kline Kirkpatrick, "Partners Dumping Partners: Business Before Ethics in *Bohatch v. Butler & Binion*" (1999) 83 Minn. L. Rev. 1767; Lisa G. Lerman, "Scenes From a Law Firm" (1998) 50 Rutgers L. Rev. 2153; John J. Marquess, "Conference on Gross Profits: Legal Audits and Dishonest Legal Bills" (1994) 22 Hofstra L. Rev. 637; Virginia G. Maurer et al., "Attorney Fee Arrangements: The U.S. and Western European Perspectives" (1999) 19 NW. J. Int'l L. & Bus. 272; Ankur Parekh and Jay R. Pelkofer, "Current Development 2002-2003: Lawyers, Ethics, and Fees: Getting Paid Under Model Rule 1.5" (2002) 16 Geo. J. Legal Ethics 767; Douglas R. Richmond, "The New Law Firm Economy, Billable Hours, and Professional Responsibility" (2000) 29 Hofstra L. Rev. 207; William G. Ross, "Kicking the Unethical Billing Habit" (1998) 50 Rutgers L. Rev. 2199; Patrick J. Schiltz, "Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney" (1998) 82 Minn. L. Rev. 705; James P. Schratz, "I Told You to Fire Nicholas Farber – A Psychological and Sociological Analysis of Why Attorneys Overbill" (1998) 50 Rutgers L. Rev. 2211; George B. Sheperd and Morgan Cloud, "Time and Money: Discovery Leads to Hourly Billing" (1999) U. Ill. L. Rev. 91; Carl M. Selinger, "Conference on Gross Profits: Inventing Billable Hours: Contract v. Fairness in Charging Attorney's Fees" (1994) 22 Hofstra L. Rev. 671; and Roy Simon, "Conference on Gross Profits: Gross Profits? An Introduction to a Program on Legal Fees" (1994) 22 Hofstra L. Rev. 625.

⁹ William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Durham: Carolina Academic Press, 1996) [*The Honest Hour*]; Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* (New York: Oxford University Press, 2000); Macklin Fleming, *Lawyers, Money and Success: The Consequences of Dollar Obsession* (Westport, CT: Quorum Books, 1997).

¹⁰ *ABA Commission on Billable Hours Report 2001-2002* (American Bar Association, 2002) [*2002 ABA Report*]. Note that this report is said not to have "been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association" (at 2).

¹¹ See, e.g., Andy Willis, "Law Firms Under Fire Over Fees: Rising legal costs may limit small investors' access to courts, critics say" *Financial Post* (7 May 1990) 4; Paul Globus, "Swimming with sharks: How to Negotiate fees with a lawyer without losing an arm and a leg" *The Gazette* (Montreal), (6 May 1998) B3; Janice Tibbetts, "Lawyer fees 'astronomical,' Supreme Court judge says: Binnie suggests courts could exert power to curb costs" *National Post*, (22 October 1999) A4; Diane Francis,

public¹² with respect to the level and propriety of lawyers' fees. The shared perception of the Canadian media and public is that the fees charged by Canadian lawyers are too high, and reflect dubious ethical principles and priorities held by the profession.

Why are Canadian law professors and practitioners silent on the ethics of hourly billing? One possibility is that the American materials only reflect the practices of the American profession, and that the Canadian media and public's opinion only reflects anti-lawyer prejudice. Another possibility is that the regulation of lawyers in Canada is so effective that any unethical billing which does happen is soon redressed. In either case, unethical hourly billing does not create a problem for Canadians and does not warrant academic or professional attention.

In this paper I refute both these possibilities, and argue that unethical hourly billing does take place in Canada, that the current regulatory regime is inadequate to address it, and that reforms must be made to the regulation of lawyers' fees to protect the public and to shift the culture of the profession away from acceptance of unethical hourly billing practices.

To do so this paper begins with a brief overview of the ethical problems with hourly billing identified in the American literature. It then outlines the evidence that hourly billing creates the same ethical problems for Canadian lawyers. Finally, the paper considers what the profession can do to reform the problems with hourly billing. After looking at the current regulation of Canadian legal fees, and at the limitations of the market as a means of controlling lawyers' fees, it proposes reforms to the regulation of Canadian lawyers aimed at reducing the incidence and effect of unethical billing behaviours.

"Resolve litigation through arbitration, not the courts: Adversarial legal system serves only to enrich lawyers" *National Post*, (26 October 1999) C.03; Brian Flemming, "Lawyers should rethink fees: Billable hours put services out of reach" *Halifax Daily News*, (30 August 2000) 22; Douglas Quan, "Top judge's suggestion of fee cuts doesn't impress area lawyers," *Ottawa Citizen*, (23 August 2000) A2; Graham Thomson and Darcy Henton, "Lawyers clean up in Day settlement" *The Gazette* (Montreal), (17 January 2001) A.1.FRO; Janice Tibbetts, "Enormous Fees' must go, judge tells lawyers" *National Post*, (19 August 2003) A7.

¹² The fact that the media expresses concern does not, in and of itself, demonstrate that the Canadian public is also concerned. However, the letters to the editor on the subject of lawyers' fees suggests that in this case the media and the public speak as one: see, e.g., Peter B. Scully, "'Obscene' legal fees," Letter to the Editor, *Globe and Mail* (19 January 2001) A12; Durhane Wong-Rieger, "Legal Tab shameless, not shocking," Letter to the Editor, *Globe and Mail* (21 July 1999) A9; Audrey O'Rilly, "Fees for 'bottom-feeders,'" Letter to the Editor, *Edmonton Journal* (1 October 2000) A13; and Walter Lee, "How can average person afford fees?" Letter to the Editor, *Charlottetown Guardian* (28 February 2001) A.7.

II. *American Critique Of Hourly Billing*

A. *Introduction*

The American materials identify three categories of ethical problems arising from hourly billing: First, lawyers who bill by the hour tend to perform as much work as possible for clients, with little analysis of whether that work is in fact likely to further the clients' interests.¹³ Second, lawyers do not record their time contemporaneously or accurately, which results in clients paying for more time than was spent on their files. Finally, a material number of lawyers who bill by the hour are not honest in recording their time; instead, they either consciously or subconsciously inflate the number of hours they record, with the result that clients pay for hours which were never worked.

B. *Paying Something For Nothing I: Doing Work Which Accomplishes Nothing*

One of the major problems with hourly billing as a means of assessing the value of a lawyer's work is that it provides an incentive for a lawyer to put hours into a client's file without considering whether those hours actually further the client's cause. Some of the American commentators suggest, in fact, that inefficiency and the performance of "busy work" are the primary reasons for artificially inflated legal fees:

More common and more insidious than "padding" and "churning" are more complex practices that ultimately amount to little more than sophisticated versions of the same two abuses. Through liberal methods of time recordation, attorneys may unduly inflate their hours without actually padding any entries. Similarly, overzealous attorneys may perform tasks that yield a benefit to the client that is disproportionately small compared with the bill.¹⁴

This assessment is borne out by surveys of American practitioners and

¹³ When first researching this topic my focus was on the dishonest recording of hours; I was uncertain whether doing too much work, while obviously undesirable, was really an "ethical" problem with hourly billing. Upon further consideration, however, I would suggest that, while much less likely to be associated with *mala fides* than time padding, the failure to accurately assess whether work is being done to benefit the client, or simply to generate billable hours, is a result of the lawyer privileging her own interests over those of her client. The failure to properly account for the legitimate interests of others, and the improper privileging of one's own concerns over those of others, is unethical behaviour. Further, from the client's point of view there is little difference between paying for work from which she derived no benefit and paying for work which was never done at all. In either case she is paying something for nothing.

¹⁴ *The Honest Hour*, *supra* note 9 at 261.

in-house counsel which suggest that bill inflation occurs routinely through lawyers deliberately doing work to generate billings rather than to benefit the client's interests,¹⁵ and through lawyers spending time on intra-office conferences, clerical work, research, drafting legal briefs, drafting corporate documents, responding to discovery requests and preparing deposition digests that is of little or no benefit to the client.¹⁶ Estimates for the amount of time which is billed in the United States for work which is of little benefit to the client range from five to fifty percent of the total time billed.¹⁷ As one lawyer who was interviewed in a study of lawyer's billings put it:

The most common [type of deception], by far, is make-work that the client pays for but that didn't lead very directly to the result. That describes an enormous percentage of the activity that I think goes on in law firms...¹⁸

These make-work projects, and the general failure of lawyers to assess what the client's interests require in deciding how much time to spend on a matter, result in clients of American lawyers paying too much for legal services.

C. Paying Something For Nothing II: It's All In How You Count It

In the new high tech world it is easy to imagine, and perhaps some consumers of legal services do, that lawyers who bill their time record on an ongoing basis precisely how many minutes they have spent doing work for a particular client. According to the American literature, however, such imaginings are no more than that; very few lawyers record their time contemporaneously. Instead, lawyers estimate, at the end of the day, the

¹⁵ *Ibid.* at 29. In that survey forty percent of private practitioners admitted letting billing influence their work decisions on at least some occasions. Some eighty-three percent of in-house counsel surveyed believed that lawyers' work decisions (from five to twenty-five percent) are motivated by billing.

¹⁶ *Ibid.* at 129-130; 135; 137-138; 163. See also *Beyond the Billable Hour*, *supra* note 7 at pp. 85-86 which identified excessive research, too many intraoffice conferences, failure to enter into early settlement discussions, billing for the training of associates, excessive discovery and overstaffing of cases as "[a]mong the most common perceived inefficiencies" with hourly billing. Similarly, the *2002 ABA Report*, *supra* note 10 at 5-7 suggests that the "[c]orroasive" impact of billable hours is reflected in its failure to encourage project or case planning, its penalization of the efficient and productive lawyer, its failure to promote a proper risk/benefit analysis, its failure to discourage excessive layering and duplication of effort, its failure to reward the efficient use of technology, and, finally, the risk it creates that clients will pay for incompetence, inefficiency, associate training and associate turnover.

¹⁷ *The Honest Hour*, *supra* note 9 at 129-130; 135; 137-138; and 163

¹⁸ Lisa G. Lerman, "Lying to Clients" (1990), 138 U. Pa. L. Rev. 659 at 706-709 (Square brackets in the original), citing an interview with Winston Hall.

week or the month how many hours they spent working on a client's file.¹⁹

It is possible, of course, that the failure to keep contemporaneous time records results in lawyers under-estimating the time they spend on files; however, in a world where time billed is the primary measure of legal ability, and lawyers are subject to official or unofficial billing targets, the greater likelihood is that lawyers will inflate their time when recording it. As noted by one critic:

When a lawyer sits down on July 31 and tries to remember how much time she devoted to a client's work on July 9, it is only natural that she will underestimate the amount of time wasted on coffee breaks and personal phone calls and overestimate the amount of time devoted to the client's work.²⁰

Not only are American lawyers not recording their time contemporaneously, they are also not recording it accurately. Very few American lawyers bill in one minute increments and a significant number – perhaps as high as twenty-five percent – bill in fifteen minute increments.²¹ The use of billing increments can be a relatively painless way for lawyers to inflate their accounts:

Another widely accepted way of padding time sheets is to bill in minimum increments of, say, .25 hours or .30 hours. This permits the enterprising lawyer to engage in four two-minute phone calls and bill one hour. I cannot tell you how many times I have seen a lawyer bill a client fifteen minutes for the ninety seconds it took him to leave a voice mail message or to read a one paragraph deposition notice. I recall one occasion on which I sent a letter to an attorney who was representing my client in connection with a lawsuit filed in a distant state. I included in the same envelope copies of two other letters about the lawsuit that I mailed to other people. I later learned that this lawyer had billed my client .90 hours for reading three letters that I had billed my client .50 hours for writing. How? He billed in .30 minimums and billed separately for each of the three letters he read, while I billed only for the time that I actually devoted to writing the

¹⁹ In *The Honest Hour*, *supra* note 9 Ross notes that the majority of attorneys do not record time as they go and suggests, in fact, that fewer attorneys do so than the number who record their time on a monthly or even less frequent basis (at 63). Similarly, interviews of 25 recent law graduates working at large American firms identified only one lawyer who reported recording “her hours in a logbook immediately after completing work for a given client.” Most of the respondents instead reported keeping only “loose track” of their hours: Dennis Curtis & Judith Resnik, “Teaching Billing: Metrics of Value in Law Firms and Law Schools (2002) 54 Stan. L. Rev. 1409 at 1417 [“Teaching billing”]. See also “Lying to Clients”, *ibid.* 716-17.

²⁰ Patrick J. Schiltz, “On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession” (1999) 52 Vand. L. Rev. 871 at 919 [“On Being a Happy...”].

²¹ *The Honest Hour*, *supra* note 9 at 169, citing a survey of lawyers by the Orange County (California) Bar Association.

letters. Many lawyers would admire this as clever and creative (if perhaps a bit aggressive) billing.²²

Through the failure to contemporaneously and accurately record their time American lawyers are artificially inflating the amount their clients pay.

D. Paying Something for Nothing III: Paying For Work Which Wasn't

The greatest concentration of effort, and expression of distress, in the American literature on billing ethics is with respect to the prevalence of dishonest legal billing. While one commentator has asserted that “respect for the legal profession demands that one presume that the majority of attorneys attempt to bill their time in an ethical manner...,”²³ the majority of American legal academics assert that dishonest billing is disturbingly common in the legal profession:

Padding time records is “something everybody does,” a senior associate tells Mitch McDeere in *The Firm*. Lamentably, his remarks ring true not only within the fictitious firm of Bendini, Lambert & Locke, but in the real world as well. Padding time records is a genuine professional plague, one not confined to a few firms or even a few lawyers within most firms. It is a silent epidemic: the realization of what has occurred is so unwelcome that it is largely ignored...

many law firms not only shut their eyes to patently extravagant time, they encourage it. The lesson that Mitch McDeere learned in a fictitious firm controlled by the Mafia – “[m]ost good lawyers can work eight or nine hours a day and bill twelve” – is taught to young lawyers every day. Many young lawyers must feel like they are watching the emperor model invisible clothes: they know that padding time cannot truly be what *good* lawyers do, yet there is no dissent. At first, many young associates in firms with a culture of padding will try mightily to put in the required hours; but eventually they will leave the practice of law, take a job in the public sector, move to a firm with different values, or succumb. The lawyers who succumb swallow a sinister poison, one that dissolves integrity while coaxing its victims to employ rationalizations and psychological avoidance mechanisms to remain consciously unaware of how they have changed.²⁴

The perception that dishonest billing is a “genuine professional plague” is supported by the empirical evidence of dishonest billing in the American profession. In surveys and interviews American lawyers acknowledge the prevalence of dishonest billing²⁵. Further, prosecutions of American

²² “On Being a Happy...”, *supra* note 20 at 919.

²³ *The Honest Hour*, *supra* note 9 at 261.

²⁴ Carl T. Bogus, “The Death of an Honourable Profession” (1996) 71 *Ind. L.J.* 911at 922, 928.

²⁵ See: “Lying to Clients”, *supra* note 18 at 709-719 where Professor Lerman reports numerous examples of overbilling from her anonymous interviews of 20

lawyers provide some shocking examples of dishonest billing²⁶. Even the materials published by the American Bar Association acknowledge that “aggressive time recording” and “questionable” billing practices are issues with hourly billing.²⁷ The evidence is that clients of American lawyers are paying for time which was never spent on their files.

E. Conclusion

The extensive American literature provides a strong basis for the perception that clients of lawyers in the United States are paying too much in legal fees in the form of payment for work which only marginally furthered their legal interests, for hours which were recorded late or in increments, and for hours which were never worked at all.

III. Unethical Billing In Canada?

A. Introduction

Before it can be argued that reforms need to take place in Canada to control the unethical billing practices identified by the American literature,

lawyers; “Teaching Billing”, *supra* note 19 at 1417 which reports that almost half of the twenty-five recent law graduates interviewed acknowledged either intentionally or accidentally inflating their hours; *The Honest Hour*, *supra* note 9 at 29 which reports that sixty percent of in-house counsel and fifty percent of private practitioners claimed when surveyed that “at least five percent of all billable time is the result of padding;” Susan Fortney, “Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and The Effects of Billable Hour Requirements” (2000) 69 U.M.K.C. L. Rev. 239 at 258-59 which reports that double billing (billing two clients for the same period of time) and recycling (billing a client more than the revision time for applying work done for another client to the first client’s case) was admitted by between ten and thirty percent (depending on the size of their firm) of the Texas associates surveyed.

²⁶ See: Lisa G. Lerman, “Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers” (1999) 12 Geo. J. Legal Ethics 205 at 238. In “Blue Chip Bilking” Professor Lerman identified 36 cases of lawyer billing or expense fraud since 1989. She then did an intensive study of the 16 cases which involved lawyers who had stolen more than \$100,000, were jailed or disciplined, and were a high level person either at a respected firm or at a spin-off from a respected firm. Lerman notes that “Many of the techniques described did not involve either ‘failure of judgment’ or ‘puffery’, but reflect shameless, pre-meditated chronic thievery” (at 245). One of the more startling examples of such techniques is the case of Edward S. Digges Jr., who falsified his time sheets, inflated his hours, billed time for persons who did not work on the matters billed, engaged in *ad hoc* billing and, most astonishingly, had partners who, with their wives, “spent part of a weekend at the firm producing fictitious time sheets to correspond with erroneous bills that had been sent to the client. The wives were enlisted so that time sheets would reflect the handwriting of several people.” at 238.

²⁷ 2002 ABA Report, *supra* note 10 at 7, 43.

however, one must first demonstrate that those practices exist here. Otherwise defenders of the status quo will argue that those practices are simply excesses typical of the American legal profession which neither significantly occur nor need to be addressed in Canada.

In determining whether unethical hourly billing is a problem here, I will not consider the question *de novo*. Rather, I will assess whether the balance of the evidence on how Canadian lawyers behave when they bill by the hour either confirms or calls into question the existence here of the unethical practices identified by the American literature. While there are important differences between the United States and Canada in general, and between their legal professions in particular, those differences are not so profound as to render wholly inapplicable American conclusions about the ethics of the legal profession. The differences mean that it is necessary to subject the American position to scrutiny against Canadian sources, but they do not mean that it is necessary to ignore the work of the American academics and professionals who have considered the subject.²⁸

There are various sources of information about the ethics of Canadian lawyers' billing which will be used for this purpose. First, Canadian lawyers are subject to a form of discipline in their fees which does not exist in the United States: the power of the court to tax a lawyer's bill and to enforce the payment of that bill and/or adjust the amount of the bill downwards.²⁹ The taxation cases uncover the usually hidden facts about how lawyers bill their clients, which in turn provides a window into whether those billings are ethically troublesome.³⁰

²⁸ For a discussion of the care required in applying American literature on legal ethics to Canada see Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer", *supra* note 2.

²⁹ This process is referred to as "taxation" or "assessment" depending on the jurisdiction. The terms will be used interchangeably here.

³⁰ Taxation cases do not, however, reveal all of the problems with billing which may arise. Many clients do not use the taxation process even if they are troubled by their lawyers' accounts. For example, a survey of in-house counsel and private practitioners in Ontario suggests that because of the nature of the relationship between big firm lawyers and their clients taxation is a rarely used remedy for billing disputes between those parties: Herbert M. Kritzer, "The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study" (1984) *Am. B. Found. Res. J.* 409 at 416-17. See also text accompanying footnote 80, below. In addition, taxation decisions focus on adjusting the level of the bill; they do not directly consider the lawyer's conduct or attempt to determine whether the lawyer was dishonest. An assessment officer will find, for example, that the lawyer failed to record her time contemporaneously, and will make a disallowance on that basis, but the decision will not assess why the lawyer did what she did or whether she acted dishonestly. As a consequence, taxation cases are a limited source of information with respect to whether Canadian lawyers behave honestly in billing their clients.

Second, there are a small number of law society discipline decisions reported since 1990³¹ which can be reviewed for evidence of unethical billing behaviours.³²

Third, for the purposes of this paper and a related project on the history of hourly billing in Canada, I conducted interviews with eleven Canadian lawyers called to the bar in 1961 or earlier. The interviewees came from British Columbia, Alberta, Manitoba, Ontario and Nova Scotia. All had distinguished legal careers which included, *inter alia*, being founders and/or managing partners of their firms, benchers or presidents of their provincial law societies, and/or being of high repute in the profession. All of the practitioners were men, which is unsurprising given their year of call. All were based in major urban centers, and while the majority had spent a significant part of their careers in large firms, as a group they represent the full spectrum of private practice except criminal law. The lawyers were not randomly selected, and the total number of lawyers interviewed is too small to be statistically significant; however, the views of even a small number of lawyers with that level of experience in the profession is of note in considering whether unethical hourly billing occurs in Canada and needs to be addressed.

Finally, in assessing the likelihood that hourly billing leads to ethical problems in Canada I will consider the systemic incentives and structures created by hourly billing. Incentive structures are relevant for predicting how, all other things being equal, lawyers who bill by the hour will behave.

B. Where There Is Smoke...

The rest of this section will look at the cases, interviews and incentives in the context of the three categories of unethical billing practices identified by the American literature. Before doing so, however, some facts which give a strong air of reality to the general belief that unethical hourly

³¹ The 1990 date is selected to ensure the currency of the data and because it was only in the 1990s that the provincial law societies began reporting their decisions in the Law Society Disciplinary Digest.

³² Like the taxation cases, discipline decisions are problematic as a source of information on the extent of unethical billing in Canada. While the ethical rules on lawyers' billing are written very broadly in most Canadian jurisdictions, Canadian law societies have taken an extremely narrow view of their jurisdiction over the fees lawyers charge. See: Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, *supra* note 3, at 25-15; and *Nova Scotia Barristers Society v. Ayres* [1998] L.S.D.D. No. 8 (aff'd (1998), 169 N.S.R. (2d) 315 (C.A.), leave ref'd [1998] S.C.C.A. No. 374) at para. 157-160 in which the Barristers' Society held that it must be shown that there was a subjective intention to charge an objectively unreasonable fee or, at the very least, willful blindness to the fact that the fee was unreasonable before a lawyer will be disciplined.

billing is a problem for the Canadian profession should be considered. In a random review of one hundred Ontario assessment cases, former Assessment Officer Gramlow and Master Linton found that seventy-eight percent of lawyers' bills were reduced on assessment. While twenty-six percent of the bills were reduced by ten percent or less, almost twenty-six percent were reduced by thirty percent or more, and a shocking nineteen percent were reduced by more than fifty percent.³³ That is, *almost one in five bills assessed was reduced by more than fifty percent.*

Lawyers asked about the taxation power will often suggest that the taxation officer is going to look for somewhere to find a reduction in order to appease the client.³⁴ It is submitted, however, that even if such a tendency exists, which is not established, it is unlikely to explain any of the reductions in excess of ten percent of the fee charged. And if one excludes all of the bills reduced by no more than ten percent that still leaves some fifty-two percent of the legal bills which were reduced because there was an issue with the amount that had been charged. It is submitted that reductions of that frequency and magnitude *prima facie* suggest that there is reason to believe that there are ethical problems with how Canadian lawyers bill their clients. The evidence with respect to the three categories of unethical billing supports this suggestion.

C. Paying Something for Nothing I: Doing Work Which Accomplishes Nothing (Redux)

Overworking Files

Canadian lawyers, like their American counterparts, do work because it generates hours rather than because it provides benefit to their clients. Several of the senior lawyers interviewed expressed the view that hourly billing leads lawyers to spend time on files without scrutinizing the value of that time to clients. For example, SL1, an Edmonton lawyer called to the bar in 1959, pointed to examinations for discovery as particularly subject to this kind of abuse. He felt that often lawyers are pleased if the examination takes three days instead of the three hours actually necessary to find out about the other side's case, get admissions and move on with the lawsuit; these lawyers treat discoveries as "a forum to ask every fool question you can think of and ask for a gazillion undertakings." In SL1's view hourly billing has the result that many lawyers simply have no

³³ R.W. Gramlow and R.B. Linton, *The Nature of the Process for Assessing Solicitor and Client Bills* (Toronto: RWG Consulting, 2000) at xi. The breakdown of the 100 cases is: 22% assessed as billed; 26% reduced up to 10%; 20% reduced from 11-20%; 6.4% reduced from 21-30%; 6.3% reduced from 31-40%; 11.6% reduced from 51-60%; 7.7% reduced from 61-100%.

³⁴ Two of the senior lawyers I interviewed noted this as an issue.

perception that it could be bad for something to take two hours rather than one. Similarly, SL2, a Calgary lawyer called to the bar in 1957, suggested that trials have become longer, and there is less incentive to settle, because lawyers simply keep track of their time and “plug away” regardless of the client’s best interests.

The taxation cases confirm these lawyers’ perception that some of their colleagues fail to calculate appropriately the value to the client of the time they spend. The most common justification for a reduction of fees in the cases was that the lawyer’s bill was excessive for the results which were achieved and/or for the complexity of the matters at issue; that is, a portion of the time which was spent on the file was of marginal or no benefit to the client.³⁵

One of the more egregious examples of billing beyond what the file requires is *Speciale v. Jackson*.³⁶ For representing a client in a straightforward slip and fall case, which was ultimately settled for \$17,000, the lawyer sought \$11,111 in fees and claimed to have spent sixty-four hours working on the file. This was the case even though the client had only achieved her settlement after seeking the assistance of other counsel. The Court held that the amount of time billed was excessive and that unnecessary steps were taken; the lawyer was awarded only \$1000 in fees.

Similar excessiveness is found in *Brock & Brock v. Diogenous*.³⁷ In that case the lawyer represented a client in the purchase of a laundromat. The laundromat was ultimately purchased for \$90,000; the lawyer charged \$36,151 in fees. Assessment Officer Gramlow reduced the fees to \$11,850. He noted that the solicitor had billed 59 hours for time spent

considering status, analysing recent developments, review of file, considering results of various public searches, analysing status, determining strategy, considering problems

³⁵ In addition to the cases discussed below see, e.g., *Cruickshank Karvellas v. Nord* [1999] A.J. No. 43 (Q.B.) (Q.L.); *Wilson, Christen v. Sokolawski* [1992] O.J. No. 1110 (Ont.Ct. (Gen. Div.)) (Q.L.); *Fraser & Beatty v. Clive Levitt and Levitt Architect Limited*, 98/08/27 Court File No. 96-MU-14777; *Baxandall v. Peterson Hustwick Wetsch and Moffat*, [1995] A.J. No. 1243 (Q.B.) (Q.L.); *Fine & Deo v. Christie* (1993), 2 A.C.W.S. (3d) 1094; *Gray v. Ford* (1993), 40 A.C.W.S. (3d) 1044; *Werbicki v. Long*, [1995] A.J. No. 1242 (Q.B.) (Q.L.); *Crowe v. Lucas Bowker and White*, [1995] A.J. No. 1244 (Q.B.) (Q.L.); *McCarthy Tétrault v. Signum Communications Ltd.* (1995), 36 C.P.C. (3d) 169 (Ont. Ct. (Gen. Div.)), aff’d (1997), 18 C.P.C. (4th) 31 (Ont. C.A.); *Cassels, Brock & Blackwell v. Berger*, [1993] O.J. No. 3165 (Ont. Ct. (Gen. Div.)) (Q.L.); *Freedman v. Brown*, [1992] O.J. No. 1670 (Ont. Ct. (Gen. Div.)) (Q.L.); and *Brock, Brock and Eyre v. Vinen*, [1992] O.J. No. 489 (Ont. Ct. (Gen. Div.)) (Q.L.).

³⁶ [1994] O.J. No. 225 (Gen. Div.) (Q.L.).

³⁷ [1992] O.J. No. 1423 (Gen. Div.); rev’d [1994] O.J. No. 497 (Gen. Div.); aff’d [1997] O.J. No. 2640 (C.A.).

with status; developing logic, assessment and checking logic, continued analysis etc.³⁸

Gramlow held that this time was clearly excessive.

In *Scholl v. Haber & Haber*³⁹ the lawyer claimed \$60,211 in legal fees for a matter in which his client had obtained judgment in the amount of \$38,186, including interest. Included in the legal fees was a significant amount of time spent on a medical claim even though the lawyer knew from the outset that the claim was not provable. The fees were assessed at \$33,000.

The disciplinary decisions also indicate the way in which some lawyers will work hours for hours' sake. In *Law Society of Upper Canada v. Sussman*⁴⁰ Sussman was disbarred for, *inter alia*, responding to a \$1600 small claims matter filed against his clients with a \$5,000,000 lawsuit for which there was no basis, and for seeking some \$50,000 in legal fees for his wholly unproductive services.⁴¹

These cases provide some concrete examples of the way in which lawyers can overwork files. However, some lawyers who read about these cases may respond by arguing that they are atypical, that most lawyers are too busy with real work to engage in busy work.⁴² This argument is belied by the proportion of taxation cases in which lawyers' fees are reduced and, as well, does not stand up on its own terms. As noted by SL1 and SL2, the fundamental problem with hourly billing is that it blinds lawyers to the difference between 'real' work and 'busy' work since the client pays the same amount for both. The impetus for lawyers who bill by the hour is to provide their clients with exhaustively researched legal memoranda, and with facts or opinions that have spent hours under revision, even if the exhaustiveness of the research and the hours spent revising have starkly diminishing returns for the client.

This problem with hourly billing is only compounded by the fact that excellent work is more satisfying, and less likely to lead to criticism (or litigation) than not doing excellent work. The resolution of a client's affairs may only require work that is good or very good but hourly billing provides no incentive for the lawyer to assess whether that is the case.

Specific Abuses

The taxation cases and other evidence also suggest that the specific kinds

³⁸ *Ibid.* at 4.

³⁹ [1990] O.J. No. 1576 (H.C.J.)(Q.L.).

⁴⁰ [1997] L.S.D.D. No. 39.

⁴¹ See also, for example, *Law Society of Manitoba v. Lee*, [1998] L.S.D.D. No. 22.

⁴² William Ross notes this argument in *The Honest Hour*, *supra* note 9.

of overworking file abuses identified in the American materials are occurring in Canada. There are a number of cases where lawyers have had fees disallowed for overstaffing files, for duplication of effort on files, for conducting excessive research, for failing to properly use junior lawyers and/or clerical staff, and for excessive and/or inappropriate use of intra-office conferences.

i. Overstaffing Files and Duplication of Effort

In several cases fees have been significantly reduced because of the taxation officer's determination that the lawyers overstaffed the file and duplicated their efforts.⁴³ For example, in *Osler, Hoskin & Harcourt v. Watson*,⁴⁴ the Court upheld an Assessment Officer's reduction of an account by almost half where the reduction was based in part on the excessive number of legal staff used on the file. In its conduct of relatively straightforward matrimonial litigation, Oslers used twenty-six employees including eight lawyers, five law clerks, eight students and secretaries. In upholding the reduction in fees the Court noted:

A corporate mode of legal services, where many solicitors with various areas of expertise are necessary to examine a given situation, is not always appropriate or necessary in matrimonial litigation. A corporate client, for example, may retain and need to retain a firm with a wide range of expertise for advice on multi-faceted problems. The same approach is not justified in relatively straightforward matrimonial proceedings such as these, even if the lawyer practices in a large firm, particularly where senior experienced counsel is retained.⁴⁵

Similarly, in *McMillan Binch v. 1009768 Ontario Ltd.*⁴⁶ legal fees were reduced by sixty percent in part because over a two year period McMillan Binch had twenty-five different legal professionals working on a power of sale; the Court viewed this as "excessive in the circumstances..."⁴⁷

⁴³ In addition to the cases discussed below see, e.g., *Strata Plan VR808 v. Thaxter*, [2002] B.C.J. No. 1129 (S.C.)(Q.L.); *Gardiner v. Field, Turner*, [1999] O.J. No. 3790 (S.C.J.)(Q.L.); *Household Trust Co. v. Cromb*, [1997] A.J. No. 643 (Q.B.)(Q.L.); *Kucher v. Chowne*, [1997] A.J. No. 367 (Q.B.)(Q.L.); *Cassels, Brock & Blackwell v. Berger*, *supra* note 35; and *David v. Wakim*, [1992] O.J. No. 2110 (Ont. Ct. (Gen. Div.))(Q.L.).

⁴⁴ [1993] O.J. No. 462 (Gen. Div.)(Q.L.).

⁴⁵ *Ibid.* at para. 52.

⁴⁶ [1995] O.J. No. 4868 (Gen. Div.)(Q.L.).

⁴⁷ *Ibid.* at para. 15.

ii. Excessive Research

In several taxation cases legal accounts were significantly reduced because the taxation officer was of the view that the lawyer had spent too much time on research.⁴⁸ The most egregious example of excessive research is, however, the disciplinary decision of the Nova Scotia Barristers' Society in *Nova Scotia Barristers' Society v. Jordan*.⁴⁹ Jordan was reprimanded by the Barristers' Society, and subject to random audits for a one year period, as a result of his billing practices in relation to three files. The Barristers' Society was particularly concerned with Jordan's excessive research: on one file where he was acting as a trustee he "amassed 150 pages of research notes and consumed 200 hours of time which he billed and paid from trust monies without the consent of the Court or the beneficiaries";⁵⁰ on another file he spent in excess of 166 hours researching a matter yet was unable to provide any memo of law or written opinion with respect to the matters researched. The Barristers' Society noted that billing for unlimited research is not consistent with the charging of fair and reasonable fees:

A lawyer, whether he is acting in his capacity as a lawyer or otherwise, should not consider his retainer or appointment to give him boundless freedom to conduct research. He must have regard to the resources and objectives of his client or those to whom he has a duty to account. If the lawyer wishes to conduct research for the benefit of his own education in addition to that which is necessary for the conduct of the retainer, the value of the research for the benefit of the file must be carefully scrutinized and the account for services adjusted accordingly. It is not acceptable to blindly conduct research and then to bill for the service without regard to the usefulness of the research.⁵¹

Although the facts of *Jordan* provide a clear example of unethical hourly billing, the case provides some comfort that, when presented with a case of excessive research, a professional body regulating lawyers identifies such excessiveness as an ethical problem. The concern, however, is with whether lawyers are following the practices of *Jordan* rather than the ethical radar of the Nova Scotia Barristers' Society. As the Barristers' Society noted in its decision,

Clients are not often in a position to know whether advantage has been taken of them. They may think it is a normal practice to act as Mr. Jordan did.⁵²

⁴⁸ See, e.g., *Kucher v. Chowne*, *supra* note 43; *Lautrec Acquisition Co. v. Snyder & Co.*, [1996] A.J. No. 623 (Q.B.)(Q.L.), *aff'd* (1996), 192 A.R. 275 (Q.B.); *Biggs, Sloan & Strye v. Sangha* (1990), 23 A.C.W.S. (3d) 707.

⁴⁹ [1995] L.S.D.D. No. 258.

⁵⁰ *Ibid.* at 16.

⁵¹ *Ibid.* at 14.

⁵² *Ibid.* at 26.

iii. Use of Junior Lawyers/Billing for Clerical Work

The failure to use junior lawyers and clerical staff appropriately – either in the form of failing to supervise a junior’s work, or in the form of a senior lawyer doing work more appropriately done by a junior lawyer or a legal assistant/paralegal – is evident from the taxation cases.⁵³ For example, in *Strata Plan VR 808 v. Thaxter*⁵⁴ fees were reduced in part because the senior lawyer had charged \$335 per hour for preparing routine court documents and organizing files, which the Court felt was an inappropriate use of the firm’s resources:

It is of course entirely proper for senior counsel to be engaged in all activities when asked to do so by the client. In the absence of those instructions, however, there is, in my view, an obligation on the part of a law firm to apply its resources efficiently to the task at hand so as to provide reasonable cost-effective representation of the client.⁵⁵

iv. Intraoffice Conferences

In a number of taxation cases costs were reduced because the taxation officer viewed the use of intra-office conferences as excessive and/or inappropriate. In *Lang, Michener, Lash, Johnston v. Schacter et al.*⁵⁶ and *McMillan Binch v. 10009768 Ontario Ltd.*⁵⁷ fees were reduced in part because of excessive time spent in intra-office conferences. In *McMillan Binch* the Court noted:

It was submitted by the solicitor that 3 lawyers and 1 clerk accounted for 65% of the hours. The pre bill reports found in exhibit 2 indicate that from February 1992 to November 1993 there were 516 entries (time dockets). Of that number, 268 entries refer to inter-office or inter-staff meetings including discussions, telephone calls & memos. These 268 entries represent 52% of the postings in all the pre bill reports.

While, as was submitted 4 professionals docketed 65% of the hours; one must question the value of these hours considering that there was such extensive inter-office communication.⁵⁸

In *The Honest Hour* William Ross asserts that intra-office conferences

⁵³ In addition to the cases discussed below see, e.g., *Cyrson Design Ltd. v. Hauptman, Hart, Cherkawsky*, [2003] A.J. No. 1324 (Q.B.)(Q.L.); *Robins, Appleby & Taub v. Friedlander*, [1995] O.J. No. 344 (Gen. Div.)(Q.L.); *Speciale v. Jackson*, *supra* note 36; and *Cozzi v. Hays*, [1992] O.J. No. 1659 (Gen. Div.)(Q.L.).

⁵⁴ *Supra* note 43.

⁵⁵ *Ibid.* at para. 35.

⁵⁶ [1987] O.J. No. 863 (H.C.J.)(Q.L.).

⁵⁷ *Supra* note 46.

⁵⁸ *Ibid.* at paras. 16-17.

can be cost effective for clients insofar as they focus lawyers' efforts on the matters which are most important. While this may be the case where one or two lawyers meet, it is much less likely to be the case where a conference involves five to ten lawyers.⁵⁹ In a meeting of one or two lawyers the benefits of the conference in ensuring that work is being done, and that it is being done by the right people, are clear, and likely in line with the cost to the client of the conference taking place. By contrast, where five to ten lawyers meet many of the lawyers attending will likely make little contribution to the discussion and matters are as likely to get bogged down in irrelevancies as focused on the client's interests. Further, whatever benefits such meetings have, they must be balanced against their enormous hourly cost, which in a large firm could range from \$1500-\$3500 per hour and up.⁶⁰ Moreover, and more significantly, under a system of hourly billing there is no incentive for the lawyers to question whether an intra-office conference is truly furthering the client's interests.

Conclusion

The American materials demonstrate that hourly billing leads lawyers to overwork files, billing time on matters which are of little or marginal benefit to their clients' interests. It is submitted that the evidence set out in this section demonstrates that Canadian lawyers are also doing work to generate billings rather than to benefit the client. The senior lawyers identified overworking files as a significant issue, the taxation and discipline cases give numerous specific examples of it, and the structure of hourly billing creates a strong incentive for such practices to occur. This evidence does not conclusively determine how much or how often legal bills are inflated for this reason; however, it provides a strong air of reality to the assertion that the Canadian profession is no better than the American in this respect.

D. Paying Something for Nothing II: It's All In How You Count It (Redux)

The Canadian profession is not immune from the failure of some lawyers to keep contemporaneous time records. In a number of the taxation cases reviewed for this paper lawyers' bills were reduced because the lawyer had not properly or accurately recorded their time.⁶¹ The cases do

⁵⁹ The value of a meeting of three or four lawyers would vary with the circumstances and the cost.

⁶⁰ Hourly rates at Canadian law firms have sharply increased in the past few years. This fact may exacerbate the impact of unethical hourly billing practices, although much higher rates may conversely make lawyers more cautious about how many hours they record (because the total bill may be less palatable/justifiable to clients).

⁶¹ In addition to the cases discussed below see, e.g., *Nesker v. Mouyal*, [2000] O.J. No. 4334 (S.C.J.)(Q.L.) *McDonald & Hayden v. Golden B. Construction Co.*, [1988]

not necessarily suggest dishonesty on the part of the lawyer, but they do suggest shoddy time keeping habits. For example, in *Kelly & Company v. Kempel and Kempel*⁶² the Court reduced a \$13,000 legal bill by 54% in part because the time dockets on which the bill was based were not recorded contemporaneously, but were rather reconstructed for the assessment hearing. In *Whiteacre v. Stanojovic*⁶³ the legal bill was reduced by 79% because the assessment officer concluded that the amounts charged were purely arbitrary. Despite the client's request for more information, dockets supporting the bill were never supplied nor filed with the assessment officer. In *Reiter v. Gordon*⁶⁴ the \$159,000 legal bill was reduced by 67% in part because

The solicitor's dockets are not accurate. There are errors in duplicate billings. The dockets also show, as an example, 15 hours attendance, at a trial on June 29th, 1992. The solicitor's evidence was that five hours should have been on June 30th, 1992. The solicitors had no notes showing what occurred on either June 29th or June 30th, 1992, at trial. The solicitor's dockets and bills both show, lump sum charges for services performed on a given date. There is generally no break down on either of the dockets or the bills.⁶⁵

In the United States the individual failure of lawyers to keep contemporaneous time records is coupled with the systemic use of minimum billing increments by the profession as a whole. No taxation cases, discipline decisions or interviews with senior lawyers raised the use of minimum billing increments in Canada. My experience of several different law firms, and discussions with other lawyers, suggest, however, that the use of six minute minimum billing increments is standard in Canada.

The use of six minute increments raises an ethical issue because clients can pay an amount six-fold higher than the time value of a particular legal service – where, for example, a client pays six minutes for the lawyer leaving a one minute voice mail message. Six minute increments are significantly less extreme than fifteen minute increments in this respect, however, and most lawyers would likely argue that the use of some minimum billing increment is practically necessary.

While I would concede the practical necessity of one minute billing

O.J. No. 437 (S.C.O. Assessment Officer)(Q.L.); *Ault & Ault v. Lyons Estate*, [1994] O.J. No. 1432 (Gen. Div.); and *McCarthy Tétrault v. Kulikowsky*, [1994] O.J. No. 571 (Gen. Div.)(Q.L.).

⁶² Court File No. 96-MU-14600, Ontario Assessment Officer.

⁶³ 96/07/05, Court File No. 93-MU-06352.

⁶⁴ [1996] O.J. No. 4798 (Gen. Div.)(Q.L.).

⁶⁵ *Ibid.* at para. 10.

increments, the practical necessity of six minute increments is questionable, particularly where the amount recorded for a task is less than half an hour. If a lawyer is working on a file for an extended period of time – two to three hours for example – it is likely that there will be a certain amount of rounding in her recording of time regardless of whether she has official billing increments or not. When a lawyer spends a longer period of time she is naturally less likely to keep a careful record of how long she spent and the proportional cost to the client of her not doing so is lower.⁶⁶ In such a case recognizing this reality with minimum billing increments is excusable. But if the lawyer has spent less than half an hour on a task she is more likely to know exactly how long she spent, and by using billing increments she will have a proportionately higher impact on the bill she sends. It is submitted that with modern computer time keeping and billing programs there is no longer any practical necessity for using increments for tasks taking less than half an hour where the lawyer clearly knows (or ought to know) how much time she has spent.

It could be argued that where a lawyer is conscientious in his billing habits increments are neutral across clients; conscientious lawyers only write down matters which take less than three minutes where it is important that they have a record that the task was done.⁶⁷ With this approach clients who receive three minutes for free will, over time, balance out those clients who pay six minutes for three. One can question, however, whether all, or even a majority, of lawyers take this approach. The system is designed so that lawyers do not have to give their clients this benefit and it is not in their economic interest to do so.

Finally, a lawyer may respond that the cost effect of six minute billing increments is so small that the practice does not raise an ethical problem. She might point out that even with a well above average billing rate of \$350/hour, the difference between a bill of one minute and one of six minutes is less than \$30. The response to this argument is that, first, \$30 differences can add up over time; ten such billing entries is a difference of closer to \$300. Second, if it is not practically more difficult to bill in one minute increments, and there is a benefit to the client from doing so, then what ethical justification can be given for continuing to use higher six minute increments?

Conclusion

The taxation cases reviewed for this paper suggest that the Canadian profession has members who overcharge clients because they do not keep

⁶⁶ An extra five minutes of time on a 180 minute bill is less proportionally significant than an extra five minutes on a one minute bill.

⁶⁷ Reviewing a limitations diary, for example.

contemporaneous time records. The impact on clients of these poor practices of individual members are compounded by the systemic practice of the Canadian profession to bill in increments even where the task being performed is short, the lawyer knows exactly how much time she has spent on it, and the result of the use of increments is that clients pay more for legal services than they were worth.

E. Paying Something for Nothing III: Paying For Work Which Wasn't (Redux)

Introduction

When the ethics of lawyers' billing is raised in Canada, the focus point tends to be on whether lawyers are honest in writing down their time. It is on this point that the perception that Canadian lawyers over bill can be most pointed:

Have you heard the one about the lawyer who objected to finding himself at heaven's gate? He told St. Peter it must be a mistake because at 45 he was far too young to be dead. "That's odd," St. Peter replied, "according to the hours you've billed you're 120."

This and countless other lawyer jokes reflect widespread public skepticism about the legal profession (except, of course, when we need a lawyer). And if there's a single common source of this distrust, it is the perception lawyers charge too much.⁶⁸

This section will identify the evidence which exists with respect to whether, as the quotation suggests, Canadian lawyers bill dishonestly.

Cheats and Liars?

The discipline decisions provide specific instances of Canadian lawyers who were dishonest in their hourly billing. In *Nova Scotia Barristers' Society v. Ayre*⁶⁹ Ms. Ayre was suspended for six months in part because of her improper billing practices. She had failed to keep accurate time records, instead preparing accounts by "reviewing the entirety of each file and estimating time." Further, she had billed for time spent calculating the bill, for time spent after she had been discharged as counsel and for time at a higher hourly rate than that which was agreed to. Ultimately the Barristers' Society concluded that Ayre had "intentionally inflated" her accounts.⁷⁰

⁶⁸ "Your legal bill is no joke" Editorial, *Ottawa Citizen*, (23 August 2000) A16.

⁶⁹ *Supra* note 32.

⁷⁰ *Ibid.* at paras. 165, 172; see generally 165-74.

In *Law Society of British Columbia v. Nader*,⁷¹ Nader submitted inflated accounts to the government, who had agreed to fund lawyers representing certain persons at the APEC inquiry. Nader requested that he be remunerated at the highest level for his category to compensate him indirectly for the significant amount of work he had previously done for his clients on a *pro bono* basis. He also, however, inflated the hours submitted so that he would be paid directly for the *pro bono* work done. When asked for dockets of the time he had submitted Nader withdrew his claim and acknowledged that the hours could not be proven. Nader was found guilty of professional misconduct and was suspended from practice for eighteen months.⁷²

More comprehensive evidence that Canadian lawyers bill for time not worked comes from the interviews with senior members of the bar. Although many of the senior lawyers acknowledged the positive aspects of hourly billing, and a number felt that the nature of the billing system used was less significant than the honesty of individual lawyers, all but one noted the ethical pressure which comes from hourly billing, particularly where it is combined with annual billing targets.

For example, SL3 was called to the bar in 1958 and practices in a mid-large sized firm in Toronto. In his view, hourly billing quotas create a temptation for lawyers to choose the higher estimate of the time spent. When not sure whether they worked two or three hours they will choose three. He said that he was not saying that lawyers are being dishonest, but rather that they are driven by the fact that they must have an acceptable number of hours.

This negative view of the effect of hourly billing was shared by SL1, the Edmonton lawyer called to the bar in 1959. SL1 described hourly billing as “totally contrary to the public interest” in large part because it rewards inefficiency but also because it creates a tendency to pad hours. In his view, where a large firm tells associates that the minimum billing target is increasing to 1850 hours/year from 1600, associates will bill 1850 even if they do not work any harder than before.

SL2, the Calgary lawyer called to the bar in 1957, was of much the same view. He said that if you tell a junior lawyer to bill 2000 hours a year that lawyer will do so whether he works the hours or not, and that if you tell a partner that he will receive the most points if he bills the most he will bill more too. SL2 described measuring success by hours billed as “absolute complete insanity.”

SL4, who was called to the bar in 1954, practiced in mid-sized firms

⁷¹ [2001] L.S.D.D. No. 40.

⁷² His penalty would have been higher but for certain mitigating factors related to his health and to his waving of his legitimate claim for reimbursement.

in Winnipeg. SL4 was more balanced in his view of hourly billing. He did not think that most lawyers padded their time and said that he “likes to think most lawyers are ethical.” He also noted, however, that hourly billing creates temptation and that he had had certain partners “who should have gotten a Nobel prize for fiction.” He subsequently qualified this remark by saying that this was because they recorded things that did not have to be recorded rather than because they recorded time which they did not work.

SL5 was called to the bar in 1952 and practiced in a large firm in Winnipeg. He also had mixed views on the value of hourly billing. He felt that it is a useful management tool in a large firm but also felt that, when combined with billing targets, it creates a tendency to pad time and for lawyers to justify what they are doing by overdoing.

SL6 was called to the British Columbia bar in 1965 after practicing law in the United States. He practiced with a large firm in Vancouver. He said that he did not witness any padding of hours but that that did not mean that it wasn't going on “five feet away.” He noted that there is

Pressure on young people to record a lot of hours in a month or a year and I'm sure that some of them yield to that pressure and either pad their hours or take on tasks they really shouldn't be doing.

The only lawyer who was uniformly positive on hourly billing was SL7, a Halifax lawyer called to the bar in 1961. SL7 practices in a large firm in Halifax, and said that in his observation as many lawyers under-record their time as over-record it. He noted times when he had had to tell junior lawyers that they were not recording enough time for the hours which they were working. He felt that if a lawyer was going to be dishonest they were going to be dishonest regardless of the billing system used.

With this exception, the overall view of the senior lawyers interviewed was, then, that hourly billing, when combined with minimum billing targets, creates at best the temptation to be dishonest and, at worst, dishonesty in fact. The validity of these lawyers' views, and of the perception that very high billings are associated with hour inflation, is supported by consideration of the number of working hours necessary to sustain billings at the 2000-3000 hour per year level.⁷³ The American materials suggest that “an attorney normally must spend three hours in the office for every two billable hours.”⁷⁴ This takes into account non-billable work such as firm management and administration, attending conferences or other legal education activities, reviewing legal update materials provided by the library, reviewing communications from the law society,

⁷³ Candid conversation with any Canadian lawyer indicates the existence of Canadian lawyers billing at these levels, often over a several year period.

⁷⁴ *The Honest Hour*, *supra* note 9 at 27.

and recruiting and marketing activities. It also includes non-productive time such as lunch breaks and coffee breaks, chatting with colleagues at the office or talking with friends on the phone.⁷⁵ Using this ratio, and assuming that she takes only 14 full days off a year including all statutory holidays, vacation and weekends, the lawyer who bills 2400 hours a year must work 3600 hours a year, which comes to 72 hours a week over 50 weeks. To achieve 72 hours this lawyer would have a typical work week of four 13 hour days (8AM-9PM) between Monday and Thursday, a ten hour day on Friday (8AM-6PM), a two hour day on Saturday (10AM-12PM) and an eight hour day on Sunday (10AM-6PM), and she must have this kind of week for every week of the year except two.

The lawyer who bills 3000 hours a year has an even more onerous working schedule. He must work 4500 hours a year which comes to 90 hours a week for 50 weeks a year. His typical work week would have three 16 hour days (7AM-11PM) and one 14 hour day (8AM-10PM) from Monday to Thursday, a ten hour day on Friday (8AM-6PM), a six hour day on Saturday (10AM-4PM) and a twelve hour day on Sunday (9AM-9PM). Again, this would have to happen week in and week out for 50 weeks of the year.

Can I prove that all lawyers billing over 2000 hours a year pad their time? Of course not, and nor do I think that to be the case. But do I, like SL1 and SL2, believe that, whether consciously or sub-consciously, an amount of time that is written down by some of the lawyers billing at these levels was never worked? Absolutely. The inherent implausibility of the work schedule which that level of hours requires, when combined with the equation between hours, success and money prevalent in much of the profession, creates, in my submission, a reasonable basis to suspect that many and perhaps even a majority of the lawyers who routinely bill 2000-3000 hours a year are engaging in either conscious or sub-conscious hour inflation and/or other improper billing practices such as recycling and double billing.⁷⁶

⁷⁵ It could be argued that applying a 3/2 ratio regardless of the hours billed is unfair given that certain matters like law firm administration should only take a constant amount of time. There is some validity to this argument. However, many of the unproductive uses of time are variable with hours worked – for example, the more hours you spend at the office the more meal breaks you will need. Further, while the proportion of time spent on matters such as law firm administration goes down as billable hours go up, the drop in productivity which is certain to occur with such an onerous schedule more than makes up the difference.

⁷⁶ With respect to what is included in recycling and double billing see footnote 93, below.

Conclusion

Verifying (or refuting) the perception that Canadian lawyers overcharge by padding their hours is especially difficult. As William Ross notes, padding time is not only tempting to lawyers who bill by the hour, it is also almost impossible to detect:

Most dishonest billing is the perfect crime. Because there is no practical manner of verifying the accuracy of most time records, every attorney who has billed time knows that hourly billing creates tempting opportunities for fraud...much padding of hours is simply impossible to detect and can escape the attention of even the most dedicated sleuth.⁷⁷

When looked at in light of the magnitude of the difficulty of proving lawyer dishonesty, the evidence reviewed in this section does suggest the existence of dishonest hourly billing in the Canadian profession. Discipline decisions give some examples of it, the majority of the senior lawyers interviewed believe that it occurs, and the level of billings which some lawyers produce justify the suspicion that dishonest billing is a problem in the Canadian profession.

F. Conclusion

Canada does not have the high profile cases of lawyers convicted of billing fraud which have occurred in the United States, and nor have there been any broad surveys of the profession which could provide statistical evidence that Canadian lawyers are not billing their clients ethically. It is submitted, however, that the frequency and significance of bill reductions in taxation cases; the facts of particular taxation cases which clearly indicate that lawyers perform work which is more notable for the hours generated than for the value provided; the discipline decisions which document the improper billing practices of some members of the profession; the general view of senior members of the bar that hourly billing creates at best the temptation to be dishonest and, at worst, dishonesty in fact; the implausible working schedule which extraordinary high billings require; the economic incentive created by hourly billing to record both everything done and more than was done; and, finally, the pressure arising from a world in which hours billed is equated with success, demonstrate that the problems with hourly billing documented in the American literature exist here.

⁷⁷ *The Honest Hour*, *supra* note 9 at 23.

IV. What Should Be Done?

A. Introduction

Having demonstrated the existence of unethical hourly billing in Canada, the next question is: is the current regulation of Canadian lawyers adequate to address these problems with hourly billing and, if not, what should be done to improve it? In order to answer this question, however, it is important to first identify what effective regulation of hourly billing would do.

Regulation of hourly billing, whether formal or through the market, should seek to prevent lawyers from unethical hourly billing, and to protect the public from paying the cost of these abuses. In order for regulation to be effective it must address both the symptoms of unethical hourly billing – its specific manifestations in overworking files, improper recording of time and dishonesty – and its causes.⁷⁸

While a thorough analysis of the causes of unethical hourly billing goes beyond the scope of this paper, a preliminary identification is possible, and can be used to assess both the effectiveness of the current regulatory regime and what should be done to improve it. It is submitted that unethical hourly billing is caused by, *inter alia*: the economic pressure of modern legal practice and the drive, particularly in large firms, to very high incomes at both the associate and partner level; the desire of individual lawyers for recognition and achievement when combined with the strong link in many law firms between high billings and professional success; inadequate training; the incentive structure of hourly billing which provides higher economic rewards for lawyers who bill time relative to those who are more efficient and/or sensitive to the interests of their clients; a legal culture in which aggressive billing practices are tolerated or rewarded; and, finally and most importantly, opportunity.

Bill Clinton has recently said of his affair with Monica Lewinsky:

I think I did something for the worst possible reason — just because I could. I think that's just about the most morally indefensible reason that anybody could have for doing anything.⁷⁹

⁷⁸ By “causes” in this context I am not referring to the legal concept of “causation” but rather to the more generic idea of things which lie behind other things, in this case the things which lie behind unethical hourly billing. So, for example, inadequate training, pressure to bill more hours, the incentive structure of hourly billing and opportunity can all be recognized as possible causes of unethical hourly billing even if none can be identified as having “caused” unethical hourly billing in a legal sense.

⁷⁹ Howard Kurtz, “Bill Clinton’s Very Personal Reflections” *Washington Post*, (17 June 2004) C01.

It is submitted that this “worst possible reason” also explains a material amount of unethical hourly billing and is one of the things which effective regulation of hourly billing must seek to address.

B. Formal Regulation of Lawyers’ Fees

The regulation of legal fees in Canada takes three basic forms. First, as already noted, bills sent by lawyers to their clients can be taxed and adjusted downward to an amount which is fair and reasonable. Second, provincial law societies have codes of professional conduct which set out the ethical constraints on lawyer billing and which provide a basis for disciplining lawyers. Finally, a small number of Canadian law societies have arbitration or mediation services which a client can use where she believes her bill was inappropriately high.

It is submitted that none of these regulatory mechanisms can, in their current form and application, adequately prevent or control the abuse of hourly billing by Canadian lawyers.

The taxation power is an important mechanism for regulating lawyers’ fees – it provides a way for clients to obtain an independent and informed review of their lawyers’ accounts and, as a consequence, will correct some of the abuses of hourly billing identified in this paper. It has, however, two major drawbacks as an effective means of regulating lawyer conduct. First, while taxation officers have the power to reduce a lawyer’s bill, they do not have the power to impose any sanction on the lawyer beyond the reduction of that specific bill. Unless, therefore, the taxation power is used in conjunction with law society discipline (which occurs only in egregious cases)⁸⁰ it does not have any preventative force outside of the specific case in which it is applied.

Second, a client will not always use the taxation power even if she is unhappy with her lawyer’s account. Clients may be worn down by their negative experience with the lawyer, strict time limits apply to taxation in most jurisdictions⁸¹ and clients may not be aware of the availability of taxation of accounts. Notably, a large and culturally influential part of the legal community⁸² – lawyers who practice in large firms – are rarely subject to the taxation power.⁸³ For those lawyers the taxation power

⁸⁰ In Alberta, for example, taxation cases are referred to the law society when the reduction is greater than 50%.

⁸¹ For example, in Ontario clients have one month from the time they receive their bill to start the assessment process.

⁸² “Small firms, corporate legal departments, government offices, and even public interest firms “have borrowed many features of large firm practice”: Bogus, “On Being a Happy...” *supra* note 20 at 896.

⁸³ *Supra* note 30.

provides little reason to bill ethically.

The various codes of conduct, and the disciplinary power of the law societies, are also weak means of regulating lawyer conduct. For the most part the various codes of conduct set out general requirements that fees be fair and reasonable, or not “excessive.” The rules in the codes set out no specific requirements for how lawyers who bill by the hour should conduct themselves.⁸⁴ Of the provinces considered here only Alberta requires that information on fees be provided in writing, and only Alberta expressly sets out reservations about the use of time as the main factor in billing.⁸⁵ Having general principles is important, and prevents lawyers from engaging in “rule morality,” where they parse the ethical rules and follow their letter rather than their spirit.⁸⁶ However, the lack of any specific restrictions on hourly billing means that the codes speak to neither the specific manifestations of unethical hourly billing nor to the underlying problems of the incentive structure of hourly billing, law firm practices, inadequate training in hourly billing and the legal culture which awards aggressive billing.

Further, law societies have taken an extremely restrictive view of their power to discipline lawyers for improper billing practices, intervening only where there is evidence of a subjective intent to overcharge.⁸⁷ Given the extraordinary difficulty of establishing such intent, particularly to commit “the perfect crime,” the consequence of this narrow approach is that, when combined with the generality of the rules, the possibility of law society discipline does almost nothing to prevent or correct either the symptoms of unethical hourly billing or its causes.

At least three provincial law societies have introduced fee mediation (British Columbia) or arbitration (Manitoba and Québec). Like taxation, these services provide meaningful and important protection to consumers of legal services. Also like taxation, however, these services have limited

⁸⁴ See: Nova Scotia *Legal Ethics and Professional Conduct Handbook*, Chapter 12; Ontario *Rules of Professional Conduct*, Rule 2.08; Manitoba *Code of Professional Conduct*, Chapter 11; Alberta *Code of Professional Conduct*, Chapter 13; British Columbia *Professional Conduct Handbook*, Chapter 9. British Columbia uses the language of not “excessive;” the other provinces use the fair and reasonable standard.

⁸⁵ Rule 2 of Chapter 13 of the Alberta *Code of Professional Conduct* requires that a lawyer provide “in writing... as much information regarding fees and disbursements as is reasonable and practical in the circumstances.” Commentary C.1(b) states that “When time expended is the most important factor, or the only factor, taken into account by a lawyer, the result may be a disservice to either the client or the lawyer... It is generally preferable to consider a range of factors in establishing a fee unless the client has specifically agreed to pay on the basis of time.”

⁸⁶ See: Hutchinson, *Legal Ethics and Professional Responsibility*, *supra* note 3 at 39-43.

⁸⁷ *Supra* note 32.

regulatory utility insofar as they have no general application and are unlikely to be used by the clients of large firms. As a consequence, while I would urge other law societies to make similar services available, those services cannot provide a complete answer to the problem of hourly billing abuse.

C. Market Regulation of Lawyers' Fees

Even if these formal mechanisms are ineffective, however, lawyers may argue that if there is a problem with hourly billing it will be fixed by the market – lawyers who bill unethically will be more expensive and clients will not use them. The problem with this argument, however, is that lawyers work in a highly inefficient and imperfect market. As cogently analyzed by Gillian Hadfield this is not only because the law is a regulated monopoly, but is also because of the nature of “the law” as a commodity.⁸⁸The law is opaque, complex, unpredictable, results in winners and losers, and involves large sunk costs. As a consequence, purchasers of legal services must rely on lawyers to tell them “how much of the good or service they need” and are, generally, unable to “assess whether or not the service [they received] was performed or how well.”⁸⁹ It is “extremely difficult for anyone, including other lawyers, to judge whether the time spent on a case was honestly and carefully determined...”⁹⁰

It is submitted that the inefficiency of the market for legal services, and the resulting disparity of power between lawyers and their clients, preclude reliance on the market as a means of preventing unethical hourly billing, and require that other forms of regulation be considered to fix the problem of unethical billing. Rather than correcting unethical hourly billing, the market for legal services, because of its profound and inherent inefficiency, arguably creates the opportunity for unethical hourly billing to occur.

D. Some Proposed Reforms

It is submitted that in order to address the symptoms and causes of unethical hourly billing the following reforms are required.⁹¹

⁸⁸ Gillian Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System” (2000) 98 Mich. L. Rev. 953.

⁸⁹ *Ibid.* at 968.

⁹⁰ *Ibid.* at 970.

⁹¹ This paper does not base its proposed reforms on a move away from hourly billing. This is for two reasons. First, while it may be that other modes of billing would be an ethical improvement over hourly billing, such a claim is, in my view, largely speculative. In the absence of an efficient market for legal services it is likely that the introduction of other modes of billing clients would, absent historical factors such as a

First, in addition to establishing the general principles of what constitutes an ethical fee, the codes of professional conduct should set out specific rules to regulate the ethics of hourly billing. It is submitted that the amendments to the codes should include rules which:

- Require fees likely to be in excess of \$1,000 to be set out in an agreement signed by both the client and the lawyer, unless either a) the lawyer and client have an existing relationship such that the agreement to fees is implied, or b) the services are provided on an emergent basis. The agreement must set out the hourly rate, other applicable fees and charges, the general nature of the legal services to be provided, the respective responsibilities of the attorney and client as to the performance of the contract, and the availability of taxation and/or law society mediation/arbitration where there is a dispute as to legal fees, including the time limits which apply to those remedies. This rule would increase the efficiency of the legal market. It would reduce both the opportunity for lawyers to bill unethically and increase the likelihood that a consumer who receives an improper bill will be able to remedy it.⁹²
- Forbid billing two clients for the same period of time (double billing) and forbid billing a client for more time than a matter actually took, even if the shorter period of time arises because of work done by the lawyer for another client (recycling). This rule could be subject to the client's informed consent. This rule would help prevent one of the specific types of unethical hourly billing.⁹³
- Provide guidance as to what activities are not billable (for example, recording time spent on a file or explaining a bill to a client) and those which are (for example, work which calls for a lawyer's professional judgment). The rule could also provide guidelines on staffing files,

small and collegial legal profession, simply result in the introduction of different incentives towards improper billing. For a brief overview of some of the ethical issues with alternative billing models see Donald C. Massey and Christopher D'Amour, "The Ethical Considerations of Alternative Fee Billing" (2001), 28 S.U.L. Rev. 111; and Ronald D. Rotunda, "Moving from Billable Hours to Fixed Fees: Task-Based Fees and Legal Ethics" (1999) 47 U. Kan. L. Rev. 819. Second, hourly billing is both dominant in the profession and likely to remain that way: the 2002 ABA Report, *supra* note 10 suggests hourly billing is attractive because of "simplicity and profitability... [and] psychological issues of amiability and efficiency"(at 11). As a result, even if a move away from hourly billing is desirable and should be advocated for by the profession, until such a change takes place some improvement in how lawyers behave when they bill by the hour is required.

⁹² For a similar rule see Article 8.5, s. 6148 of the California State Bar Act Rules of Professional Conduct, cited in *Beyond the Billable Hour*, *supra* note 7, Chapter 26.

⁹³ ABA Formal Opinion 93-979 provides: "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for

research, and/or use of intra-office conferences, or, at minimum, could alert lawyers to the existence of ethical issues with respect to these matters.⁹⁴ This rule (and the next) would help prevent the unethical billing which arises from ignorance.

- Require law firms to provide training in billing.
- Require that no billing increments be used for any amount of time less than thirty minutes. This rule would protect clients from this form of overcharging.⁹⁵
- Require that time be recorded on a twice-daily basis with sufficient detail to permit the client to understand what was done.⁹⁶ This rule (and the next) would address the overcharging which arises from non-contemporaneous time recording.
- Require that law firms impose financial sanctions on lawyers not submitting time sheets on a weekly basis.⁹⁷
- Require law firms to obtain explanations from lawyers where more than eighteen hours are billed in a twenty-four hour period, more than 250 hours are billed in a one month period, or more than 2400 hours are billed in a one year period.⁹⁸ This rule would provide some disincentive to lawyers motivated to be aggressive in how they record their time and would help move the profession away from the current culture of acceptance of aggressive hourly billing.
- Prohibit law firms from establishing minimum billing targets or compensating associates solely on the basis of the number of hours worked. This would help reduce the pressure on lawyers to pad their time and reduce the extent to which hourly billing is equated with success.⁹⁹

more time than she actually spent... In addressing the hypotheticals regarding (a) simultaneous appearance on behalf of three clients, (b) the airplane flight on behalf of one client while working on another client's matters and (c) recycled work product, it is helpful to consider these questions... from the perspective of what 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." ABA *Compendium of Professional Responsibility Rules and Standards*, 2003 ed. (Chicago: American Bar Association, 2002), 451.

⁹⁴ See "Lying to Clients", *supra* note 18 at 752.

⁹⁵ See "Teaching Billing", *supra* note 19 at 1423.

⁹⁶ See "Lying to Clients", *supra* note 18 at 751.

⁹⁷ At least one Canadian law firm has such a policy.

⁹⁸ See "Teaching Billing", *supra* note 19 at 1424.

⁹⁹ The limitation on this proposal is that if firms eliminate formal billing targets,

Second, to ensure that they have preventative force these rules need to be coupled with a more aggressive approach to regulating unethical hourly billing. The law societies should review any taxation decision (or arbitration/mediation) where the reduction to the fees exceeds thirty percent, should be alert to the number of hours billed when performing random audits on legal practices, and should be more open to receiving public complaints with respect to a lawyer's bill even if they cannot order that the bill be reduced.¹⁰⁰ The law societies should be prepared to discipline lawyers who can be shown, on the balance of probabilities, to have violated the rules even if it cannot be demonstrated that the lawyer had the subjective intent to overcharge their clients. Some kind of *mens rea* requirement is necessary, but a subjective intent/willful blindness standard is too restrictive to provide a serious disincentive to those lawyers inclined to bill unethically. Negligent overbilling of clients should, it is submitted, be subject to some kind of sanction, even if it is only a reprimand.

Third, Canadian law schools should not divorce practice from law in teaching ethics to their students – and they should teach ethics to their students. It is only in law school that students can be given some relatively disinterested advice¹⁰¹ about the ethical pitfalls which legal practice can present and, in particular, about the ethical pressure which hourly billing exerts. This training would help reduce the incidence of breaches of ethical billing requirements which arise from ignorance.

Finally, taxation officers should be given the authority, and encouraged, to report any lawyer whom they suspect of billing unethically (whether because of overworking a file, improper billing procedures or overbilling) to the local law society. This would provide a more effective means of tailoring the law society's review of unethical billing than does simply looking at taxation cases where the reduction is over a certain amount.

Can these reforms cure unethical hourly billing in the Canadian legal profession? Perhaps not. If undertaken, however, they would address both the symptoms and causes of unethical hourly billing and, as well, would represent a clear statement by the profession that unethical hourly billing

while retaining a culture in which it is clear that only lawyers who record over a certain number will be viewed as "successful" little is likely to change. The hope would be, however, that if rewarding associates solely on the basis of hours is said by the collective voice of the profession to be ethically inappropriate there would be a cultural shift in how firms view associate performance.

¹⁰⁰ Most of the law society websites looked at for this paper discourage complaints about legal fees by highlighting that the law society does not have jurisdiction to decrease fees and/or resolve fee disputes.

¹⁰¹ Disinterested in the sense that it is external to the day to day pressures of hourly billing.

is unacceptable. Such a statement would represent a shift in the current legal culture which could in itself provide an effective means of regulating lawyer conduct.

V. Conclusion

In 1969 Stanford psychologist Philip Zimbardo left a car on a street in Palo Alta with the hood up and no license plates. The car stood unharmed for a week. Zimbardo then broke the car's window. It was immediately vandalized – “[w]ithin a few hours, the car had been turned upside down and utterly destroyed.”¹⁰² In their 1982 article “Broken Windows: The Police and Neighborhood Safety,”¹⁰³ sociologists James Q. Wilson and George L. Kelling took Zimbardo's experiment with the car and applied its central insight – that vandalism will take place even in the most property respecting communities where “communal barriers...of mutual regard and the obligations of civility...are lowered by actions that seem to signal that ‘no one cares’” – to policing. Wilson and Kelling argued that the failure to direct policing to matters of public order as well as to the prevention and detection of more serious crime – to fix broken windows as well as to seek out the person who broke them – results in both a perceived and real increase in the incidence of more serious lawlessness.¹⁰⁴

Unethical hourly billing is the broken window of the Canadian legal profession. Like Americans, a number of Canadian lawyers do work which provides little benefit to clients, do not record their time appropriately and bill dishonestly. And when lawyers are able to bill unethically, and when they observe unethical billing by others, the message they receive is that honesty and respect for the interests of others do not matter. It is submitted that once that message has been received the likelihood increases that

¹⁰² James Q. Wilson and George L. Kelling, “Broken Windows: The Police and Neighborhood Safety” March 1982 *The Atlantic* 29. This article had a revolutionary impact on the approach to policing in the United States in general and in New York City in particular. The Order-Maintenance style of policing adopted by then Mayor Rudolph Giuliani, and which has been perceived as directly related to the radical decrease in crime rates in New York, arose directly from Giuliani and other's adoption of the “Broken Windows” theory. See: Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* (Berkeley: University of California Press, 1992).

¹⁰³ *Ibid.*

¹⁰⁴ The effectiveness of how New York has applied this theory is the subject of significant debate; however, most of the problems with its application there (its disproportionate effect on the mentally ill and racial minorities) are simply not raised by application of its central insight to the impact of unethical billing on lawyer ethics generally. See Bernard E. Harcourt, “Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style” (1998) 97 Mich. L. Rev. 291.

lawyers will be dishonest in their dealings with others more generally:

Let me tell you how you will start acting unethically: It will start with your time sheets. One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of work for the client for "free." In this way, you will be "borrowing", not "stealing."

And then what will happen is that it will become easier and easier to take these little loans against future work. And then, after a while, you will stop paying back these little loans. You will convince yourself that, although you billed ninety minutes and spent only sixty minutes on the project, you did such good work that your client should pay a bit more for it. After all, your billing rate is awfully low, and your client is awfully rich [emphasis added].¹⁰⁵

The legal profession must not rely on the operation of the market and freedom of contract to avoid addressing the unethical hourly billing problem. Rather, the profession must replace its current ineffective system of regulating the ethics of hourly billing with a system designed to prevent and correct the specific forms which unethical hourly billing takes and its causes.

¹⁰⁵ "On Being a Happy...", *supra* note 20 at 919.

