

## Attorneys' Fees and Lawyers' Billings: A Tale of Emperors' Old Clothes

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**William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Durham, North Carolina: Carolina Academic Press, 1996), 272 pages, \$35.00**

Most attorneys who work for insurance companies bill them by the hour. Consequently, few topics could be more important to the readers of this journal than the law and ethics of time-based billing. Further, both insurers and lawyers are dissatisfied with the system. Insurers complain that legal bills are too high, or—at least—that they cannot really make sense of them. Lawyers complain that insurers set artificially low rates, refuse to authorize necessary work, and quibble about time spent. Both sides are searching for alternatives.

Some of the solutions are idealistic, most of them are quite realistic. The most idealistic of all solutions is “value-added” billing, about which we hear a good deal these days. Sounds good; can't be done across the board. And there are a good many more realistic approaches. Some insurance companies arrange for “blended rates.” On these arrangements, all lawyers, whether very junior or quite senior, bill at the same middle-of-the-road rate. Such arrangements are problematic, of course, because they encourage junior lawyers to overwork files and discourage senior lawyers from working on them at all. Insurers are also turning to audit firms. Attorneys hate these audits and, at least sometimes, the auditors may be insensitive to the intricacies of difficult cases. Then again, auditors can only work with bills they receive. Attorneys tell each other over drinks that legal audit firms work on contingency fees. Every auditor I have ever talked to denies this emphatically. There can be no doubt, however, that auditors have an

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interest in justifying their function and cost.

Hourly billing has been around for 50 years, or more, and it has been prevalent in business practice for 40 years or so. It remains controversial, nevertheless. In 1989, for example, Richard C. Reed edited a substantial collection he titled *Beyond the Billable Hour: An Anthology of Alternative Billing Methods*. Since then, there has been a steady stream of writing on the subject, and legal audit firms have multiplied rapidly. The time is therefore right for some legal scholar to provide a systematic book-length treatment of hourly billing, its legal regulation, and its temptations. *The Honest Hour*, by William G. Ross, a law professor at Cumberland School of Law, Stamford University, in Birmingham, Alabama, has now done just that. Ross is eminently suited to the task. Not only does he have distinguished educational credentials and substantial academic experience, he practiced in a large law firm for nearly ten years. Needless to say, it billed by the hour.

### The Book

This book is reasonably well written; its prose is understandable, if not exactly sprightly. Ross relies upon cases, other legal writings, two empirical studies he designed himself, the writings of accountants, and other sources as well. His approach to other writings is mostly journalistic. Ross cites some several hundred different observers and commentators.

Frequently, he lets the writers speak for themselves. Only occasionally does Ross engage in true dialogue with the authors he quotes, however. This treatise is not the kind of book to keep you up far into the night. At the same time, it won't put you to sleep at 7:30 either. There is lots of very sound work reported here. It's a valuable read and a good book to have nearby. And readers will be grateful that the publisher has elected to use footnotes, and not endnotes. However, the lack of a bibliography and table of citations is disappointing.

Topically, the book covers the waterfront. It discusses the history and prevalence of time-based billing, its place in the rules of professional conduct, and its relationship to client consent. Professor Ross faults the rules of professional conduct for not explicitly treating time-based billing and for not providing specific guidance to attorneys. He believes that the rules are far too malleable. Still, he believes that virtually any billing practice is permissible with the right sort of client consent. At the same time, without rule-based constraints on how attorneys may obtain and maintain client consent, many clients will consent to virtually anything.<sup>1</sup>

Ross devotes several chapters to what should be included in bills. In this context, he considers numerous court decisions. In general, they

divide into three categories: those facing fee-shifting questions arising from private arrangements (such as the provisions of a contract), those with fee-shifting questions arising from statutes, and bankruptcy cases. These chapters are a gold mine for the lawyer doing nationwide research on the attitude of courts toward how fees are reported. In general, the courts are dissatisfied: they want more specific and more explanatory billing. Only occasionally does Ross think the courts have erred in regulating fees.

The majority of the book is concerned with ethical constraints on various kinds of billing practices and attorney activities. Is double billing ever permissible? Is it ever permissible to recycle work already done and bill for it again? Should a senior lawyer bill at his or her own rate when doing junior lawyer's work? What constitutes over-staffing at any given time? What constitutes over-staffing over time? What constitutes excessive research? How should clients be brought into research decision-making when questions of *whether* and *how much* are at stake? How much time should be spent revising documents to make them exquisite? How much time should be spent revising an internal memo to make it not just presentable, but perfect? Are deposition summaries really justified? How should paralegals be billed? How should clerical activities be treated? How should travel time be treated? Why is it that clients resent being billed several times for attorney conferences? How should overhead be handled? Can law firms bill for air conditioning on Sunday afternoons during the summer? Should lawyers be able to bill clients for time they spend with the press? What should a lawyer do—and what should a lawyer be expected to do—when he or she knows that a colleague is substantially over-billing a client?

Near the end of the book, Ross explores the dark side of hourly billing, that is, "the time card mentality," and considers recent developments, such as the rise of outside audit firms, the romance with value-added billing, and so forth. The time card mentality can take all sorts of forms. Recently, a professor friend of mine told me a story about a well-known New York law firm. A partner had just flown in from the Far East and bragged he had managed to bill 37 hours in the course of a single day. My friend told me that the firm was all atwitter about this remarkable accomplishment. Now that's time card mentality.

This book is far too rich to be summarized in detail. I will therefore discuss six topics Professor Ross touches on. These are the nature of the dishonesty found in billing, two significant billing paradoxes, one problem in double billing, the justifiability of charging for deposition summaries, billing for factual research, and the contents of bills. In

conclusion, I will discuss one approach to auditing legal bills, which I have utilized in expert testimony, which several courts have accepted, and which seems rather fruitful.

### **Bad Billing—Fraud, Negligence, or Self-Deception?**

How much unjustifiable hourly billing is there? How much of it is dishonest? What factors lead to dishonest billings? The answers to these questions, according to Ross are: lots, some, and many.

In elaborating on and supporting his answer to these questions, Professor Ross equivocates. On the one hand, he quite clearly believes that attorneys engage in fraudulent billing practices. His book opens with a quotation from the Litany of Penitence for Ash Wednesday, taken from the Episcopal Book of Common Prayer: "our dishonesty in daily life and work, we confess to you, [Oh] Lord." He reports that nearly all of the lawyers interviewed in an important 1989 survey "reported some amount of deception in billing practices." Further, there is this remark:

One would hope that [survey data and the anecdotal evidence] exaggerate the extent of fraud, and one would like to believe as a legal management consultant stated in 1990, the 'vast majority of lawyers bill ethically and accurately.' My 1991 and 1994-95 surveys of attorneys do not support such an optimistic view, although they do not indicate that improper billing is so widespread as the harsher critics of hourly billing have alleged.

And then there is this: "Lawyers who responded to my 1994-95 survey likewise perceive that padding of bills is widespread." One chapter begins, "Dishonest billing is the perfect crime." After all, Ross says much later, "Rich corporations do not quibble over a few thousand dollars here or there—or even over a few hundred thousand dollars." In the last paragraph of the book, Professor Ross refers to the contemporary scene as a "billing bacchanalia" and suggests that lawyers always have a desire to boost their billable hours. He suggests that this desire is so strong that the interests of lawyers perpetually conflict with those of their clients.

These and many other such remarks add up to the thesis that attorneys engage in a fair amount of fraudulent billing. On the other hand, in another place in the book, Professor Ross makes this startling statement: "If, as this book contends, most over-billing is the result of self-deception rather than conscious fraud, liberal estimates of time long since spent but not logged is an excellent example of how attorneys can overcharge a client without making a deliberate decision

to commit fraud." There is, of course, a vast difference between a person saying, "I am now going to do X," where doing X constitutes fraud, and saying, "I will now commit fraud." Nevertheless, the former, as well as the latter, constitutes fraud.

When it occurs, over-billing is either fraudulent, or it is negligent. Professor Ross appears torn between these two poles. Of course, it is true that some over-billing is fraudulent and some is negligent. If we are asking which accounts for the vast majority of over-billing, Professor Ross can't seem to make up his mind.

I think the case is clear. Ross is wrong. Most over-billing is fraudulent. I spent a good number of years (1) observing lawyers bill, (2) watching law firms subtly pressure attorneys to pad their time and then implicitly teach them how to do so, (3) listening to lawyers about how they bill and (more important) how they have seen others bill, (4) playing the role of a kind of (secular) confessor to many lawyers, (5) examining my own behavior, consciousness, and conscience, (6) auditing legal bills for insurance companies, and (7) in general, observing the passing show. In my opinion, the profession is awash in over-billing, and lawyers know they are doing it. Legal billing is frequently not simply inadequate; it is dishonest. Of course, most lawyers deny this most of the time. What would one expect?

Evidence for my view comes from many quarters. Most law firms I know have quotas. Many firms deny they have such things, but everyone on the inside knows they do. If associates are spoken to about their billings in any systematic way, there is always a quota or a minimum of some sort. This may be true even when there is no official policy—and even if there is an official denial of its existence. When law students I taught came and asked how to find out the minimum on the way in, I told them to ask about the firm's expectations or norms. If the recruiter gave a number, I told the students, that was probably the minimum. This conclusion was justified, I told them, even if the recruiter said things like, "At Ache and Grump, we work hard but we play hard, too" or "At Scads, O'Harps, you can fire a cannon down the hall at seven and not hit anybody."

Another way institutions push the idea of *Bill! Bill! By God, bill!* is through the competition for partnership. Everyone knows that not everyone makes it. "Classmates" and good friends are pitted against each other in a sort of tournament. One's numbers matter. The hours you bill (and for which the firm gets paid) are important. But not all stimuli to extravagant billing result from institutional sources. Lawyers compete with each other to see who can bill the most. I wish I could report that this behavior is strictly male, macho nonsense, but I'm no

longer sure that women are immune to these forces.

In honest moments, lawyers give many justifications for what goes on. Because Ross wrongly minimizes the influence of fraud, he does not properly attend to these explanations. Here are two that might be especially relevant. (1) Insurance companies demand that we charge low rates. No one can make any money with these low rates. We simply have to inflate the number of hours. (2) Insurance companies insist on low rates but know good and well that lawyers cannot survive with those rates. They are demanding low rates so they can look good. They also know that lawyers are making it up in terms of the number of hours they report; and the insurers are winking at this. Thus, lawyers and insurers have an implicit deal.

Here is a third justification. Some lawyers say that they are far brighter and/or quicker than the average lawyer. For some reason they cannot adjust their billing rates: the client won't tolerate it, the firm has an inflexible lock-step escalation pattern, or what have you.

When I have asked lawyers why the market tolerates this kind of "deal," no lawyer has ever been able to give me an explanation. Here are two possibilities. First, there is a silent and implicit "conspiracy" among lawyers not to let rates drop too far. The "brotherhood" seeks to take care of itself and (many) of its own. Second, insurance adjusters like higher hours for lawyers because it justifies their working at a slower pace, too. These explanations are consistent, of course, but neither is intuitively plausible. Microeconomic theory tells us that the first explanation cannot happen, while I have never really seen any evidence of the latter.

Shrinks have told me that many of their lawyer-patients have told them they bill extra time as a kind of revenge on clients toward whom they feel hostile. Ross is aware of this idea in general. It is an especially acute problem at the interface between insurance adjusters and lawyers. For some reason, many lawyers have very complicated feelings about adjusters. They tend to feel superior to them. They tend to put them down behind their backs. And yet they court them meticulously—indeed, so enthusiastically that some insurance companies have laid down strong rules against accepting any gift larger than lunch. Perhaps the necessity of courtship against the backdrop of socioeconomic class differences contributes to attorney resentment. Some lawyers dislike having to report to and follow the orders of those they regard as beneath their station. I must confess I do not understand why so many lawyers who work for insurance companies resent, even despise, adjusters.

Interestingly, Ross discusses the resentment theory in general terms but does not seem to recognize that this explanation will work only on a fraud theory. It will not work on a negligence theory.

Padding is controlled, to some degree, of course. The widespread is not identical to the infinitely possible. Lawyers who have worked in outside law firms and who then go in-house for (say) insurance companies have a feel for how much time it really takes to accomplish this or that task. Legal auditors can also be helpful, as can billing guidelines.

One would think that competition among law firms would severely retard fraudulent billing, but it does not, except at the margin. It is a mystery to me why this is so, but it is. Fraudulent billing may be a consequence of the inflation of the past 30 years or so. If people (and businesses) were actually told clearly what legal services cost them by the hour—by the honestly worked hour—they would revolt and refuse to pay. Hence, the true per-hour cost is concealed by (fraudulently) upping the number of hours worked.

If over-billing is as rampant as I think it might be, it is inflicting a terrible toll, not only on the legal profession as a whole, but on individual lawyers and their families. Most lawyers would like to think of themselves as honest people—principled, conscientious, and perhaps even caring. This is an impossible hypocrisy if lawyers regularly bill their clients on some basis other than the truth. Not much is said about this among lawyers, even in very private situations, but it is now common to write about how pervasive unhappiness and depression are in the legal profession. Perhaps billing practices are an undiscussed reason.

I suspect Ross adopts the “negligence theory” in preference to the “fraud theory” for reasons of tact. It is unseemly for one lawyer to suggest that a good number of other lawyers are dishonest in some respect, even if that respect pertains to billing. Ross's failure of nerve, if that is what it is, is illustrated by the following passage: “Despite shocking revelations [about padding, double billing, and the like], respect for the legal profession demands that one presume that the majority of lawyers attempt to bill their time in an ethical manner and that criminal behavior remains an anomaly.” This is no way to reason. Ross has confused courtesy with epistemology.

### **Two Billing Paradoxes**

*The Honest Hour* discusses two very interesting paradoxes. The first one it identifies as such, the second one it labels paradoxical only implicitly.

owes a duty of professional responsibility to the employer-client to supervise outside lawyers adequately.

### **Double Billing**

One of the most interesting discussions in Ross's book concerns double billing. This situation arises when a lawyer is performing a purely passive activity for one client, during which he or she can perform another activity for another client. The paradigm is travel. Suppose  $L$  is traveling from Seattle to Miami for  $C_1$ . Perhaps the lawyer has just finished taking a deposition in Seattle and is on the way home. During that period of time  $L$  puts together a brief for  $C_2$ . Can  $L$  bill  $C_1$  the flight hours and bill  $C_2$  the performance hours?

There is almost universal agreement that  $L$  has wronged both  $C_1$  and  $C_2$  if  $L$  bills both for the same time. While Ross acquiesces to the power of the consensus, he asks whether this view really makes sense and appears to imply that if he were writing on a clean slate, he would not forbid the practice. "Double billing may be ethical under these circumstances because it does not increase the amount of the bill that either client would have to pay if the work had been separately performed." Moreover, Ross observes, although ABA Formal Opinion 93-379 (1993) criticizes the practice because it creates a windfall for the lawyer, "the client receives a windfall if an attorney does not bill it for work that he would have otherwise have performed because he is performing work for another client at the same time. Since the attorney has indeed earned two fees, an attorney might argue that it is fairer to allow him to reap the windfall of double billing than for the client to receive what amounts to free legal services." Further, he notes that "double billing does not necessarily detract from the value that the lawyer renders to either client." In addition, the "prohibition of double billing. . . could reward inefficiency." If a lawyer cannot bill for work performed on an airplane then the lawyer may be tempted to watch television, swill scotch, or (worse yet) sleep.

The critics of double billing have it right. The practice should be forbidden. It does not encourage inefficiency; it encourages sloth. That may be an across-the-board problem with time-based billing, but the existence of the general problem does not authorize billing twice for the same hour in a particular circumstance. Lawyers bill clients for the activities they perform during intervals of time. If I am sitting on an airplane, that is an activity. From a billing point of view, I simply cannot perform two activities at the same time. The mere fact that my sitting on an airplane is a passive activity does not authorize me to perform some other activity as well and then bill

for it too. From a billing point of view, just as you cannot be in two places at the same time, you cannot bill for two activities at the same time. This is so even if—like the well-coordinated child—*L* can pat his head and rub his tummy at the same time, or vice versa. (I feel duty bound to report that the straightest, most honest, most virtuous, even prudish, lawyer I know read this essay, agreed with most if it, but rejected this view completely.)

Sophisticated clients are familiar with this type of billing deviance. Some of them require lawyers to work on their problems while traveling. Some merely encourage it. Some law firms cleverly decline to bill for travel. Instead, lawyers are trained from their first day with the firm to work on the airplanes, thereby ensuring that the time will be chargeable to somebody. This is a very salutary practice. As Ross remarks, once you've acquired the knack, working on airplanes can be very efficient. You don't get phone calls (as yet), and folks around the office don't bother you.

There is another billing practice relating to travel which I believe is much more pernicious than double billing. This is the practice of billing all your time away from home, except for sleeping, to the client. Thus, if a lawyer arrives at his hotel in New York at 5:00 but does not retire until 11:00, the client will be billed six hours. Apparently, this is true whether the lawyer is working on the case, dining at the Palm Court, reading Homer, or hanging around. Obviously, this billing practice stinks.

It should be terminated by law firms and prevented by clients. The argument given in its favor is "*L* is away from home. *L* is deprived of domestic bliss. She should be compensated." If that argument works, then, of course, the lawyer should be paid for sleeping time. After all, she is not sleeping in her own bed. If a lawyer wants to bill for an evening away from home, she should either work or take the last flight out.

### **Deposition Summaries**

In one of his most interesting chapters, Professor Ross criticizes billing for preparing deposition summaries. He describes this as the ultimate busy work. According to Ross,

most deposition digests [are] absolutely useless because they [are] generally prepared by a person who is most intimately familiar with the facts and law of the case. In most instances, only an attorney who is responsible for reformulating strategy on the case can identify the key issues in a deposition transcript. Anyone else will simply be unable to evaluate the relative importance of the testimony, even if he is highly skilled and is familiar with the background of the case.

Professor Ross goes on to point out that several courts have been quite suspicious about fees accumulated in preparing deposition digests.

Contrary to Ross's view, I think deposition summaries are frequently quite helpful. On more than a few occasions I have been asked to take over a case after a fair amount of discovery had been accomplished. Sometimes the call comes not long before mediation. Occasionally, I have even been asked to take over cases on the eve of trial. Under these circumstances, deposition summaries have been crucial. Hardly any lawyer could try a case, or even evaluate it competently, under these circumstances without the deposition summaries. My experiences in this regard are not uncommon. In almost every large case where cross-examination is important, deposition summaries are useful for preparing cross-examination. I might have taken the deposition in the distant, and therefore dim, past, for example, and need a quick refresher. Even if the deposition were adequately summarized in status letters to the client, those letters will not contain page and line references. Only "formal" deposition digests will have that.

Ross advocates that the lawyer who takes the deposition should prepare the summary. He further suggests that the summary should be included in a periodic report to a client. Both of these suggestions make good sense. However, it also makes good sense to appoint one paralegal (or a team of paralegals with an identifiable leader) to digest depositions. This is really cheaper for the client if done thoughtfully.

Arguably, some of the necessity for deposition summaries is mitigated by the development of computer technology. Nowadays, for next to nothing, court reporters provide lawyers with computerizations of depositions they have taken. These computerizations can be stored in a central data bank and searched almost instantly. Court reporters are also providing attorneys with computerized indexes for virtually every deposition they take. If the new technologies are really going to replace summaries, there must be substantial planning. Ross makes this point in a variety of contexts, and it is surely true here. After all, if there are 50 depositions and the interrogator does not employ a standardized terminology, key-word-in-context searches will not help.

### **The Issue of Factual Investigations**

Occasionally, Ross goes down the wrong path. Perhaps the most remarkable of his errors is this one. "Factual investigations should be normally conducted by non-attorneys. . . ." While it is surely true that simple inquiries into fact should be conducted by secretaries or paralegals, attorneys need to perform significant factual investigations, particularly when they rest on the testimony of witnesses. It is my sad duty to report

that many litigators do not have a good feel for the rules of evidence. What is true for these lawyers is even more true for paralegals, secretaries, and even professional investigators. It is absolutely essential in many cases for a competent attorney to do some of the factual investigation precisely because it requires interviewing witnesses, and such investigations must probe the extent to which the witnesses are basing their testimony on hearsay, half-remembered fragments, events witnessed while under the influence of something, and so forth.

One pet peeve many capable lawyer-managers have about legal education is that it does not train law students to think clearly about facts and fact gathering. Contemporary legal scholarship, with its emphasis on narrative and story telling, is not helping matters. When I was in law school, I worked in my father's criminal defense firm. I had a Ph.D. in analytic philosophy and I had done well in law school, so I was arrogant about my legal abilities. A government prosecutor faced me down—insufferable pup that I was—and said, "I would rather have a suitcase full of facts than all the law in Plato's heaven." He was just as arrogant as I was in his own way, but his remarks contained more than a grain of truth.

### **Ten Commandments of Billing**

Weaving in and out of *The Honest Hour* are many observations about how billing should work. Although Professor Ross does not organize his observations this way, here are ten commandments of billing:

1. The language of bills should be specific and concrete.
2. Don't just mention the general activity, state precisely what you did.
3. The language of bills should be clear and straightforward. It should not be cryptic. Anything but universal abbreviations should be avoided.
4. Billing items should be prepared contemporaneously with the activities. (If a lawyer is away from the office, he or she should take notes, and the bills should be prepared from these notes. The notes should remain in a folder in the file.)
5. If a lawyer is billing for research, he or she should not only explain in detail what was done, and articulate the question or questions researched, he or she should also articulate the reasons why it was necessary to research those questions. This is true even if the client antecedently approved the activities.

6. Do not aggregate several activities into one time report. Report each activity separately, and assign times to each such activity.
7. Add the time up correctly.
8. Bill in the smallest increments available. Do not bill in quarter hours. If possible, bill telephone conversations in twentieths of hours.
9. The contents of telephone conversations should be reported, even if they are with the client.
10. The other commandments stated here notwithstanding, don't provide too much detail.

Ross articulates each of these. He has nothing helpful to say about the relationship between the first nine and number ten. Except for this tension, his directives are easy to follow if the lawyer prepares his bill directly on some computerized program. In the alternative, a lawyer can dictate the entries, and the secretary can type them into the billing program.

Although Ross does not say so, detailed discussions of legal activities may help sophisticate the meat-cleaver approach of many legal auditors to the substantial amounts of time it sometimes takes to prepare complex cases. Instead of writing "prepare interrogatories" or "revise requests for admissions," the lawyer should go to some length sketching why it took a lot of time to accomplish these tasks.

### **Experimental Evidence of Falsity**

I have testified on legal bills several times, and I have evaluated legal invoices many times. These bills were generally quite large and stretched over several years. In each case, the lawyer had billed in tenths of hours.

I have begun from the assumption that over a long period of time a lawyer's activities should distribute randomly across all of the fractions of hours available for reporting. In other words, since there are ten possible digits that could be placed to the right of the decimal point, I have assumed that, over time, each digit should appear in the tenths' position as frequently as any other. Thus, 0.3 should appear as frequently as 0.7 or 0.0.

If this assumption is true—as to date no lawyer has questioned, much less refuted—and if the distribution does not conform to the expected pattern, then (at least *prima facie*) the legal bill is unreliable, and a court should refrain from relying on it. Interestingly, no legal bill I have audited has conformed to the assumption. Invariably, 0.0 and

0.5 appear much more than 20 percent of the time. The second most used time entries are 0.9 and 0.1. These four entries invariably appear over 65 percent of the time, and in one case they appeared 87 percent of the time. For some odd reason, 0.4 and 0.8 appeared less often than any other pair of numbers. In no case that I audited did the two appear more than 12 percent of the time.

In order not to skew the result, I ignore all entries which equal exactly one-tenth of an hour, that is, entries of 0.1. In an active file, if a lawyer records all phone calls, there will be quite a large number of such entries, and that will tend to skew the result. I also look at the total time without the phone calls included. Two surprising facts have emerged from this part of my work. First, it is amazing how many lawyers do not write down phone calls, but either do not report them or merge them into other parts of the time report. Second, my own experience—and that of many others—is that most phone calls do not last six minutes. Billing in tenths of hours and then charging one-tenth of an hour for every phone call is problematic without advance approval from the insurer. Claims people are aware of this problem and they grumble about it.

I myself am tempted to draw rather unflattering inferences from this configuration of numbers. I suspect that the timekeepers are rounding off to an hour and that they are utilizing 0.1 and 0.9 to divert suspicion. (Lawyers have admitted this in depositions. Uniformly, they claim that they round *down*. I have never seen anyone believe this claim, and in one trial I attended, jurors laughed.) I really do not have data that establish my view, however, and I doubt I should be saying to courts that, as an expert on legal fees, I formally opine that my unflattering view is true. Of course, I do not have to do that. All I have to do is testify that the bill is unreliable. If the court also draws that conclusion, then it should require that it be provided with reliable evidence of the attorney's activities, and the time expended, before it makes any award at all.

### Conclusion

Ross does not tell us much about what we can do to replace the "billing bacchanalia" with sober and responsible billing that is not self-deceptive. Two of his suggestions are worthy of consideration. In the first place, Ross suggests that law schools should teach ethical billing practices as a part of the legal ethics courses. In the second place, he suggests that law firms should more carefully supervise junior associates, more carefully review their bills, and more carefully review billing practices with lawyers as they grow toward partnership.

The former suggestion suffers from two difficulties. I just finished teaching professional responsibility at the University of Texas. The students resent being required to take any course on professional responsibility, and they fight learning the subject matter every step of the way. Only exotic and dramatic examples of the dilemmas that can face the occasional lawyer focus their attention. They do not wish to hear that the emperor of their chosen vocation has few, if any, clothes on. Furthermore, students haven't the faintest idea what a detailed legal bill looks like, much less what it should look like. In theory, of course, Professor Ross is exactly right. Indeed, his book will provide excellent source material for professorial lectures or Socratic dialogues on the subject of ethical billing. It may not reach the minds and hearts of the students, however.

His other suggestion, that training as to billing should be incorporated expressly into supervision is a more likely route. While law firms frequently implicitly pressure associates—and partners, for that matter—to increase, and ultimately inflate, their billings, law firms also try to maintain an innocent persona. For at least many law firms with which I am familiar, what comes out of one side of the mouth is contradicted by what comes out of the other. If supervision of billing were expressly incorporated into a formal program of training lawyers, law firms would necessarily have to expressly endorse ethical billing. Who knows, if they said it often enough, they might come to believe it, and maybe even practice it.

#### Note

1. Client consent is a thorny topic to which legal commentators have paid far too little attention. I have attempted a preliminary exploration of this topic in "Advanced (Client) Consent," *Recognizing and Resolving Conflicts of Interest*, State Bar of Texas (1997).

