

A DOUBLE STANDARD FOR LAWYER DISHONESTY: BILLING FRAUD VERSUS MISAPPROPRIATION

*Lisa G. Lerman**

I. INTRODUCTION

In the 1970s, Monroe Freedman¹ did a great deal of work trying to curb the tendency of the lawyer disciplinary system to go after the wrong people. During this period, Freedman and some other public interest lawyers were charged with ethics violations because they spoke up about problems they observed in the legal system. Freedman had dared to give a talk in which he urged that in some instances, a criminal defense lawyer's duty to his client was more important than his duty of candor to the tribunal. Freedman defended some of the other lawyers who were charged with similar ethics violations.²

In the last thirty years, the District of Columbia disciplinary system has become less political and more professional. Even so, Freedman's work to ensure even-handed enforcement of the ethics rules remains unfinished. Bar counsels still tend to bring most of their charges against solo practitioners and small firm lawyers.³ Disciplinary charges are seldom brought against lawyers in larger firms, and when elite lawyers do face disciplinary charges, sometimes they get off easy.⁴ I do not

* Professor of Law and Director, Law and Public Policy Program, The Catholic University of America, Columbus School of Law. I am co-author with Philip G. Schrag of *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* (Aspen Law and Business 2005), and have written extensively on dishonesty and theft by lawyers.

1. The conference for which I have written this Article set out to revisit the issues explored in Monroe Freedman's seminal work, *Lawyers' Ethics in the Adversary System*. My topic is not one of litigation ethics, but like Freedman, I am preoccupied with lawyer truthfulness and with the risks to the profession from unchecked pursuits of self-interest. Freedman's fierce integrity, dogged independence and willingness to tell the truth about the problems he perceives in the legal profession set a standard for the rest of us who write about legal ethics.

2. MONROE FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 160-63 (3d ed. 2004).

3. See Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 310 (2004); Mark Hansen, *Picking on the Little Guy*, A.B.A. J., Mar. 2003, at 30, 32; Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 819-20 (2000); Bruce L. Arnold & Fiona M. Kay, *Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self Regulation*, 23 INT'L J. SOC. L. 321, 337-38 (1995). These articles all note that most disciplinary actions are brought against lawyers who practice alone or in small firms.

4. See Michael S. Frisch, *No Stone Left Unturned: The Failure of Attorney Self-Regulation in the District of Columbia*, 18 GEO. J. LEGAL ETHICS 325, 356-59 (2005). Frisch describes two

believe that there is any deliberate discrimination in the disciplinary system based on the respondent's professional status. Nevertheless, the structure of the disciplinary system and decades of precedent seem to produce disparate prosecution and disparate penalties.⁵

The disciplinary case law is harsh toward solo and small firm practitioners and lenient toward some large firm lawyers in its analysis of lawyer dishonesty with respect to client funds.⁶ In the District of Columbia, as in some other jurisdictions, if the financial dishonesty involves "borrowing" a small amount of money from one's client trust account, this is a capital crime, deserving of presumptive disbarment.⁷ On the other hand, if the financial dishonesty involves a partner at a large law firm who pads the time sheets of other lawyers in his group, he may be given the benefit of the doubt. This "benefit of the doubt" may be rationalized by a claim of uncertainty about whether the dishonesty was knowing or intentional. If a court wants to punish dishonesty, it can conclude that the dishonest intent is evident from the act. This dichotomy in the required showing of intent to deceive is being explored in *In re Romansky*,⁸ which is currently pending before the D.C. Court of Appeals.

In this Article, I examine the dishonest billing practices alleged to have occurred and the analysis of the dishonesty by the Hearing Committee and the court. I offer a critique of the investigation of the case, the findings of fact and the legal standards applied. I compare this billing fraud case to the leading case on misappropriation of client funds in the District of Columbia. I argue that the decision-makers (Hearing Committee, Board on Professional Responsibility, and court of appeals) have gone to great lengths to avoid addressing the very grave dishonesty that led to this disciplinary matter. I speculate as to some possible reasons for this deference. Finally, I urge that the disciplinary standard on lawyer dishonesty should be interpreted and enforced even-handedly, especially when the purpose of the dishonesty is to take client funds to which the lawyer or the firm is not entitled.

cases involving charges against associates at large law firms, one harshly sanctioned and one leniently. Frisch urges that the outcomes were unduly swayed by the respective firm's inclination to stand by the associate, or not. He urges that these cases demonstrate "the inappropriate institutional bias of a volunteer board dominated by the interests of the District of Columbia's most powerful law firms." *Id.* at 356.

5. See generally Levin, *supra* note 3.

6. See *id.* at 311.

7. *In re Addams*, 563 A.2d 338 (D.C. 1989) (discussed below).

8. 825 A.2d 311 (D.C. 2003).

II. MICHAEL ROMANSKY'S BILLING FRAUD

A. *Dr. Siepser's Bill*

One day in September of 1994, lawyer Michael Romansky sat in his office at the law firm of McDermott, Will & Emery reviewing pre-bills that were to be sent to some of his firm's clients that month. This was a normal activity for Romansky. He was a senior partner in his firm and the head of his practice group,⁹ so he was responsible for reviewing bills to be sent to about 100 clients of the firm.¹⁰ On this particular day, Romansky was looking at a bill to be sent to a doctor client named Stephen Siepser. An associate named Albert Shay had recorded 2.5 hours of work for Dr. Siepser during the previous month on "certificate of need" matters in mid-September.¹¹ When Romansky reviewed the pre-bill, he added three extra hours to Shay's recorded 2.5 hours.¹² He didn't talk to Shay; he just thought that the "results obtained" by the firm on this matter warranted his charging a premium of \$700.¹³ The firm had agreed to bill Dr. Siepser based only on time worked, but Romansky added the hours anyway. He made a notation that the firm should not send Dr. Siepser any details on how the bill was calculated or how much time had been recorded.¹⁴

This adjustment may not have been anything unusual for Romansky. He sometimes added hours to the time records of other lawyers in his practice group to reflect his judgment that the work done was worth more than the client would be billed based on time alone. During September and October of 1994, Romansky added hours to at least three other bills, always without consulting the lawyers who had done the work, always without notice to the client.¹⁵ Some of the retainer

9. Michael Romansky graduated from law school at George Washington University in 1977. In 1979, he became an associate at McDermott, Will & Emery. He became an income partner in the firm in 1982 and a capital partner in 1986. In 1984, he became the leader of the health care practice in the firm's Washington office. Bar Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation for Sanction at 2-3, *In re Romansky*, No. 163-96 (D.C. Aug. 31, 1998) [hereinafter Bar Counsel's Proposed Findings of Fact].

10. Proposed Findings of Fact, Conclusions of Law and Recommendations of Hearing Comm. at 2, *In re Romansky*, No. 163-96, (D.C. Dec. 23, 1998) [hereinafter Hearing Comm. report]. In describing the facts of this case, I rely primarily on the findings of fact of the Hearing Committee, since the Hearing Committee is the finder of fact and its findings are entitled to substantial deference.

11. *Id.* at 23.

12. *Id.*

13. *Id.*

14. *Id.* at 23-24.

15. *Id.* at 16-26.

agreements allowed consideration of “other factors” besides time, but Michael Romansky did not bother checking the terms of the contracts with particular clients.¹⁶ After all, he (reportedly) had been making such adjustments in the time records of other lawyers for years.¹⁷

As a result of an administrative error, the time records were sent to Dr. Siepser despite Romansky’s contrary instruction. The client called the associate to question the bill.¹⁸ As a result, Michael Romansky’s billing practices came to the attention of the law firm. The managing partner deputized another partner, James Sneed, a member of the firm’s professional responsibility committee, to investigate.¹⁹

B. *The Law Firm’s Investigation*

In the course of investigating Michael Romansky’s billing practices after the call from Dr. Siepser’s office, Sneed asked Romansky to assemble and supply all his billing records for clients billed during the two months prior to the request.²⁰ Romansky collected these materials, and reviewed his files, providing explanatory notes on any “write-offs,” “premiums,” or “edits to pre-bills.”²¹ Sneed examined the material that Romansky provided to him for about sixty clients billed by Romansky during the fall of 1994, including explanatory “cover sheets” for “approximately ten to thirty files.”²² Also, he interviewed eight lawyers in the health care department of the firm.²³ The investigation revealed that during the two months in question, Romansky had increased the number of hours recorded by other lawyers on work done for Dr. Siepser

16. *Id.* at 21-25.

17. On Review of Report and Recommendation of the Board on Prof’l Responsibility at 29, *In re Romansky*, No. 163-96 (D.C. Sept. 2005) [hereinafter Post-remand Brief of Bar Counsel].

18. An employee of Dr. Siepser’s contacted Shay (the associate) to question the accuracy of the bill and to find out why more hours were billed than had been worked. Shay reviewed his records and confirmed that the bill reflected more hours than he had recorded. Dr. Siepser wanted to know why the hours had been increased, especially since his agreement with the firm provided that he would be charged solely on the basis of hours worked. Romansky was not available, so Shay sought guidance about the extra hours from another senior partner at the firm, who informed Charles Work, Esq., the managing partner. Hearing Comm. report, *supra* note 10, at 2-3.

19. *Id.* at 3.

20. *Id.* at 6.

21. *Id.*

22. *Id.* at 6; Post-remand Brief of Bar Counsel, *supra* note 17, at 28.

23. Post-remand Brief of Bar Counsel, *supra* note 17, at 28. Romansky urged that three drafts of the report from the firm’s internal investigation should not be admitted into evidence because, he argued, they were hearsay, because the investigation lacked procedural safeguards, and because the report discussed “unproven, prejudicial allegations” that went beyond the scope of the charges. These arguments were rejected by the Hearing Committee and by the Board on Professional Responsibility. *In re Romansky*, Bar Docket No. 163-96, Report and Recommendation of the Board on Prof’l Responsibility at 24 (1999) [hereinafter 1999 Board Report].

and three other clients.²⁴ The table below compiles such information as I have on these incidents.²⁵

Hours Added to Time Records
by Michael Romansky, October-December 1994

24. See Hearing Comm. report, *supra* note 10, at 16-26.

25. This information is drawn from the Post-remand Brief of Bar Counsel, *supra* note 17, at 13-33 and from the Hearing Comm. report, *supra* note 10, at 16-26.

Client	Dr. Siepser ²⁶	Surgical ²⁷ Health	Premium Plastics ²⁸	RCH Summit ²⁹
Attorney whose hours were augmented	Albert Shay	Diane Millman	David Rosen	Joel Suldan
Hours recorded by the other lawyers	2.5	Unknown	Unknown	8
Number of hours added to pre-bill	3	2	3	6 ³⁰
Amount of increase in fee	approx. \$700	\$530	\$465 added to bill of \$41,441.25	
Date of bill reflecting extra hours ³¹	November 17, 1994	October 26, 1994	December 6, 1994	November 28, 1994
Explanation for billing extra hours	"reapportioned" & to charge premium	to charge premium & to recoup write-off on previous bill	to charge premium	to reflect hours MR thought lawyer did not record
Terms of engagement letter	hours only	hours only	Hours plus "other factors"	hours plus "other factors"
Consultation with/notice to lawyer	No	No	No	No
Consultation with/notice to client	No	No	No	No
Disclosure to client of number of hours billed ³²	Yes—by mistake	No	No	Yes
Lawyer testified that he/she had not billed all hours worked	Yes		Yes	Yes
Firm refunded amount added	Yes	Yes	Yes ³³	Yes
Hearing Committee found violation	Yes- serious	Yes - serious	No	No
Board of PR violation ³⁴	Yes- serious	Yes - serious	No	No

C. Premium Billing?

Sneed talked with Romansky about the extra hours billed to Dr.

26. See Hearing Comm. report, *supra* note 10, at 22-24; Bar Counsel's Proposed Findings of Fact, *supra* note 9, at 5.

27. See Hearing Comm. report, *supra* note 10, at 24-25.

28. *Id.* at 21-24.

29. *Id.* at 19-21.

30. Romansky also reduced his own recorded hours from fourteen to twelve. His written explanation for this increase in Suldan's hours and decrease in his own hours was that he was "seeking a more realistic allocation of time." He noted also his view that Suldan had not recorded all of his time. 1999 Board Report, *supra* note 23, at 19.

31. *Id.* at 16.

32. *Id.* at 40-41.

33. *Id.* at 41.

34. See *id.* at 28.

Siepsner. Romansky initially said he had ‘reapportioned’ the time spent.³⁵ Later he said that billing for hours not worked was “what he regarded as an acceptable way to ‘take a premium’ for a good result for a difficult client.”³⁶ Romansky also claimed to have thought that Siepsner had received an engagement letter that would allow him to consider other factors in billing in addition to time spent.³⁷

In three of the cases in which Romansky added hours, he claimed that he had increased the hours to charge a premium.³⁸ The firm had promised to bill two of these clients, including Dr. Siepsner, exclusively on the basis of the number of hours worked.³⁹ In the RCII Summit matter, Romansky claimed to be adjusting the hours recorded because the lawyer in question tended not to record all of his hours.⁴⁰

Romansky did not consult with the lawyers whose time records he altered to find out whether some hours had not been recorded or whether the lawyers who did the work believed that the “result obtained” warranted charging a premium.⁴¹ Neither did he inform the lawyers that he had billed the clients for additional hours. Each testified that he or she had not billed all the hours that he or she had worked, but in the absence of consultation, Romansky could not have had precise information on the basis of which to correct their time records. Also, Romansky did not consult with or inform the *clients* about his decision to charge them for extra hours.⁴²

1. The “Other Factors” Letter

Two of the clients to whose pre-bills Romansky added extra hours had been sent engagement letters notifying them that while time was the primary factor to be used in setting fees, “other factors [besides time] may be taken into consideration” in setting fees.⁴³ The firm had initiated

35. Post-remand Brief of Bar Counsel, *supra* note 17, at 30.

36. *Id.*

37. *Id.*

38. *See, e.g.*, Hearing Comm. report, *supra* note 10, at 22 (explaining the premium charged to Premium Plastics).

39. *Id.* at 23, 25.

40. This was a matter in which an attorney named Joel Suldan had done some work for RCII-Summit Technologies (RCII). Suldan was “known within the Firm to have a ‘light pencil.’” *Id.* at 19-20. When Romansky reviewed the pre-bill, he increased the eight hours of time that Suldan had recorded to fourteen hours, and reduced his own time from fourteen hours to twelve. Romansky stated that he was seeking “a more realistic allocation of time.” *Id.* at 20. While the committee had “some concern” about that, they found no violation of 8.4(c). *Id.* at 42.

41. *Id.* at 40.

42. *Id.* at 16-26.

43. *Id.* at 17, 42. The new letter was sent with a brochure that listed “other factors” that the firm might take into account in determining a fee. The list looks a lot like the list of factors in Rule 1.5 that are asserted to be relevant in determining whether a legal fee is “reasonable.” *Id.* at 17.

a “test period” during which the billing attorneys “were required to use” this new engagement letter.⁴⁴ For some reason, the new engagement letter was sent to some but not all of the firm’s clients. Romansky claimed to have been confused about which clients were to be billed based only on hours and which clients had received the new engagement letter. This, he said, was the reason that he added hours to the bills of some “hours only” clients.⁴⁵

2. Firm Policy on Premium Billing

Romansky did not consult anyone else in the firm about how to charge a premium.⁴⁶ Apparently, at the time, the firm had no articulated internal policy on when and how a premium was to be charged. Romansky apparently was unaware of the available guidance on this subject from outside the firm.

James Sneed testified in the later disciplinary hearing that within the firm, the normal way to take a premium would be “to charge an hourly rate greater than the normal rate for billable hour clients.”⁴⁷ This was not a consistent practice, he said, but firm policy required notification of a client anytime a premium was charged.⁴⁸ Because Romansky’s clients had not been notified that a premium was being charged, the firm refunded the “premiums” they had paid.⁴⁹

D. The Law Firm Sanctions Imposed on Romansky

After Sneed concluded his investigation, the firm did not fire Romansky or (as far as I know) report his fraud to the U.S. Attorney. Instead, Romansky’s partners decided to sanction him for his dishonest billing practices. The firm reduced Romansky’s compensation for that year by about \$30,000.⁵⁰ He was removed from his position as head of the health care practice group, was required to reimburse the firm for services that had been provided to his father, and was required to submit his time records to the managing partner.⁵¹

44. *Id.* at 16.

45. *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003) (The court of appeals noted that Romansky claimed a “negligent failure to check the client’s retainer agreement . . . to verify whether the agreement permitted premium billing.”).

46. *See id.* at 313.

47. Hearing Comm. report, *supra* note 10, at 17.

48. *Id.* at 17-18. Work, the firm’s managing partner, testified that under the new engagement letter, a lawyer could charge a premium without disclosing it to the client. *Id.* at 18; *Romansky*, 825 A.2d at 313 n.1.

49. Hearing Comm. report, *supra* note 10, at 18.

50. The financial penalty took the form of a compensation reduction of fifty units. *Id.* at 3.

51. *See* Bar Counsel’s Proposed Findings of Fact, *supra* note 9, at 16-17.

III. THE DISCIPLINARY MATTER

A. *The Hearing Committee: Billing Fraud and Other Charges*

The matter came to the attention of the D.C. Bar Counsel, who charged Michael Romansky with dishonesty in violation of D.C. Rule of Professional Conduct 8.4(c) for inflating the hours billed to Dr. Siepser and other clients.⁵² The Bar Counsel brought other charges also, including two other allegations of dishonesty.⁵³

1. Directing an Associate to Bill Hours to the Wrong Client

One of the charges was based on an episode that took place in 1991, when Romansky directed an associate named Lisa Gilden to assist Romansky's father with the sale of the father's medical practice. Michael Romansky instructed the associate to bill her time not to his father, but to another client, Outpatient Ophthalmic Surgery Society ("OOSS"). Gilden billed approximately twenty-five hours of time that she worked for Dr. Romansky to OOSS.⁵⁴ OOSS was a "retainer client," so the recording of these hours did not directly increase the fees charged.⁵⁵ However, the misbilling of this time concealed from the firm management that Romansky was asking another lawyer to provide pro bono service to a member of his family,⁵⁶ probably one who could afford to pay for legal services. Once discovered, Romansky was required to repay the firm for the value of Gilden's time.⁵⁷

The Hearing Committee found no violation of Rule 8.4(c) in these allegations. The report noted that "[a]ny misreporting of time is improper" but that this did not constitute a violation because there was no impact on client funds.⁵⁸ The Board on Professional Responsibility agreed, noting that Romansky's directing Lisa Gilden to misbill her hours to OOSS was "strictly an internal record keeping matter and Romansky did not violate Rule 8.4," since it involved no increase in the amount of fees charged to OOSS.⁵⁹

52. *See Romansky*, 825 A.2d at 313.

53. *Id.* at 313-14.

54. *See* Hearing Comm. report, *supra* note 10, at 14. Under firm procedure, Romansky should have opened a file for this client even if his intention was to provide the service pro bono. *Id.*

55. *Id.* at 15.

56. *Id.* at 16.

57. *Id.*

58. *Id.* at 43-44. As I discuss below, in evaluating allegations that a lawyer "borrows" from a client trust account, the dishonesty is regarded as extremely serious even if the lawyer restores the amount borrowed.

59. *Romansky*, 825 A.2d at 314 (characterizing the board's conclusion).

2. Fabrication and Back-dating of a Client Fan Letter

A final disciplinary charge was based on Romansky's attempt to thwart the firm investigation of his billing practices. When Romansky learned that the firm was investigating his billing practices, he was "shocked . . . and very scared."⁶⁰ Soon after he learned of the investigation, Romansky asked one longstanding client, Ms. Durant of Federated Ambulatory Surgery Association ("FASA"), whether she would be willing to write a letter to the firm attesting to the quality of his legal services. He made this request during a bris (circumcision ceremony) for his son at which Durant was a guest.⁶¹ She agreed to do so after she got back from vacation. Romansky was in a hurry, so after the client left on vacation, Romansky called the client's assistant and dictated a letter. He told the assistant that her boss had already approved the letter and asked her to back-date the letter by a month and fax it to him.⁶² Romansky then submitted the letter to James Sneed with some other materials, telling Sneed that he had received it "a month or so ago."⁶³

When Durant called in to the office from her vacation, she found out about the letter and was "very upset."⁶⁴ She asked Romansky not to use the letter.⁶⁵ Romansky told her (falsely) that the letter had not been used and had been destroyed.⁶⁶ She felt so betrayed by the episode that she fired Romansky then eventually fired the firm.⁶⁷

Romansky admitted that he had violated Rule 8.4(c) in preparing and submitting the FASA letter, and the Hearing Committee agreed.⁶⁸ They described this conduct as "quite serious" and "inexcusable."⁶⁹

3. Alteration of Time Records

The Hearing Committee opened its discussion of Romansky's alteration of the time records of other lawyers by quoting an earlier D.C. case, *In re Schneider*,⁷⁰ in which an associate at another large law firm, Seyfarth, Shaw, Fairweather & Geraldson,⁷¹ was suspended for thirty

60. Hearing Comm. report, *supra* note 10, at 5.

61. *Id.* at 6.

62. *Id.* at 7.

63. *Id.* at 8.

64. *Id.*

65. *Id.* at 9.

66. *Id.* at 10.

67. *See id.* at 12. The firm considered these fabrication and back-dating charges to be the most serious of those against Romansky. *Id.* at 13.

68. *Id.* at 31-32.

69. *Id.* at 48.

70. 553 A.2d 206 (D.C. 1989).

71. *Id.* at 213. The name of Schneider's employer was mentioned by the dissenting opinion

days because he had added a “1” in the 100s column of eight expense receipts that he had submitted to the firm for reimbursement. Schneider claimed to have altered these receipts to obtain reimbursement for expenses for which he had not kept receipts.⁷² The D.C. Court of Appeals nevertheless found the conduct to be dishonest. The court said (and the Hearing Committee quoted):

Documents are an attorney’s stock in trade, and should be tendered and accepted at face value in the course of professional activity. If an attorney knowingly proffers altered documents in a context where the attorney knows or should know that action may be taken thereon, the attorney has engaged in conduct involving deceit in violation of the rule, whatever the ultimate intent or motives may have been in making such alterations. The latter may go to sanction, but not to the threshold issue of violation *vel non*.⁷³

Romansky argued that the alteration of pre-bills to change the hours listed was not an alteration of documents, and that he had no dishonest intent.⁷⁴ The Hearing Committee rejected both arguments, finding that:

Romansky deliberately inflated the amount of time recorded by timekeepers for the purpose of presenting to clients bills which reflected undisclosed premiums. This was knowing, deliberate action and Mr. Romansky expected that the clients would take the bills at face value and pay them.⁷⁵

The committee noted that Schneider believed he had a legitimate reason for altering the documents, did not intend to obtain funds to which he was not entitled, and that he did not intend to deceive the firm or the client about the total amount legitimately owed.⁷⁶ The committee acknowledged that Romansky had made similar arguments.⁷⁷ The Hearing Committee urged that in dealing with client funds, lawyers must observe scrupulous standards of honesty.

The report quoted at length from ABA Formal Opinion 93-379,⁷⁸ which offers guidance in interpreting the Model Rules as they apply to hourly billing and expense billing. The committee noted with approval the conclusion of the ABA opinion that lawyers must never record hours

but not by the majority. The dissent would have found no violation of the dishonesty rule in Schneider’s behavior.

72. *Id.* at 207.

73. *Id.* at 209 (footnote omitted).

74. Hearing Comm. report, *supra* note 10, at 33.

75. *Id.* at 37.

76. *Id.* at 36.

77. *Id.* at 37.

78. ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993).

that were not worked, and must disclose—at the outset and in each billing statement—the basis for the amount billed.⁷⁹

The committee concluded that Romansky violated Rule 8.4(c) in charging undisclosed premiums by altering the time records of the two clients who had contracted to pay fees based only on hours worked.⁸⁰ The committee found that his charging of premiums by altering the record of time worked for these clients “evinces the kind of recklessness which has been deemed to fulfill the requirement of intent.”⁸¹ These incidents were described as “serious misconduct . . . Any misrepresentation on a bill to a client is a serious matter,” and were the basis of a recommended thirty-day suspension.⁸²

The committee found no violation of 8.4(c) in the addition of hours to RCII-Summit, because Romansky’s claimed purpose in adding hours to the pre-bills was “to correct what he perceived as timekeeping errors.”⁸³ The committee did, however, express concern about Romansky’s failure to consult with the relevant lawyer about what the correction should be.⁸⁴ As to Premium Plastics, the committee found insufficient evidence to support a finding of a violation of 8.4(c) because the engagement letter with that client “contemplated possible premiums” and because Romansky’s falsification of the time records was only on the pre-bill and was not sent to the client.⁸⁵

4. Sanction

Having concluded that Romansky acted in violation of Rule 8.4(c) in adding hours to the bills of two clients and in fabricating a client fan letter in response to the investigation of his improper billing practices, the committee recommended that Romansky be suspended for thirty days. This recommendation was informed by the thirty-day suspension imposed in *Schneider* and the sixty-day suspension imposed in another case, *In re Bikoff*,⁸⁶ in which a partner in a law firm who co-chaired his practice group was found to have “intentionally misclassified over \$100,000 in client expenses on bills in order to avoid client inquiry into ‘debatable’ categories of expenses.”⁸⁷ Bikoff had, for example, reclassified billings for secretarial time as phone and photocopying

79. Hearing Comm. report, *supra* note 10, at 39.

80. *Id.* at 41.

81. *Id.* at 42.

82. *Id.* at 48-49.

83. *Id.* at 42.

84. *Id.*

85. *Id.* at 42-43.

86. 748 A.2d 915 (D.C. 2000).

87. Hearing Comm. report, *supra* note 10, at 47.

costs.⁸⁸ Bikoff's misconduct was found to be more serious than Schneider's because he had twenty years practice experience. Also his misconduct occurred over a long period of time and involved more money than Schneider's.⁸⁹ The Hearing Committee noted that mitigating factors included showing remorse, cooperation with Bar Counsel, and lack of prior discipline. Aggravating factors included Romansky's position as the leader of his practice group and his major billing responsibilities.⁹⁰ The committee found that "there was no excuse for a partner in his position to be unaware of proper billing procedures . . . [but] the violations are not so serious as to call into question Romansky's fitness to practice law."⁹¹

B. Appeals to the Board on Professional Responsibility and the Court of Appeals

After the Hearing Committee report in December of 1998, the matter was reviewed by the Board on Professional Responsibility. The board accepted the Hearing Committee's recommendations on which allegations violated Rule 8.4(c) and the recommended thirty-day suspension.

Romansky appealed the board's conclusions to the court of appeals, arguing (among other things) that his inflation of hours billed to Dr. Siepser and Surgical Health "was, at most, negligent, the result of his good faith, though erroneous belief that the fee agreement permitted premium billing."⁹² He urged that he was negligent in failing to check the retainer agreements to sort out which ones allowed undisclosed premium billing.⁹³

The Bar Counsel appealed the board's finding of no dishonesty in Romansky's direction of associate Lisa Gilden to work for his father and bill the time to another client. Bar Counsel also urged that a thirty-day suspension was inconsistent with prior cases and urged a six-month suspension.⁹⁴

The court of appeals decided that the board had not made adequate findings on whether Romansky had committed acts of intentional dishonesty in charging undisclosed premiums to clients whom the firm

88. *Id.* (describing the facts of *Bikoff*).

89. *Id.* at 48.

90. *Id.* at 49.

91. *Id.* at 49-50.

92. *Romansky*, 825 A.2d 311, 315 (D.C. 2003).

93. *Id.*

94. Brief for the Office of Bar Counsel at 2, *In re Romansky*, 825 A.2d 311 (D.C 2003) (No. 99-BG-1626) [hereinafter Brief of Bar Counsel 2000].

had agreed to bill based on hours worked. The court remanded the case for further proceedings. One may prove dishonesty without showing dishonest intent, said the court, by presenting “clear and convincing evidence that an action is obviously wrongful and intentionally done.”⁹⁵ In other words, if a lawyer intentionally commits an obviously wrongful act, the dishonesty may be inferred from the act itself. However, the court explained, “when the act itself is not of a kind that is clearly wrongful, or not intentional, Bar Counsel has the additional burden of showing the requisite dishonest intent.”⁹⁶ Romansky’s recording of extra hours on other lawyers’ time records was found not to be a “clearly wrongful” act. Therefore, if upon remand, the dishonesty was found to be intentional or reckless, the board should find a violation of Rule 8.4(c), but if his dishonesty was merely negligent, no violation should be found.⁹⁷

The court viewed the alleged dishonesty of Romansky as less significant than the alteration of expense receipts by Schneider. The court queried whether “the *mere* act of *adjusting* client bills without authorization is sufficient evidence of dishonest intent to warrant a Rule 8.4(c) violation.”⁹⁸ The opinion noted that “[e]very *unauthorized mistake* in rendering a client’s bill, even if unintentional and the result of no more than simple negligence, does not necessarily constitute dishonesty.”⁹⁹ On the other hand, Schneider’s “deliberate falsification of documents” was a dishonest act from which one could infer dishonest intent.¹⁰⁰ While Schneider knew “that falsifying credit receipts was wrongful conduct,”¹⁰¹ Romansky claimed that he *did not* know that his conduct was wrongful. The court concluded that “it [was] inappropriate for the Board to [have relied] so heavily on the *Schneider* line of cases.”¹⁰²

Finally, the court disagreed with the board’s analysis of Romansky’s direction to the associate to misbill the time she worked for Dr. Romansky to OOSS. The court found this conduct to be a serious

95. *Romansky*, 825 A.2d at 315.

96. *Id.*

97. The court noted that negligent misappropriation violates the ethics rules but does not support a sanction of disbarment. *Id.* at 316 (citing *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) (en banc)). Negligent charging of an undisclosed premium, however, would not even violate the dishonesty rule. See discussion of the double standard for misappropriation cases and billing fraud cases, *infra* Part V. B.

98. *Romansky*, 825 A.2d at 316 (emphasis added).

99. *Id.* (emphasis added).

100. *In re Schneider*, 553 A.2d 206, 209 (D.C. 1989).

101. *Romansky*, 825 A.2d at 317.

102. *Id.*

violation of Rule 8.4(c).¹⁰³

C. Board Decision on Remand

After the remand, the board decided that it was not necessary to have further evidentiary hearings but that the respondent's intent could be discerned from facts already in the record. Upon reconsideration of the record, the board found a violation of Rule 8.4(c) in the OOSS (direction to associate to misbill her time) matter, and concluded also that FASA letter (the phony client fan letter) involved serious dishonesty. The board backed away from its previous finding of dishonesty in Romansky's recording extra hours to be billed to Dr. Siepser and Surgical Health (who were to be billed based only on time). The board concluded there was insufficient evidence to conclude that this conduct involved reckless or intentional dishonesty. The board recommended a thirty-day suspension based on the OOSS violation and the FASA violation.¹⁰⁴

In explaining why it found no evidence of reckless or intentional dishonesty in charging extra hours to "hours-only" clients, the board accepted Romansky's characterization of these extra hours as "premiums" and found that Romansky's testimony that he did not remember which billing policy applied to these clients showed negligence in failing to consult the engagement letters, but not "dishonest intent or recklessness."¹⁰⁵ The board found it "troubling that Respondent determined that the appropriate manner of charging a premium was to alter the hours actually worked rather than expressly add on a separate premium charge."¹⁰⁶ Troubling, but not intentionally dishonest. In explaining this conclusion, the board noted that this practice would have been more dishonest if the altered time records had been provided to the client, but since they were concealed, it was arguably "an internal matter."¹⁰⁷ The board also excused Romansky's confusion or uncertainty about how to charge a premium, since the firm gave no guidance. Since the board believed that the "other factors" letter "unquestionably entitled" Romansky to charge undisclosed premiums to the clients who had received that letter, Romansky's transgression in imposing similar charges on hours-only clients seemed minor.¹⁰⁸

103. *Id.* at 318.

104. Report and Recommendation of the Board on Prof'l Responsibility at 1, *In re Romansky*, Bar Docket No. 163-96, (June 24, 2005) [hereinafter 2005 Board Report].

105. *Id.* at 10.

106. *Id.* at 11.

107. *Id.*

108. *Id.* at 11-12.

Although the board found no dishonesty, they cautioned that this decision “is not to be taken as holding that attorneys may go about charging premiums to clients by misstating the number of hours actually worked rather than disclosing the fact that a premium was charged.”¹⁰⁹

Bar Counsel appealed this decision to the D.C. Court of Appeals, again. Oral argument was heard in May 2006. This Article is to be published before the case is finally decided, so there is a missing chapter in the story. Regardless of the ultimate outcome, this case bears examination as an example of the need for development, implementation and enforcement of clear boundaries in lawyer billing practices.

D. Where Things Stand

Six years after the hearing committee report, and twelve years after the events which led to the disciplinary action, the matter is still being litigated.¹¹⁰ The litigation drags on in part because the Board on Professional Responsibility and the D.C. Court of Appeals are having a hard time sorting out whether it is dishonest to bill a client for hours that were never worked.

Meanwhile, in 2004, Romansky’s twenty-five year employment at McDermott, Will & Emery ended, and he went to work for one of his clients, the Outpatient Ophthalmic Surgery Society, where he still retains some affiliation,¹¹¹ and then became a “senior partner” in a lobbying firm called Strategic Health Care.¹¹² The circumstances that led to his departure from his long-time employer are unknown.

IV. CRITIQUE OF THE *ROMANSKY* OPINIONS

The Romansky matter offers a fascinating case study in the difficulties of assembling a full and accurate factual record. It also

109. *Id.* at 12-14.

110. Although it is difficult to explain the duration of this litigation, one can identify a few possible factors: (1) The D.C. disciplinary system relies on volunteers to staff the Hearing Committees and write opinions, which means that the time-consuming work of scheduling hearings, reading records, and writing opinions must often be sandwiched into the busy schedules of practicing lawyers; (2) Litigating against a lawyer in a large firm can be time-consuming because of the possibility of a larger-than-usual number of motions, appeals, objections to document requests, etc; (3) Sometimes a skillful respondent’s counsel can take steps that cause delays in resolution of a matter, thereby postponing any sanction that might be imposed; (4) Some cases raise issues that are difficult to resolve. Apparently this is one of them. For example, the Bar Counsel’s first brief to the court of appeals was filed in March of 2000, but the decision was not issued until June of 2003.

111. OOSS, Council Membership: Exclusively Representing the Interests of the Ophthalmic ASC Surgeon, <http://www.ooss.org/membership.html> (last visited Jan. 29, 2006).

112. Strategic Health Care, Mike Romansky, Bio, http://www.strategichealthcare.net/Bio/Mike_Romansky.htm (last visited Jan. 29, 2006).

illustrates an impressive array of analytical steps used almost to excuse a senior partner in an elite law firm from responsibility for secretly adding false hours to client billing records. In some cases, lawyers who have done exactly as Romansky did—editing time records to add hours without any confidence that the extra hours were worked—have been disbarred and/or have gone to prison.¹¹³ The *Romansky* case puts on display the still widespread collective confusion among lawyers and judges about what billing practices are or are not dishonest. I first note some deficiencies in the factual record and in the legal analysis of the various decision-makers. Then I note some relevant legal and factual context that was largely ignored by all the opinions to date.

A. *Incomplete Factual Record*

1. Self-protective Firm Investigation

McDermott, Will & Emery organized a prompt¹¹⁴ investigation when a client complained that he had been billed for hours that had not been worked. James Sneed, a member of the firm's professional responsibility committee was properly tasked to oversee the investigation. Perhaps it was a reasonable initial decision to review only two months of Romansky's billing records. However, one might question the wisdom of asking a lawyer suspected of falsifying his billing records to review his records and to identify which files might reveal misfeasance.

All eight of the lawyers in Romansky's practice group whom Sneed interviewed as part of his investigation "expressed the view that [Romansky's] 'bills had reflected time not actually spent . . . and that

113. See, e.g., *In re Duker*, 662 N.Y.S.2d 847 (N.Y. App. Div. 1997); *Duker Pleads Guilty to Overbilling U.S. in S&L Bailout Cases*, WALL ST. J., Aug. 22, 1997, at A9B. Duker was managing partner of a firm that did professional liability work for the federal banking agencies. He reviewed the time records of other lawyers in the firm, and forwarded them to the bookkeeper with written instructions to increase the number of hours billed. He pled guilty to mail fraud and other charges, was sentenced to thirty-three months in prison, and agreed to repay the government \$2.9 million. See Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 241, 266 (1999) [hereinafter Lerman, *Blue-Chip Bilking*].

114. Contrast, for example, the conduct of the New York office of Hunton & Williams upon receiving reports from three associates alleging massive billing fraud by partner Scott J. McKay Wolas. The firm did not initiate its internal investigation until eighteen months after the associates began to complain, and then the investigators concluded that it could not be proven "beyond a reasonable doubt" that Wolas had engaged in over-billing. Wolas subsequently absconded with an estimated \$40 million in stolen funds. Two of the associates later sued for wrongful discharge, claiming they were forced out of the firm for reporting Wolas' misconduct. See Lerman, *Blue-Chip Bilking*, *supra* note 113 at 278, 286, 346. McDermott's conduct is, by contrast, almost exemplary.

[Romansky] had been engaged in padding his own hours for years.’”¹¹⁵ Several of the lawyers mentioned that one of the lawyers in the group had confronted Romansky about his bill-padding about a year before the investigation, and that Romansky reportedly had acknowledged the allegations and said that he would stop.¹¹⁶ These disclosures apparently did not lead Sneed to review Romansky’s billing records for the years during which his colleagues alleged that Romansky was padding bills. (I do not know whether this eventually occurred, but it is not part of the record). It is possible that the partners made a considered judgment to keep the temporal focus of the investigation narrow, since discovery of a longer pattern of improper billings could have had disastrous financial and other consequences.

2. Limitations of Bar Counsel Investigation

I do not know the scope of the Bar Counsel’s investigation, but the factual record as reported in the various briefs and opinions suggests that the Bar Counsel relied quite substantially on the internal investigation conducted by the law firm. Even if the firm had self-protective reasons to limit the scope of the investigation, the Bar Counsel might have sought to collect billing records covering a longer period of time. Since Sneed’s investigation suggested very strongly that Romansky had been adding hours to time sheets for years, a broader investigation was warranted.

Bar Counsel probably faced many practical impediments. The law firm may have resisted giving the Bar Counsel records that would have allowed a broader investigation. Bar Counsel may not have had enough staff to review years of billing records or to interview a large number of lawyers. If the disciplinary system is to grapple with misconduct all across the profession, additional resources are needed.

3. Irresponsible Timekeeping Disregarded

While lacking the facts to prove a long pattern of bill-padding, the finders of fact seemed also to turn a blind eye to another glaring problem in Romansky’s billing practices. Romansky admitted during his testimony that he only recorded his own hours once a month. Even if he had an excellent memory, this method of recording hours cannot possibly produce an accurate account of a month’s time, and reflects at least a reckless attitude about recording time. Other lawyers have been disciplined for such conduct. Even if Bar Counsel was unaware of this

115. Post-remand Brief of Bar Counsel, *supra* note 17, at 29 & n.8.

116. *Id.*

practice and did not charge dishonesty on the basis of this reckless time-keeping, the Hearing Committee, initially or on remand, might have considered the respondent's testimony on this subject as evidence of whether his dishonest billing behavior was negligent, reckless or intentional.

4. Disregard of Romansky's and the Firm's Supervisory Responsibilities

Michael Romansky was the leader of the health care practice in the Washington office at McDermott, Will & Emery. Part of his responsibility as the billing partner for his practice group was to know and to follow firm policy on billing clients, and to know and follow any applicable law on lawyer billing practices. Likewise, his position in the firm obliged him to offer guidance to the lawyers in his practice group on billing practices.¹¹⁷

Bar Counsel did not charge Romansky with violation of his supervisory duties under Rules 5.2 and 5.3 as a billing partner, even though the factual record is replete with evidence that he violated these rules. Did Romansky take reasonable steps to ensure that the lawyers and other staff under his supervision complied with the ethical rules? Did he establish policies, training, or oversight to ensure that their billing practices were truthful and accurate? Did he acquaint himself with the available guidance about how the rules should be interpreted with respect to billing practices?

If Bar Counsel had ample investigatory resources, the investigation might have extended beyond Romansky's personal responsibility to examine some puzzling practices in the law firm. Consider, for example, the "other factors" engagement letter that was being tested during the fall of 1994. One assumes that the responsible lawyers did not sit down with each client to explain that the terms of the letter allowed the lawyers discretion to increase the amounts billed based on any of the other factors on the list without consultation or disclosure. It appears the letter was simply sent to some clients. What was the firm "testing"? Was the experiment designed to determine whether the clients would notice that the firm had made a unilateral change in the terms of its fee contracts? Or perhaps the test was to see how much the firm's billings would rise if the lawyers were given this additional billing discretion.

Another example: The firm had no written policy on when premium

117. Rule 5.1 of the D.C. Rules of Professional Conduct requires that a partner or supervisory lawyer ensure compliance with ethical rules by subordinate lawyers and states that under some circumstances, a lawyer may be subject to discipline for failure to exercise proper supervision. *See In re Cohen*, 847 A.2d 1162, 1166 (D.C. 2004).

billing was permitted, what notice to or consultation with clients was required, or how premiums were to be reflected in the billing records. Apparently the firm had no explicit policy that lawyers should make contemporaneous records of the time they worked, or that it was impermissible to record fictitious hours. All of these failures to take steps to ensure ethical behavior in billing clients might have led to disciplinary charges against other senior lawyers in the firm. But these questions were not pursued.

B. Questionable Legal Analysis

The legal standards applied in the *Romansky* case are nearly meaningless. They depend so much on characterization of the facts that a judge who wishes to punish a respondent can simply declare the alleged dishonesty to be of the grievous self-evident sort, which requires no proof of intent, while a judge who is disinclined to impose serious sanctions can characterize the misfeasance as a lesser variety of dishonesty and therefore find insufficient proof of intent.

The *Romansky* case offers an example of the sympathetic version of the analysis. All three sets of decision-makers seem to think that it is sometimes permissible for a lawyer to record hours that were not worked and bill a client for them, but perhaps only if one characterizes the undisclosed extra charge as a “premium.” Then, if the lawyer subjectively believes that the work is more valuable to the client than a fee calculated based on time worked, the lawyer is justified in increasing the fee.

1. “Obviously Wrongful Acts”

The court of appeals held that if the dishonest conduct alleged is not “obviously wrongful,” one must show reckless or intentional dishonesty.¹¹⁸ It is on this basis that the court distinguishes *Schneider* and finds the lowly associate more culpable than the senior partner who had managerial responsibility for his practice group.¹¹⁹ But the court does not offer guidance about how to distinguish “obviously wrongful” dishonesty from more minor forms of dishonesty. The court is reaching for a distinction between billing mistakes and billing fraud, but the 2003 opinion displays confusion about how to draw this line. As a long-time student of some lawyer billing practices, I offer a modest taxonomy.

One yardstick that may be used to distinguish billing mistakes from billing dishonesty is the Restatement of Torts definition of fraudulent

118. *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

119. *Id.* at 317.

misrepresentation, which involves “a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it”¹²⁰ A person who engages in fraudulent misrepresentation may have one of the following mental states:

- (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.¹²¹

The critical distinction between honest billing mistakes and dishonest or deceptive billing practices lies in whether the lawyer in question intends to deceive a client or someone else.¹²²

a. Billing Mistakes

As the court noted, many billing mistakes do not involve dishonesty. For example:

- If a lawyer misreads the clock and records an hour more than the time actually worked on a matter, the lawyer has made a truthful but mistaken record of the time worked.
- If a lawyer fails to record her time on the day she does the work, and the following day (soon enough to remember) she makes an honest effort to remember and record the time that she actually worked on a matter, her conduct might be negligent, but her time record is not dishonest.
- If a lawyer accidentally records time that should be billed to client A on a log of time to be billed to client B, the record is mistaken but not dishonest.

In each of these cases, the lawyer is endeavoring to make a truthful record but is making a mistake.

b. Billing Dishonesty

Some billing mistakes are dishonest. A lawyer acts dishonestly if he or she knowingly:

- alters time sheets (his own or those of others) to record hours that he

120. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

121. *Id.* § 526.

122. See SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 13-14 (1978) (explaining that intentional deception may be accomplished through false statements, nondisclosures, or through other action or inaction).

knows were not worked,¹²³
–does not keep a record of how he spends his time but reconstructs what he did weeks after the work was done,¹²⁴
–“pads” time or expense records or bills the whole of a particular block of time to two or more clients,¹²⁵
–engages in conduct “intended to mislead and deceive her client into believing that more professional time had been devoted to the case than actually had been expended,”¹²⁶ or
–directs subordinates to alter billing records to misstate which lawyer did the work in question or to include false information about expenses.¹²⁷

In each of these cases, the lawyer “knows the matter is not as he represents it to be.”

If a lawyer alters the time records of another lawyer to record extra hours without consulting the other lawyer to confirm that the extra time was actually worked, the lawyer also acts dishonestly. He “does not have confidence in the accuracy of his representation.”

Part of the confusion that pervades the analysis of Romansky’s alteration of time sheets is that various decision-makers quickly embraced—or at least failed to reject—the proposition that it is acceptable to write down extra hours that do not represent time worked but represent an undisclosed extra fee for high-quality service. When this proposition is examined against other cases that have found various billing behaviors dishonest, it quickly becomes apparent that recording phony hours is dishonest. The record misdescribes the lawyer’s intention. The intent to deceive is evident from the failure to disclose the basis of the extra charge to the firm or the client.

123. See, e.g., *In re Lawrence*, 884 So. 2d 561, 567 (La. 2004) (holding that because respondent listed hours on his timesheets for work not performed, he failed to maintain “the ethical standards of the legal profession” thus violating rules 8.4(a) and 8.4(c) of the Rules of Professional Conduct).

124. See generally Lerman, *Blue-Chip Billing*, *supra* note 113 (discussing various cases in which lawyers were disciplined for altering time sheets and billing practices).

125. See, e.g., *In re Dyer*, 750 So. 2d 942 (La. 1999) (disbarring a lawyer who overcharged a client by padding his expense records and rejecting the lawyer’s claim that padded expenses were “mistakes”).

126. See, e.g., *People v. Espinoza*, 35 P.3d 552 (Colo. 2001) (disbarring lawyer who recorded hours not worked on time records and engaged in other deceptive and unethical conduct).

127. See, e.g., *In re Haskell*, 962 P.2d 813 (Wash. 1998) (imposing a two-year suspension on a law firm partner who directed staff to substitute his initials for those of associates on certain bills and to falsely represent that he had flown coach class rather than first class on trips being billed to a client).

C. *Excuses for Dishonesty*

1. “An Internal Record-Keeping Matter”

The Hearing Committee and the board concluded that if Romansky’s recorded phony hours were not sent to the clients who were being billed for them, there was no “misstatement to the client as to the time actually spent” so there was no dishonesty.¹²⁸ The predicate for this misguided analysis is that a lawyer may secretly charge premiums to clients, so if the lawyer creates misleading internal records suggesting that the extra charges were extra hours, the client is not deceived. Below I will explain why it is dishonest to charge undisclosed premiums, but regardless, the recorded phony hours are dishonest because they would mislead others in the firm who might review the time records. Since most law firm compensation systems rely heavily on hours billed as a determinant of both salaries and bonuses, misrecorded hours could increase the compensation paid to the lawyers whose time records were altered. If the practice group showed an impressive number of hours billed, the head of the practice group might be compensated accordingly.

But what about the conclusion that hiding the extra fee from the client is less dishonest than disclosing it? Disclosure of the extra fee (premium or hours) to the client would allow the client to review the proposed increase in the fee and to consent or to object. This is less deceptive than a billing statement that says only “for professional services rendered” and a dollar amount. The board reached the opposite conclusion, erroneously assuming that, absent an affirmative false statement (in this case about the number of hours worked), there was no intentional deception. In fact, the wrongfulness of a deception does not depend on whether it is accomplished by statement or by silence.¹²⁹

The creation *or* transmission of false records to a client is unquestionably dishonest. A lawyer may commit a dishonest act by making a false record even if it is not transmitted. Romansky falsified the time records but instructed that they should not be sent to the clients. The resulting bills, which reflected an inflated calculation of the

128. 2005 Board Report, *supra* note 104, at 12.

129. *See id.* at 11-12. The ethics rules are laden with act-omission distinctions, which both reflect and perpetuate this notion that deliberate deception is less wrongful if it can be accomplished by silence than by false statement. Rules 4.1(a) and (b) prohibit false statements to third parties more categorically than they prohibit withholding information from third parties. *See* D.C. MODEL RULES OF PROF’L CONDUCT R. 4.1(a)-(b) (1991). I believe that some deception can be justified, but that the relevant distinction is not whether the deception is accomplished by lying, misleading or withholding information. *See generally* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

amounts due, were transmitted to the clients. The concealment of the details does not make Romansky's conduct less dishonest. It makes it more dishonest. But even if the falsification resulted in no extra charges to a client, it would be dishonest.¹³⁰

There is another problem with the board's excusing the recording of a "premium" as extra hours. Even if billing records are not ordinarily disclosed to clients, detailed information about the basis of a bill must be made available upon request by a client, so maintaining records necessarily involves the possibility of disclosure. If a lawyer intends to charge a premium but records it as hours worked, then even if the details are never disclosed to the client, the lawyer is still creating a false record of the basis of the bill that would mislead others in the firm who might review the time records.¹³¹

2. Romansky's Asserted Ignorance That His Conduct Was Wrongful

In general, ignorance of the law or of the rules of professional conduct is not regarded as an excuse.¹³² Even so, the court of appeals in *Romansky* rejected *Schneider* as primary precedent and remanded to require proof of dishonest intent, in some large part because Romansky claimed ignorance of his contractual obligations and of firm policy¹³³ (the court does not even discuss Romansky's ignorance of relevant law; this is discussed below). Romansky asserted that he did not know that premiums should not be recorded as phantom hours, or that proposed premiums should be disclosed to clients, or that two of the clients for whom he recorded phantom hours were under "hours-only" agreements. The court reaches for these "ignorance" excuses for Romansky even though the finder of fact found Romansky's conduct dishonest.

If an inexperienced associate in a law firm made one of the mistakes listed in the previous paragraph, his error might be excused.

130. In *In re Lawrence*, for example, a lawyer submitted to his firm timesheets that reflected hours that he did not work. He explained this by saying that when he had too little work to do, he was encouraged to pad his hours. The court noted that in this case, the lawyer's time sheets were not used for client billing. 884 So. 2d 561, 567 n.4 (La. 2004). Even so, the Supreme Court of Louisiana found that the lawyer's conduct was dishonest. *Id.* at 567.

131. See Post-remand Brief of Bar Counsel, *supra* note 17, at 42, which makes this same point.

132. See *In re Devaney*, 870 A.2d 53, 57 (D.C. 2005) (per curiam); see also Post-remand Brief of Bar Counsel, *supra* note 17, at 38 (citing other cases).

133. *In re Romansky*, 825 A.2d 311, 317 (D.C. 2003) (explaining that "*Schneider* . . . did not address the 'situation where the attorney is unaware that he has even committed the act which is the basis of the disciplinary action' because *Schneider* plainly knew that the alteration of receipts was not the appropriate way to seek reimbursement. . . . Romansky, while conceding that he premium billed his clients, contends that he did not know that it was wrongful as unauthorized under the actual client billing agreement, thus any violation was merely negligent . . .") (citation omitted).

Perhaps the associate did not receive adequate training or supervision from the firm management. However, ignorance should not excuse lack of knowledge of legal obligations, firm policy, or contract terms if the lawyer is a senior partner who has responsibility for oversight of bills sent to one hundred clients.¹³⁴ Rather the lawyer's failure to know his legal and contractual duties violates his responsibility under DC Rule 5.1 to know the rules and to ensure that other lawyers under his supervision comply with those rules.¹³⁵

The court's requirement of proof of dishonest intent leads to an analysis of what a respondent said about whether he knew that he was doing something wrong. Lawyers in trouble nearly always have rationalizations to offer, sometimes including claims of ignorance. The court's intent requirement will penalize truthful lawyers (like *Schneider*) who admit intentional misfeasance while rewarding disingenuous lawyers who come up with rationalizations for their conduct and who deny intent to deceive.

3. Bill-padding as Premium Billing—A Dubious Post Hoc Rationalization

The lawyers in the health care practice group whom Sneed interviewed reported that Romansky had been adding hours to time records for years. Given this, one might question Romansky's claim that he only added hours because he thought he was authorized to do so by the new engagement letter. If this was the case, and assuming he knew that not every client had received the new engagement letter, why would he not have checked which clients' contracts had been so modified?

Even if one assumes that Romansky's explanation was truthful,¹³⁶ he made a number of fairly dubious assumptions about what was proper. Romansky apparently believed: that the new engagement letter authorized him to charge premiums to clients without consulting or notifying those clients; that it was proper to record the undisclosed premiums by adding fictitious hours to the time records of other lawyers; that it was proper to charge premiums whenever he thought that the work product of a lawyer in his group was "worth" more than the hours

134. Therefore, the respondent in *Schneider* should be viewed as less culpable than Romansky, because of his inexperience and his evident lack of understanding of where the line is between honest and dishonest conduct.

135. See *In re Cohen*, 847 A.2d 1162, 1166-67 (D.C. 2004) (suspending from practice a partner who failed to exercise proper supervision over an associate in his firm).

136. The Hearing Committee found that Romansky had engaged in multiple acts of dishonesty, and at least twice explicitly expressed skepticism as to the truthfulness of his testimony. Hearing Comm. report, *supra* note 10, at 8, 11. Therefore, there is ample reason to doubt the truthfulness of his explanation.

recorded; and that it was proper to charge these premiums on a month-by-month incremental basis rather than at the successful conclusion of a matter.

The adjudicators of the *Romansky* case did not question these assumptions. The Hearing Committee, the board, and the court of appeals all accepted the “undisclosed premium billing” as a post-hoc rationale for adding hours to the pre-bills of other lawyers, or at least found that this explanation was credible enough that they found no dishonesty in Romansky’s charging extra hours to clients who had received the “other factors” letters. As I will discuss below, there is a growing body of law and ethical guidance that suggests that none of these assumptions are correct, but the law of lawyer billing practices has received precious little attention in this litigation.

Other lawyers facing charges of billing fraud also have tried to excuse their behavior by claiming that they were doing “premium billing” and sometimes that the practice was common among other lawyers in their firms. Maureen Fairchild, a former partner at Chapman & Cutler in Chicago, made this same claim in defending against charges that she had written down phony hours.¹³⁷ In her case, the explanation was not persuasive. She was disbarred and sentenced to a year in prison.¹³⁸

D. Lenient Sanctions

An examination of billing fraud cases in other jurisdictions suggests that a longer suspension than the six months recommended by Bar Counsel would be appropriate in this case. In some other jurisdictions, senior lawyers in major law firms who have altered time records to record hours not actually worked have been disbarred, criminally prosecuted, and sent to prison.¹³⁹ Although Romansky’s alleged billing fraud involves smaller amounts of money than the amounts alleged to have been improperly billed in some of the other cases, the pattern of dishonesty reflected in this record is similar to that presented in other cases. The amount at issue in this case may be relatively small simply because the firm reviewed only two months of Romansky’s time records,¹⁴⁰ and the Bar Counsel did not conduct a broader

137. See the discussion of the disciplinary and criminal prosecutions of Maureen Fairchild in Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money and Professional Integrity*, 30 HOFSTRA L. REV. 879, 907 (2002).

138. *Id.* at 901.

139. These cases are discussed in Lerman, *Blue-Chip Bilking*, *supra* note 113 at 211-15.

140. Sneed, a partner in the firm, interviewed eight lawyers in the health care department of the firm, and every one of them reported that Romansky “had been engaged in padding his own hours

investigation.¹⁴¹ In any event, the amount alleged to have been improperly billed should not be the primary determinant of the sanction imposed.¹⁴² Nor is it of central relevance whether the dishonesty was motivated by a desire for financial gain.¹⁴³ Instead, the primary factor should be that the misconduct alleged involves theft of client funds by falsification of time records.

Also, as I discuss below, the court imposes harsh sanctions for misappropriation because misfeasance in dealing with client funds is a grave breach of trust. If a lawyer steals from a client by over-billing, the lawyer commits a similar breach of trust. In both types of cases, the lawyer is wrongfully taking client funds for his own use. In both cases, the lawyer is deceiving the client about what he is doing. This comparison also suggests that the sanctions recommended for Romansky are curiously lenient.

E. Failure to Consider the Relevant Context: What Romansky Knew or Should Have Known About Billing Fraud

The law on lawyer billing practices has developed a great deal over the last fifteen years. Practices that once were tolerated now lead to discipline, prosecution, and civil liability. In considering the respondent's conduct, therefore, the adjudicators might have considered what Romansky knew or should have known about the law on billing practices during the fall of 1994, when the conduct at issue in this case took place. A review of this context suggests that Romansky was far more aware of the wrongfulness of recording phantom hours than he claimed to have been.

for years." Post-remand Brief of Bar Counsel, *supra* note 17, at 29. Why, in light of that apparently universal opinion of Romansky's close colleagues, did the firm not review bills over a longer period of time? One must wonder whether they did not want to discover that the problem was much more serious than they had initially supposed.

141. I have the impression that Bar Counsels' ability to investigate complex cases fully varies directly in proportion to their budget and number of staff. It probably is no accident that the ARDC in Chicago, which is relatively generously funded, has investigated and prosecuted an unusual number of complex cases, some of them involving allegations of billing fraud over a period of years. The 2004 Annual Report from the ARDC shows annual expenditures exceeding \$12.5 million. See ARDC 2004 Annual Report of the Attorney Registration and Disciplinary Commission, available at http://www.iardc.org/AnnualReport04/2004main_annreport.html#5 (last visited Sept. 30, 2005).

142. See, e.g., *In re Haskell*, 962 P.2d 813, 815-16, 824 (Wash. 1998) (imposing a two-year suspension on a law firm partner who over-billed clients \$3,136.85 by directing that his initials be substituted on the time records for those of the associates who did the work on the matters; this resulted in those hours being billed at a higher hourly rate).

143. See *id.* at 816 (noting that Haskell's motivation in directing initial-switching on time records was not financial gain but to retain certain insurance companies as clients).

1. William Appler: Romansky's Partner Fired for Billing Fraud

In 1984, the same year that Romansky became the leader of the health care practice group, William Appler was hired in the D.C. office as a non-equity partner. His specialty was food and drug administrative law. In 1991, Appler was dismissed from the law firm because, starting in January of 1986, he had undertaken a secret billing scheme under which he billed five of his clients directly and asked them to pay him directly for his services instead of paying the firm.¹⁴⁴ Appler's fraudulent billing practices included shifting fees to expense and expenses to fees, billing more than twenty-four hours a day, charging two clients for the same expense, and billing thousands of dollars in personal expenses to clients.¹⁴⁵ A secretary in the firm discovered in February 1991 that Appler had not credited a client for an unused airplane ticket.¹⁴⁶ One month later, the firm discovered that Appler was billing one of his clients directly rather than through the firm. This led to an investigation which ultimately concluded that he had stolen at least \$1.1 million from the law firm.¹⁴⁷

Appler turned himself in to the D.C. Bar Counsel. A Hearing Committee recommended a three-year suspension in 1993. The Hearing Committee's recommendation was partly based on a finding that Appler suffered from bipolar disorder, which was one cause of his misconduct. The D.C. Court of Appeals decided in April 1995 that William Appler should be disbarred.¹⁴⁸ Appler was never criminally prosecuted for his billing fraud. The court's opinion reported that he "apparently avoided criminal prosecution by reaching a settlement with McDermott."¹⁴⁹ The court of appeals noted that if Appler had been convicted of the crimes he had committed, he would have been disbarred, regardless of any mitigating factors. Even though Appler "was able to avoid criminal prosecution for his acts," the court concluded that it could not allow him

144. *In re Appler*, 669 A.2d 731, 734 (D.C. 1995).

145. *Id.*; John Murawski, *Should William Appler Be Disbarred?: Ex-McDermott, Will Partner Claims Mental Illness Drove Him to Embezzle \$1 Million from Firm*, LEGAL TIMES, Jan. 3, 1994, at 1, 13.

146. *Appler*, 669 A.2d at 734-35.

147. *Id.* Appler's conduct cheated his partners out of a share of the client fees to which they were entitled, while Romansky's conduct involved billing clients for more than they should have been billed, according to their fee agreements. It is arguably more culpable to cheat one's clients than one's partners.

148. *Id.* at 733, 741.

149. *Id.* at 735 n.6. This statement is somewhat puzzling. It suggests that the firm did not report the matter to the U.S. Attorney because of their private settlement. But the firm does not control the action of the U.S. Attorney, nor should a lawyer be able to avoid criminal liability based on a private deal with his employer. And given the magnitude of the theft, one would have thought that criminal law enforcement would be appropriate.

to remain a member of the bar because of his dishonesty and theft.¹⁵⁰

Michael Romansky was a partner in the same office of McDermott, Will & Emery during the entire period of Appler's perpetration of his scheme, his detection, investigation, dismissal, and discipline. In any firm in which one partner is fired and disbarred for massive billing fraud, every partner in the firm, most especially one in the same branch office, and most especially one who has managerial or billing responsibility, is likely to be intimately familiar with the matter. It is likely that the partners in the D.C. office of McDermott, Will & Emery had discussions about Appler's misfeasance. It is certainly fair to assume that Michael Romansky knew all about the Appler matter.

In many other law firms in which a partner or an associate has been discovered to have been engaged in billing fraud, the other partners in the firm, once they get out from under the resulting investigation and litigation, set about to institute policies and procedures to ensure that a similar situation never arises. Some firms designate one knowledgeable partner as the firm ethics counsel.¹⁵¹ Some firms adopt policies specifying how time is to be recorded and how premiums are to be billed. Some provide that all bills are to be reviewed by someone else in addition to the responsible billing partner. Some firms institute training for all lawyers and non-lawyers to ensure compliance with these policies.¹⁵² William Appler's partners at McDermott, Will & Emery were "just completely shocked" by his billing fraud, said Charles Work, the managing partner of the D.C. office. "It was a deep feeling of betrayal. We were exceptionally angry about it," said Work to a reporter who interviewed him for an article published in 1994.¹⁵³ I do not know whether this collective dismay led the firm to improve its ethical infrastructure or to institute loss protection/risk management measures, all the partners in the D.C. office should have been aware of the risks involved in "creative" billing practices and of the emerging ethical guidelines on honesty in hourly billing.

150. *Id.* at 741.

151. For example, Bill Wernz was engaged to perform this role at Dorsey & Whitney in Minneapolis in the wake of the prosecution and disbarment of partner James O'Hagan for billing and securities fraud. Deborah Shortridge was engaged to perform this role at Weinberg & Green in Baltimore after partner Stanford Hess was suspended for billing fraud.

152. For one discussion of these developments, see Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 559-61 (2002) (examining the role of in-house counsel in thirty-two law firms).

153. Murawski, *supra* note 145, at 12.

2. ABA Formal Opinion 93-379: Guidance on Billing Practices

In December of 1993, after William Appler had been fired but while the disciplinary proceeding was pending, the ABA Committee on Ethics and Professional Responsibility issued an opinion on *Billing for Professional Fees, Disbursements, and Other Expenses*. Given the recent ethical disaster in his own office, and given his responsibilities as a billing partner, Michael Romansky either read or should have read this opinion soon after it was issued. Despite detailed analysis of the opinion by the Hearing Committee, neither the board nor the court recognized that Romansky, given his billing responsibilities, knew or should have known of it, or that his bill-padding (or undisclosed premium billing), viewed in light of the opinion, was intentional or reckless dishonesty.

Suppose that Romansky was very busy, and read only the first half of the summary paragraph that appears at the beginning of the opinion. He would then have read the following:

Consistent with the Model Rules of Professional Conduct, a lawyer must disclose to a client the basis on which the client is to be billed for both professional time and any other charges. Absent a contrary understanding, *any invoice for professional services should fairly reflect the basis on which the client's charges have been determined*. In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, *a lawyer may not bill more time than she actually spends on a matter*, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour).¹⁵⁴

If Michael Romansky had read only this partial summary, he would have been on notice that the most authoritative ethics committee in the United States, interpreting Model Rule 1.5, which was nearly identical to the then-effective D.C. rule, concluded that (a) recording hours not worked is improper; and (b) a lawyer must give clients advance notice of the basis on which the client is to be billed and must disclose the basis for the charges to the client on each and every invoice. Even this teaspoonful of guidance should have alerted Romansky that his billing practices might be called into question.

But suppose Michael Romansky read the entire ABA opinion. He then would have obtained this additional guidance:

At the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the

154. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993). (emphasis added).

beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed.

....

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

Initial disclosure of the basis for the fee arrangement fosters communication that will promote the attorney-client relationship. The relationship will be similarly benefited if the statement for services explicitly reflects the basis for the charges so that the client understands how the fee bill was determined.

....

[T]he lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spent on the client's behalf. . . .

....

It goes without saying that a lawyer who has undertaken to bill on an hourly basis is *never justified in charging a client for hours not actually expended*. If a lawyer has agreed to charge the client on this basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client, not give rise to an opportunity to bill a client phantom hours. *This is not to say that the lawyer who agreed to hourly compensation is not free, with full disclosure, to suggest additional compensation because of a particularly efficient or outstanding result*, or because the lawyer was able to reuse prior work product on the client's behalf. The

point here is that *fee enhancement cannot be accomplished simply by presenting the client with a statement reflecting more billable hours than were actually expended.*¹⁵⁵

Michael Romansky was a busy man in 1993 and 1994. Could he not have heard about this guidance? Even if the opinion itself did not come to Romansky's attention directly, or even if it was not circulated to the McDermott lawyers by the professional responsibility committee, he might have learned of it through press reports. For example, the ABA Journal published two articles in 1993 and 1994 on proper and improper billing practices. One article, published in March 1994, was titled *Requiring a Truthful Tab: ABA Ethics Opinion Denounces Double Billing and Surcharges by Lawyers*.¹⁵⁶ It reported that the legal profession was now admitting that some lawyers engage in dishonest billing practices and was trying to solve the problem. Professor Stephen Gillers noted that the opinion "will force law firms—and inspire clients—to scrutinize billing practices." The other article, which was the lead story in the August 1994 issue,¹⁵⁷ was published just two months before the conduct that led to disciplinary action. This article summarized the ABA opinion and reported on several recent cases in which lawyers had been punished for billing fraud. These two articles are but examples of the extensive press coverage of the ABA opinion.

The Hearing Committee quoted extensively from the article, referencing the passages quoted above, and found that Romansky's charging undisclosed premiums by adding hours to the time records of work done for "hours-only" clients violated 8.4(c). The committee noted that Romansky was obliged, if he wanted to charge a premium, to disclose this to the client and explain how it was to be calculated. They concluded that his failure to know the proper way to charge a premium "evinces the kind of recklessness which has been deemed to fulfill the requirement of intent" to show violation of 8.4(c).¹⁵⁸ The Hearing Committee concluded that:

155. *Id.* (emphasis added). The opinion interpreted Model Rules 1.4(a), 1.4(b) and 7.1(a) to mandate the guidance offered. The D.C. Bar Ethics Committee issued its own opinion on disclosure of billing practices, concurring with the ABA opinion, but this opinion was not adopted until 1996. D.C. Bar Ethics Comm., Op. No. 267, *Disclosure of Billing Practices: Billing Based on Time and "Attorney Charge"* (1996).

156. Andrea Sachs, *Requiring a Truthful Tab: ABA Ethics Opinion Denounces Double Billing and Surcharges by Lawyers*, A.B.A. J., Mar. 1994, at 26.

157. Darlene Ricker, *Greed, Ignorance and Overbilling: Some Lawyers Have Given New Meaning to the Term 'Legal Fiction.' Now the Profession is Asking Why, How Widespread, and How Do We Stop it?* A.B.A. J., Aug. 1994, at 62.

158. Hearing Comm. report, *supra* note 10, at 41-42.

Mr. Romansky deliberately inflated the amount of time recorded by timekeepers for the purpose of presenting to clients bills which reflected undisclosed premiums. This was knowing, deliberate action and Mr. Romansky expected that the clients would take the bills at face value and pay them.¹⁵⁹

The Hearing Committee apparently thought that a firm might avoid these disclosure obligations by sending a form “other factors” letter to its clients.

The board also quoted from and discussed ABA Formal Opinion 93-379, but relegated it to a “see also” footnote to a statement that clients are entitled to scrupulous honesty in their lawyers’ billing practices.¹⁶⁰ The board agreed with the Hearing Committee that Romansky had a duty to know the proper way to charge a premium and to make the requisite disclosures, and that his failure to do so was dishonest.¹⁶¹ The court of appeals opinion neither mentions nor cites the ethics opinion, and concludes that “the Board made no findings as to Romansky’s actual state of mind.”¹⁶² While the board was less explicit than the Hearing Committee in its findings on Romansky’s state of mind, it approved the relevant findings of the Hearing Committee, which had characterized Romansky’s alteration of time records as involving both reckless and intentional dishonesty.

3. Other D.C. and Notorious Cases

During the early 1990s, there were many press reports on cases in which lawyers, some of them partners at elite law firms, were disbarred and/or prosecuted for billing fraud. Michael Romansky probably read about some of these and other similar cases; some involved lawyers practicing in D.C., others were reported in national publications.¹⁶³ Among them:

H. Lawrence Fox, who was a partner in the D.C. office of Winston & Strawn, was sentenced to fifty-five months in prison in 1993. His scheme included a pattern in which he recharacterized some legal fees as expenses rather than charges for time worked; as a result, he was reimbursed directly for those costs rather than the fees being paid to the firm. While this conduct was more directly remunerative to Fox than

159. *Id.* at 37.

160. 1999 Board Report, *supra* note 23, at 33.

161. *Id.* at 34, 37.

162. *In re* Romansky, 825 A.2d 311, 317 (D.C. 2003).

163. I do not know if Romansky actually read about these cases, but as I mentioned above, as a billing partner at a major law firm, he had a responsibility to follow relevant developments in the relevant law, so he at least should have known of these cases.

Romansky's time sheet alterations, this case might have put him on notice that falsification of billing records was unlawful.¹⁶⁴

Webster Hubbell resigned as Associate Attorney General of the United States in March of 1994 in the face of allegations that he had engaged in billing fraud while he was the managing partner at the Rose law firm in Little Rock. He was sentenced to twenty-one months in prison later in 1994 and was disbarred by consent in 1995, but his resignation and the allegations against him were big news in Washington in the spring of 1994. Among the allegations against Hubbell was "alter[ing] various internal billing memoranda through various means, including . . . inflating the number of hours of attorney time for which a client was billed, above the actual hours worked."¹⁶⁵

Until 1994, Gary Fairchild had been the managing partner of Winston & Strawn in Chicago. Fairchild was disbarred by consent in November of 1994.¹⁶⁶ The following year, he was sentenced to twenty-four months in prison.¹⁶⁷ While much of Fairchild's billing fraud involved fraudulent requests for reimbursement for expenses, he also hired his wife, a partner at another firm, to do some collection work for his firm and approved payment to her firm of nearly \$250,000 for work that had not been done.¹⁶⁸ This case attained national notoriety because of Fairchild's senior position in a respected firm and because of his personal reputation for meticulous and thoroughgoing integrity.¹⁶⁹

The record in the Romansky matter indicates that when Michael Romansky learned that his billing practices were being investigated, he was shocked and "very scared."¹⁷⁰ He was apparently so scared that he fabricated and backdated a letter from a client applauding his fine service.¹⁷¹ Given the extensive public discussion of the issue, not to mention prosecution and disbarment of lawyers engaged in billing fraud, his fearful reaction to the investigation makes sense. He knew that he was engaged in dishonest billing practices.

164. See *Ex-Lawyer Draws 55 Months in Prison*, LEGAL TIMES, Nov. 2, 1992, at 12.

165. Webster Hubbell Plea Agreement, *United States v. Hubbell*, No. LR-CR-94-241, (E.D. Ark. Dec. 6, 1994), available at <http://www.parascope.com/articles/1296/c17.htm> (last visited Mar. 14, 2006).

166. *In re Fairchild*, No. M.R. 10515, 1994 Ill. Atty. Reg. Disc. LEXIS 477, at *1 (Ill. Nov. 30, 1994).

167. Matt O'Connor, *Ex-Top Lawyer Gets 2 Years for Stealing From Firm, Clients*, CHI. TRIB., Mar. 22, 1995, at 9.

168. David Margolick, *A Theft Scandal Ravages a Career at a Leading American Law Firm*, N.Y. TIMES, May 13, 1994, at B18.

169. This and the other cases mentioned in this section are discussed at length in Lerman, *Blue-Chip Bilking*, *supra* note 113.

170. See Post-remand Brief of Bar Counsel, *supra* note 17, at 21-22.

171. *In re Romansky*, 825 A.2d 311, 314 (D.C. 2003).

F. *The Benefit of the Doubt for a High-status Lawyer?*

Perhaps the court was reluctant to conclude that Romansky's alteration of time records constituted serious dishonesty because he was a partner in a large and respected law firm. Furthermore, the firm had done an investigation and had penalized but had not fired Romansky. Perhaps the Hearing Committee, the board, and the court were taking cues as to the seriousness of the misconduct from Romansky's law firm.¹⁷² I do not suggest that this was conscious or deliberate. However, some of the decision-makers were present or former partners in large D.C. law firms and may have tended to defer to McDermott's judgment on the matter. The Hearing Committee was chaired by Timothy J. Bloomfield, Esq., a partner at the law firm of Holland & Knight.¹⁷³ Daniel A. Rezneck, who signed the opinion for the board, had been a respected partner at Arnold & Porter, another D.C. law firm, for twenty-seven years.¹⁷⁴ Judge Eric Washington, who wrote the 1993 opinion for the court of appeals, had worked as a lawyer at Fulbright & Jaworski and had been a partner at Hogan & Hartson.¹⁷⁵ Query whether these highly ethical lawyers may have or have had partners who added hours to their own or others' time records, charged undisclosed premiums as hours, or engaged in other such practices. My research and that of other scholars suggests that such conduct is commonplace.¹⁷⁶ If these lawyers knew of other elite lawyers who were "billing cowboys," and had seen other similar conduct go unpunished by firms or others, they might have been reluctant to impose harsh sanctions on Romansky. Perhaps they thought that such practices were tacitly accepted in law practice and were somehow distinct from other improper claims on client funds.

172. See Frisch, *supra* note 4, who suggests that the D.C. disciplinary system, staffed in part by lawyers who are themselves partners at large law firms, has tended to take its cues from the relevant law firm management in other cases.

173. See Biography for Timothy Bloomfield at Holland & Knight, <http://www.hklaw.com/Biographies/Bio.asp?ID=77865> (last visited Feb. 21, 2006). The other members were Shirley Williams, Esq., and Merna Guttentag, who was the public member. Hearing Comm. report, *supra* note 10, at 50.

174. See Georgetown Law Faculty (Online Curriculum Guide): Daniel Rezneck, http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=1247 (last visited Feb. 12, 2006).

175. See The Honorable Eric T. Washington, Chief Judge District of Columbia Court of Appeals, http://www.dcapeals.gov/dccourts/docs/DCCA_Bio_Washington.pdf (last visited Feb. 21, 2006).

176. See, e.g., Susan Saab Fortney, *Soul for Sale: An Empirical Study of Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000); Lerman, *Blue-Chip Bilking*, *supra* note 113; William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199 (1998); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991).

The court's generous analysis of the allegations against Romansky may have in part reflected the persuasive power of Earl Silbert, Romansky's attorney, who is a former U.S. Attorney for the District of Columbia. While Earl Silbert is unquestionably an excellent lawyer, he also is a large firm insider, since he is a partner and a leader of the white-collar practice group at Piper, Rudnick, Gray & Cary.¹⁷⁷ Silbert also may elicit a modicum of deference from the court because of his experience and reputation.

V. MISAPPROPRIATION VERSUS BILLING FRAUD

One of the fundamental assumptions made by the D.C. Court of Appeals in *Romansky* is that "adjusting client bills without authorization" is not self-evidently dishonest, and is certainly less serious than borrowing funds from one's client trust account.¹⁷⁸ The court distinguished conduct that is "obviously wrongful and intentionally done" from an act that is "not of a kind that is clearly wrongful, or intentional."¹⁷⁹ If the conduct is obviously wrongful, "the performing of the act itself is sufficient to show the requisite intent for a violation."¹⁸⁰ If not, then Bar Counsel must prove not only that the act was intentional, but that the act was done with dishonest intent.¹⁸¹ It is these distinctions that lead the court of appeals to conclude that its own prior cases on misappropriation, and even some prior cases involving alteration of records on reimbursable expenses¹⁸² were inapplicable. This analysis does not withstand examination. The profession would be better served by a jurisprudence that did not draw flimsy distinctions between varieties of lawyer dishonesty in obtaining client funds, whether those funds are improperly obtained by sending an inflated bill or by drawing unauthorized funds from a trust account.

A. *In re Addams: Dishonesty in Handling Client Funds*

One way to explore whether lawyer dishonesty is more serious in misappropriation cases than in billing fraud cases is to compare the *Romansky* case with *In re Addams*, which is the leading case in D.C. on

177. See DLA Piper, Rudnick, Gray, & Cary, <http://www.dlapiper.com/global/people/detail.aspx?attorney=2638> (follow "People" hyperlink, "Earl J. Silbert" hyperlink) (last visited Feb. 21, 2006).

178. *In re Romansky*, 825 A.2d 311, 316 (D.C. 2003).

179. *Id.* at 315.

180. *Id.*

181. *Id.*

182. See *In re Schneider*, 553 A.2d 206, 207 (D.C. 1989).

misappropriation. In 1982, Nicholas Addams was practicing law in Washington. One of his clients was a woman named Norlisha Jackson. Addams had done substantial work for Jackson, and she owed him \$14,000. Addams had deposited into his client trust account funds that were to be used to prevent foreclosure of Jackson's home. In September of 1982,¹⁸³ Addams wrote a check for \$530 on the trust account to pay one of Jackson's creditors. The account should have totaled \$1,293, but on the day the check was presented, only \$334 was in the trust account. Addams had withdrawn about \$940 from the account, perhaps to pay himself a portion of the \$14,000 that Jackson owed him. Addams claimed that his agreement with Jackson allowed him to withdraw fees owed to him.¹⁸⁴ Like Romansky, Addams failed to check with his client before he acted. Also, Addams sent Jackson an accounting that did not show his withdrawal of funds. Once Addams learned that the check had bounced, he immediately deposited funds into the account to cover the check.¹⁸⁵ There was no evidence that Addams had improperly withdrawn funds that belonged to other clients. He had practiced law for twenty-two years. Ms. Jackson was satisfied with Addams' service, and suffered no harm as a result of Addams conduct.¹⁸⁶

This matter found its way to the Bar Counsel also. In 1990, the D.C. Court of Appeals, sitting en banc, disbarred Nicholas Addams, holding that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence."¹⁸⁷ The court explains that "[t]here is nothing clearer to the public . . . than stealing a client's money and nothing worse. Nor is there anything that affects public confidence more—than this court's treatment of such offenses."¹⁸⁸

The court notes that other jurisdictions have reached similar conclusions. The majority opinion quotes a Maryland case which stated that "when an attorney is found to have betrayed the highest trust imposed in him by appropriating to his own use funds of others entrusted to him, then, absent the most compelling extenuating circumstances, disbarment should follow as a matter of course."¹⁸⁹

183. *In re Addams*, 563 A.2d 338, 339 (D.C. 1989).

184. *Id.* at 338.

185. *Id.* at 339, 341.

186. *In re Adams*, 579 A.2d 190, 192 (D.C. 1990).

187. *Id.* at 191.

188. *Id.* at 194.

189. *Id.* (quoting Attorney Griev. Comm'n v. Cockrell, 499 A.2d 928, 935 (Md. 1985)).

The *Addams* opinion quotes a Colorado Supreme Court case which states that “conversion of client funds destroys trust essential to the attorney-client relationship, severely damages the public’s perception of attorneys and erodes public confidence in our legal system.”¹⁹⁰

While the court did not adopt a per se disbarment rule for misappropriation, since some mitigating factors (such as alcoholism) might affect the sanction imposed, the court noted that in its recent cases, where there was “intentional misappropriation involving more than simple negligence,”¹⁹¹ none of the mitigating factors have been found sufficient to overcome the presumption that disbarment is the appropriate sanction.

[The court] declined to join those jurisdictions that treat intentional misappropriation of client funds [like] any other disciplinary violation . . . [W]e agree that public confidence would be irreparably shaken were we to relax our vigilance . . . but . . . [we decline to] endorse the notion of degrees of corruptness, something that seems alien to so basic a part of an attorney’s obligation to a client.¹⁹²

The court referenced a New Jersey case which explained that “the attorney’s state of mind, is irrelevant; it is the mere act of taking your client’s money knowing that you have no authority to do so that requires disbarment.”¹⁹³ The D.C. court cited with approval New Jersey’s conclusion that some mitigating factors, such as restitution, cooperation with disciplinary authorities, and contrition, were insufficient to justify a sanction other than disbarment.¹⁹⁴ Neither did the court restrict the presumption of disbarment to cases involving misappropriation of funds of “multiple clients over an extended period of time.”¹⁹⁵ The court notes that this presumption of disbarment for misappropriation may be harsh when compared to some other forms of dishonesty, but, “where client funds are involved, a more stringent rule is appropriate.”¹⁹⁶

190. *Id.* (quoting *People v. Radosevich*, 783 P.2d 841, 842 (Colo. 1989)).

191. *Id.* at 196.

192. *Id.* at 196-97.

193. *Id.* at 197 n.17 (quoting *In re Lulo*, 559 A.2d 1349, 1351 (N.J. 1989)).

194. *Id.* at 197. Judge Ferren, in his concurring opinion, noted that the majority opinion effectively makes “virtually every . . . usual mitigating factor irrelevant.” *Id.* at 201. He urged that this approach was undesirable, and argued that fair decision-making required the court to “evaluate and apply all mitigating and aggravating factors as we would in any other disciplinary case.” *Id.* at 203. Even under his own analysis, Judge Ferren agreed that Nicholas Addams should be disbarred, in part because Addams should have asserted a retaining lien on the escrow funds, and the record did not reflect that he credited his client’s fee account with the funds that he took from the client trust account. *Id.*

195. *Id.* at 198.

196. *Id.*

Judge Schwelb wrote a vigorous dissent, urging that this sanction was too harsh, and that the degree of sanction should depend on the gravity of the misconduct in this as in other areas of disciplinary enforcement. He criticized a prior opinion of the court (relied upon by the majority) as holding,

that a lawyer who, awaiting receipt of a government check on Tuesday, borrows \$100 on Monday from a client's account and returns that sum on Tuesday, should be subject to the same sanction as a practitioner who steals \$50,000, spends it to support an extravagant lifestyle, and thereafter covers his tracks.¹⁹⁷

B. Comparing Addams and Romansky: The Double Standard

The contrast in analysis between *Addams* and *Romansky* is striking. The following chart compares some of the facts and some aspects of the court's analysis of the two cases. All of the facts included in the table are drawn from the published opinions on the two cases.

	Addams: Misappropriation	Romansky: Recording phony hours
Method of stealing	stole by taking money out of client trust account without authorization	stole by billing client for phony hours (contract said hours only; real or phony hours not disclosed)
Deception of client	false accounting to client	no accounting to client

197. *Id.* at 204.

Prior disciplinary record	22 years no prior discipline	16 years, no prior discipline but lawyers in group said chronic billing fraud
State of mind	Admitted misappropriation was intentional	claimed ignorance of contract terms, denied intent to deceive
Number of clients whose funds were affected	one	at least four
Whether one or more clients was aggrieved	client (not the complainant) satisfied with service, client wrote to Bar Counsel in defense of respondent.	at least two clients complained of lawyer dishonesty
Lawyer's rationale	taking fees legitimately owed pursuant to agreement	services worth more than fee that would be charged based on hours worked
Whether lawyer offered consistent explanation of conduct	No (aggravating factor)	No
Whether lawyer tried to cover up wrongdoing	Yes	Yes
Whether lawyer admits wrongdoing	Yes	No
Whether client owed lawyer overdue payment of fees	Yes, \$14,000	No
Court's view of dishonesty of lawyer	nothing worse than stealing from clients	not every billing mistake is dishonest.
Counsel for respondent at disciplinary hearing	Respondent appeared pro se (1989 op.)	Earl Silbert, Esq., former U.S. Attorney for D.C.
Sanction	Court of appeals ordered disbarment.	PR Board recommended 30 day suspension (currently on appeal)

These two cases illustrate a double standard in the disciplinary cases. Both cases involved lawyers who stole money from their clients through dishonesty. In D.C. and in some other jurisdictions, misappropriation of funds from a client trust account results in presumptive disbarment regardless of the amount involved or any other circumstances. As I explained above, some cases involving lawyer billing fraud lead to disbarment, but one often sees sanctions far less severe than disbarment. In the *Romansky* case, the Board on Professional Responsibility noted that sanctions for dishonesty in D.C. “range all the way from informal admonitions, Board reprimands, and Court censures to suspensions . . . and even to disbarment.”¹⁹⁸

C. *Toward Consistent Standards*

The courts have been deciding misappropriation cases for decades

198. 1999 Board Report, *supra* note 23, at 40.

and have developed a clear jurisprudence on that variety of lawyer dishonesty. The billing fraud cases did not appear on the legal landscape until the 1990s; the jurisprudence is more uncertain. Query whether and to what extent the principles developed for the misappropriation cases should be applied in cases involving billing fraud. The courts may be too harsh in some misappropriation cases, but they may be too lenient in some billing fraud cases.

Lawyers have enormous discretion in setting client fees, in recording hours, and in whether and when to make disclosures to their clients of the basis of their hourly fees. Although there has been some progress in the articulation of standards of conduct to guide lawyers in billing clients, the law in this area remains murky. The recently revised Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers largely ignored lawyer billing practices.¹⁹⁹ While there is an evolving body of case law, some of which is discussed earlier in this Article, that finds dishonest billing practices to be unethical, criminal, or a basis for civil liability, the ethics codes and the Restatement have not incorporated these relatively recently articulated standards. The absence of clear standards protects lawyers' discretion to engage in deceptive billing practices that should have been banned decades ago.

There are countless areas of lawyer discretion in hourly billing practices. For example, a lawyer who has agreed to bill only on the basis of time worked might bill in quarter hours, tenths of hours, or anywhere in between. He might bill three minutes as a quarter hour. The lawyer might or might not bill for travel time. He might or might not bill at his usual rate for time spent chatting with the client on the phone about sports or family matters. The lawyer might take any given research assignment and spend three, or forty, or one-hundred hours on the matter, and bill it to the client without any clearly required disclosure or consultation. If a lawyer decides to bill a client an extra \$700 because the lawyer thinks that he (or his colleague) did a good job, must he disclose that judgment to the client and obtain consent? May he express that judgment simply as a component of a final bill that states simply "for professional services rendered" and a total amount? May he record

199. According to Model Rule 1.5, for example, a lawyer billing a new client on an hourly basis must disclose the basis or rate of the fee to be charged. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.5 (2004). This means the lawyer need only disclose his hourly rate and need not disclose any estimate of the likely fee to be charged. Even this minimal disclosure need not be made before commencing legal services. It may be "within a reasonable time after" service begins. *Id.* So a client may hire a lawyer and be obliged to pay whatever the lawyer charges without even knowing whether the hourly rate is \$150 or \$700. Caveat emptor.

that judgment in his law firm's internal records by writing down hours that were not worked? Various court decisions and ethics opinions address these questions, but the ethics codes offer no guidance in this area.

In client surveys about their concerns about lawyers, excessive fees and dishonesty in billing practices are near the top of the list of client concerns. Empirical studies suggest that a majority of lawyers who bill by the hour engage in dishonest billing practices at least occasionally.²⁰⁰ During the last decade, we have seen a fairly long list of high-powered lawyers go to prison and get disbarred for billing fraud.²⁰¹ Even so, the American legal profession has as yet failed to insist that lawyers be truly candid with their clients about matters relating to the lawyers' hourly fees. Most lawyers who mislead clients about billing issues or who withhold information that clients might want to know do so to serve their own and their partners' financial self-interest. We need to draw clear lines that prohibit deception and that require disclosure.

Whatever the courts decide are the proper standards for discipline of lawyers who have taken client funds to which they are not entitled, those standards should be enforced in a fair and equitable way. Judge Schwelb correctly noted in his dissenting opinion in *In re Addams* that justice is more likely if the analysis is more context-sensitive. He urges not every misappropriation of client funds is a hanging offense.²⁰² Also, a court's assessment of the seriousness of lawyer dishonesty should not turn on whether the misappropriation involves unauthorized removal of funds from a client trust account or unauthorized billing of a client for fees or expenses to which the lawyer is not entitled. Both involve stealing.

QUESTION AND ANSWER

MR. TEMPLE: Thank you. Ralph Temple. I've practiced in Washington D.C. for many years, and had encounters with the disciplinary system in the very year you're speaking about –

PROFESSOR LERMAN: Oh, did you? Were you on the receiving end?

MR. TEMPLE: On the receiving end. I defended a small firm practitioner, three-person firm. Bar Counsel at the time was Leonard Becker, who came to the position from the firm of Arnold & Porter—a

200. See Fortney, *supra* note 176, at 277-78.

201. See *Blue-Chip Billing*, *supra* note 113, at 208.

202. *Addams*, 579 A.2d at 206.

partner there, who then returned to that firm—went after my client on a whole range of charges, including the fact that he included his second firm in the name of the firm, Carr & McClean, even though McClean was on salary. Something which is done regularly by Arnold & Porter, since most of their lawyers are non-equity partners. Carr was found guilty by a disciplinary panel that included a couple of lawyers, one from Covington & Burling, which engaged in the same practice. They bent over backwards to interpret the rules to allow their firms off the hook to nail Carr. The D.C. Court of Appeals reversed, and that's on a number of the charges. What I find in the disciplinary system, and I don't think that the District of Columbia is worse than anywhere else—I think they are probably better than most—but the whole culture of bar counsel, and the whole culture of the disciplinary system goes after small firm practitioners with a vengeance and ignores pretty much—unless it makes the newspapers—the sins of large firms. If we talk about police aberrance in this country, we've got the American Civil Liberties Union in various cities monitoring. If we talk about all kinds of practices, we've got institutions monitoring them. There's no activist institution out there that watches disciplinary systems. We need the law schools to start putting clinical programs together and other kinds of programs that will focus on the bar counsels in the major cities, and that will focus on who is running these disciplinary panels, usually lawyers from big firms who ignore their own sins and go after the small firm practitioners. So I would like to see that kind of thing promoted, because whatever we do in conferences like this, and articles that we publish, it doesn't make the difference that having an activist group in the field going after these institutions would make. Thank you. (Applause)

PROFESSOR LERMAN: Thank you. I agree with you that the problems in the disciplinary system that one sees in D.C. are also present in other communities. A lot of people think that the lawyer disciplinary system isn't that important, because important lawyers are not often respondents. But the system is disproportionately punishing people who are at the low end of the status scale in the legal profession. That's a problem. A big part of this problem has to do with budget. In D.C., all the Hearing Committees are still made up of volunteer lawyers, and also some nonlawyers. But many of the people who write the opinions have full time jobs. Sometimes it takes years to write the opinions. The system needs to be professionalized. The rules that require lawyers to report the serious misconduct by other lawyers need to be enforced. When the Illinois Disciplinary Agency brought a couple of cases against lawyers for not reporting, all of a sudden they were getting between six hundred and nine hundred reports from law firms per year. A lot of bar

counsels are mostly reactive; they investigate complaints that are made by aggrieved clients but do little proactive work—such as enforcing the rule requiring lawyers to report misconduct. Most bar counsel's offices don't have enough money or staff to do more than handle what comes across the transom. If they enforced the reporting rule, that would put even more pressure on their already limited resources.

PROFESSOR WOLFRAM: Chuck Wolfram. I did want to comment on—Ralph asked his wife if there is an organization—there is. It's a very low budget organization. It's called H.A.L.T. in Washington D.C. They do an annual grading of disciplinary organizations. D.C. is somewhere in the middle, C plus, which is obviously not a good grade, but my question is along the same line: What's the solution to this? I can imagine the numbers seem to be about primarily doctrinal change on what the rules are if the court could make them stricter. I wondered whether the court rule changes would change anything, given the bar discipline structure. I guess I'm just inviting your reaction to this suggestion that was made yesterday. You hear it all the time: forget about lawyer discipline for enforcement for at least some rules—for a great many rules. What we need is a client protection agency, separately organized, not influenced by the bar or at least not influenced only by the bar. What do you think about that truly radical solution?

PROFESSOR LERMAN: Well, I think H.A.L.T. does some good work. It is remarkable that there's only one consumer organization advocating for clients of lawyers that I know of in the United States. That's especially surprising considering how many unhappy clients there are who feel they've been ripped off by the lawyers. Also there are the Client Security Funds. If you look at the misappropriation cases, the felt need for a bright line rule and say: "Hey, it's your client's money. You have to be really careful. You have to be really honest. You have to be really loyal. You have to make disclosures." It would be helpful to draw bright line rules like that for billing practices. The standards might say, for example, if you are writing down time, that must be actual time worked by the person whose name is recorded for that time. If those standards were made clearer, it certainly wouldn't deter somebody who's determined to inflate his hours for one reason or another, but it would offer us more clear guidance than is presently available. And by the way, I don't believe that borrowing five dollars out of your client's trust account should result in disbarment, but I think that both billing fraud and misappropriation can involve serious dishonesty, and that such misconduct should result in serious penalties. The lack of clarity on the law billing practices contributes to the kind of murkiness you see in the court of appeals opinion.

MS. RINGLER: Hi. I'm Robyn Ringler, and I realized that this discussion is going to affect my life in a way. I recently signed up to be a volunteer arbitrator in Saratoga County where I live on client and lawyer fee disputes. I signed up just very recently. In the first case I was sent, I studied the papers, and the client and the lawyer's version of what happened. Looked at the bills, and on the day of arbitration, was called by another lawyer. There were supposed to be three of us, two lawyers and one nonlawyer. The lawyer who called me said they couldn't find a nonlawyer, so it was going to be three lawyers, and we were going to have the client just waive that requirement that there should be a nonlawyer, and I said I could not participate in that, because I just felt that it did not look good or seem fair when she was supposed to have a nonlawyer on the panel, so I did not participate in that case. I have a case coming up, and I realized that any time I find for the client, the clients are always going to say, the lawyer either overcharged, or he didn't do the work. Any time I find for the client, I think I'm looking at an ethical problem with the lawyer's billing practices, unless I can find that he made a mistake. So if I do a lot of these cases, what's my responsibility as far as reporting?

PROFESSOR LERMAN: Roy, does New York have a reporting requirement similar to the Model Rules?

PROFESSOR SIMON: We do, but I thought that the fee arbitration process really didn't use testimony for any other purpose.

MS. RINGLER: I didn't hear you.

PROFESSOR LERMAN: I'll repeat it. He said he thinks the fee arbitration rule may prohibit the use of testimony for any other purpose. I know that if a lawyer consults a lawyer assistance program for substance abuse, that that information is confidential.

PROFESSOR SIMON: I don't know that I got that quite right. There is 22 New York Compilation of Codes, Rules & Regulations Part 137. Section 137.10 is called confidentiality. This is one in the whole fee arbitration in New York. "All proceedings and hearings commencing and conducted in accordance with this Part including all papers in the arbitration case file, shall be confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter."²⁰³ So I don't know what ancillary legal action with respect to a fee matter is.

PROFESSOR LERMAN: Sounds like you got some research to do. One of the problems—like what Ralph Temple was saying about the disciplinary system—is the failure of judges, arbitrators, opposing counsel, and other people to actually recognize when they have a

203. N.Y. COMP. CODES R. & REGS. tit. 22, § 137 (2005).

reporting duty. We recently had a matter that was before my faculty, and we had a big discussion about whether the misconduct had to be reported to the bar to which the former student had been admitted. Finally I pulled out Rule 8.3, and reminded my colleagues that each member of the faculty has an individual reporting duty.

MR. CHARNOV: Bruce Charnov, Hofstra University. I practiced law with a Texas firm for a couple of years. I would like to direct your inquiry or your statement at the beginning, that every billing partner in the D.C. bar would read that decision. I think another aspect is that the very first year associate—law students, as you will see—that this is part of a pervasive system that emphasizes billable hours. Virtually every associate knows that they will be punished short-term or long-term if they don't produce enough billable hours. Therefore, they will produce billable hours. They will not necessarily be punished by the firm. Until a firm starts punishing an associate equally for padding hours, as well as not producing billable hours, you're not going to have honesty in terms of billable hours in the very nature of the way in which a firm does business.

PROFESSOR LERMAN: I agree with you, and I think that the firm culture on this subject varies enormously. It is important for law students who are thinking about working in a law firm to investigate firm policies. But there are firms where everyone in the law firm gets training on billing practices, where there are policies and ethical guidance available. Most firms really don't want associates to write down fictitious hours, but the financial incentives within some firms to make up the extra hours is strong. I talk with many former students who tell me that they're billing honestly and getting heat from the firms for not billing enough. Typically, they might be billing 1500 or 1600 hours a year when they are expected to be billing at least 2000. They often report that other lawyers who are working less are billing more hours.

PROFESSOR NEEDHAM: Carol Needham from St. Louis University. I had practiced in Los Angeles before teaching, and not necessarily at my firm, but the culture at that time generally was that associates wanted to be perceived as efficient and getting the job done quickly. On some level there is the pressure internally to work twelve hours on something, and bill eight, because it looks like you're incredibly productive. As on some level telling people to accurately put down all the time they spend, is sort of a gray area—such as urging them to really write down twelve if they spent twelve, even if maybe the motion should have taken two. I want to hear your response.

PROFESSOR LERMAN: Yeah. Let me respond to that just quickly. I'm glad you brought that up. That's a different problem; right?

PROFESSOR NEEDHAM: Right.

PROFESSOR LERMAN: What I'm really saying is that I don't think people should be recording more than the number of hours that they actually worked. I think that questions about rounding, especially if two minutes work turns into a quarter of an hour, is a problem. That type of rounding can make one hour into sixteen hours if you're really good at it. But associates need guidance about what is billable. What if you're cleaning up the pile of paper on your floor? Do you bill for that? And what if you're really confused and you waste four hours and nothing happened? Guidelines should be developed within each organization, and maybe by the bar association, to encourage people to look at those questions from a client perspective and to be more careful about accuracy and disclosure.

MR. FITZPATRICK: I'll keep this quick, but just as a junior associate myself, I have a slight concern particularly. My name is Vincent Fitzpatrick, and I'm a former student. I have a slight concern, and my question is on the associate being punished by the billing partner. I think we need to look at this as a talk down scenario within the firm, and when you're tying the junior associate's compensation to the billable hours, and the bonus that may be received, I think that is something that needs to be seriously reconsidered. I was wondering if you think that there is a way in which that can be reconsidered, not just from a business perspective, but perhaps from an enforcement perspective as well.

PROFESSOR LERMAN: I think it would be possible to discipline a partner in a law firm who was responsible for a policy like that under Rule 5.1,²⁰⁴ because everybody knows that having an annual bonus encourages dishonest billing practices. I don't think it would take very many disciplinary actions before people would give up on targets and minimums. For a firm to have a requirement or even an aspiration that you should produce a certain number of hours a year puts all the lawyers in a conflict with their client and it shouldn't be allowed.

MS. STRETCH: Becky Stretch from the ABA. I'm kind of responding to Professor Wolfram's comment. In 1992 the ABA did a report called Lawyer Regulation for a New Century I think, and it was chaired by Bob McKay from New York. It did look at whether the system would be any better if it was run by a consumer protection agency of the executive branch, and compared to the way other systems are run, and decided that it wouldn't be. I think most of the boards of lawyer discipline have about a third that are nonlawyers involved. As

204. MODEL RULES OF PROF'L CONDUCT R. 5.1 (2004).

you pointed out, you try to have a third on the arbitration—on the fee arbitration, and I think you were right not to participate. And I think lawyers do do a good job of discipline and it gets very difficult when they have a problem with funding. They kind of do a good job, if you steal your client's money or even less than that, it's very difficult to find the money to deal with it, and they suggested having options at central intake for dealing with different kinds of lesser kinds of misconduct. We don't really have time to get into that, but that's the McKay report and it's on the website. But one other thing I want to point out is the Clementi report in England. There's been a huge development where—you can even find that on the web too—where they're suggesting that the discipline system be taken away from the bar, which there is no judicial oversight of regulation of the profession. It's just done by the law society, and they're suggesting that it all be taken over by the consumer agency, so that's something to follow closely, and I think I better quit.

PROFESSOR LERMAN: Thank you. I think that the whole structure of lawyer regulation is—as was said earlier at the conference, two lawyers dominated it. Even if there are clients on the Hearing Committees, or even if there's a consumer on the bar ethics committee, they are always a minority. They have less expertise and usually their views are marginalized. In our whole regulatory process, we need to think about that. Anyone else?

PROFESSOR POWELL: Burnele Powell from the University of South Carolina. I simply want to put on record, in reference to groups like H.A.L.T. being in charge of lawyer discipline or even having any substantial goal in lawyer discipline, I think would be a huge mistake. I think that organizations like H.A.L.T. are just barely over the line from being a crackpot organization, as a matter of fact.

PROFESSOR LERMAN: I respectfully disagree about that, but neither do I think they should be put in charge. I think it would make more sense to have something like the consumer agencies that are run by the states to have administrative law judges who would hear disciplinary complaints. I mean, I don't think it really matters who runs it, as long as it is more professionalized.

PROFESSOR POWELL: Well, I would agree with you in terms of the need for professionalization, but I would also point out, with respect to some major reforms that have taken place, because we have such a fractionalized system where we have lawyer discipline in the hands of the various jurisdictions. One of the things that means is that jurisdictions have an opportunity to choose whether they are actively involved, and so far some of our larger jurisdictions like California and

New York have in some instances sat on the sidelines and been very passive in terms of their participation even with respect to the McKay report. The McKay report put forth major recommendations that open up the system, that included consumer interest and other interests in the disciplinary process, but after Bob McKay's death, it was Ray Trombadore in New Jersey who became the chair of that commission, and New Jersey was one of the states that quite frankly resisted participation in McKay's reform. Fortunately, the Supreme Court of New Jersey began to push back, and I have had an adoption of many of the reforms McKay suggested in New Jersey, but what that suggests is basically that a judicial agent running the system as opposed to a lawyer running the system is a better system. But that does not mean it's necessary to have judicial oversight of the profession imposed upon by populist's interest.

PROFESSOR LERMAN: And just quickly, I didn't mean to imply that the American Bar Association or other state bar associations don't make an effort to get input from people who are not lawyers. I just don't think it's enough. I'm getting the hook here. [Applause]