

## Ask the Ethics Experts

**Editor's Note:** In this issue of The Antitrust Source, we introduce a new feature: Ask the Ethics Experts. Our experts pose ethical questions that may occur in the context of antitrust practice and then answer them based on the rules of individual jurisdictions and the ABA's Model Rules of Professional Responsibility.

Our guest experts for this issue are Kathryn Fenton, a partner at Jones Day Reavis & Pogue in Washington, DC, and Allan Van Fleet, a partner in Vinson & Elkins L.L.P., in Houston, Texas. Kathy and Allan currently serve as Officers of the ABA Section of Antitrust Law—Kathy as Secretary and Allan as Section Delegate to the ABA House of Delegates. Allan is the former Chair of the Section's Ethics and Professionalism Committee.

If you have questions or topics to suggest for discussion in future issues of The Antitrust Source, send email to: [antitrust@att.net](mailto:antitrust@att.net).

**Note:** The responses to hypothetical situations in this feature are presented for informational and discussion purposes only and should not be considered or construed as legal advice applicable to any specific facts or circumstances. They discuss general ethics principles that may not apply universally or in a particular jurisdiction, and readers should take care to determine and consult the legal and ethical standards applicable to any specific issue they confront.

### Billing Multiple Clients for Simultaneous Legal Service

**Q:** I have been asked to represent three unrelated companies in responding to an industry-wide CID issued by the Federal Trade Commission in connection with its retrospective review of hospital mergers. Each of the companies has consented to the simultaneous representation and to pay our firm's standard hourly rates. Initially, much of the work that would have been necessary to represent a single client can be used to benefit all three (e.g., reviewing FTC rules of procedures, negotiating certain general modifications of the CID, etc.). Given the traditional hourly billing arrangements in place here, can I bill each client for the total number of hours I spent on common activities, even though this would triple the time actually spent?

**A:** Ethics authorities unanimously have held that a lawyer who has agreed to charge a client for his or her services under an hourly billing arrangement may not bill more than one client for the same time. To do so would violate the ethical rules forbidding lawyer misrepresentation and charging excessive legal fees.

The principle that a lawyer may not bill more than one client for the same time expended on the same service has been articulated in numerous ethics opinions, including ABA Formal Ethics Opin. 93-379 (1993), and recently reiterated in Oregon State Bar Legal Ethics Committee Opin. 2002-170 (May 2002). The latter opinion considered the situation where a lawyer had four clients whose case were all set for a "call" before the trial court on the same day. The lawyer spent a total of one hour attending the call on behalf of all four clients and asked if each of the four clients could be billed for the entire hour.

The bar committee concluded that traditional hourly billing arrangements are violated if the lawyer bills the client for more time than the lawyer actually worked. A bill for more time than the lawyer actually worked constitutes a clearly excessive legal fee in violation of ABA Model Rule 1.5(a) and ABA Model Code DR 2-106(a). Moreover, the committee concluded “[b]illing more than one client for the same time expended on the same service also would constitute misrepresentation by nondisclosure” in violation of ABA Model Rule 8.4(c) and DR1-102(A)(3), which each make it professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In reaching this conclusion, the Oregon Committee found that it made no difference that the lawyer could have billed each client for one hour if that client’s case had been the only one set for call that day. The opinion emphasized that a lawyer must bill clients on the basis of what actually occurred rather than on hypothetical facts. To the extent there are savings due to the lawyer’s ability to achieve efficiencies in the provision of legal services, the client, and not the lawyer, must benefit from those efficiencies. *See, e.g.*, ABA Formal Ethics Opin. 93–379 (“economies . . . must inure to the benefit of the client, not give rise to the opportunity to bill a client phantom hours”). The same analysis has been applied to situations involving travel time billed to one client while simultaneously performing substantive work for another, or “recycling” existing work product originally developed for one client on behalf of another client who is billed the amount of time originally incurred to produce the product. *Id.*

**Sanctions.** The possible sanctions for violating these ethics rules can be severe. In egregious cases, disciplinary actions have been brought against attorneys who have engaged in this type of hours worked inflation or others forms of misbilling and have resulted in suspension or disbarment. *See, e.g.*, *In re Miller*, 735 P.2d 591 (Or. 1987) (attorney disbarred for routinely adding an average of 5 to 15 hours to each billing statement); *In re Lane*, 642 N.W. 2d 296 (Iowa 2002) (attorney suspended for billing client 80 hours to write legal brief that was largely copied from employment law treatise). While the ethics opinions on this topic note that it is always possible to obtain the client’s agreement, with full disclosure, for additional compensation because of outstanding results or because the attorney was able to reuse existing work product on the client’s behalf, such “fee enhancement cannot be accomplished simply by presenting the client with a statement reflecting more billable hours than were actually expended.” ABA Formal Opin. 93–379.

Thus, if you only spent a total of six hours working on behalf of the three clients here, you are not entitled to bill eighteen hours. Only the time actually spent may be billed and it must be allocated among the three clients in a manner that fairly reflects the legal services provided to each.

### Contacting Represented Parties

**Q:** I am defending a company in an antitrust action filed in federal court. I’ve gotten word that the plaintiff’s lawyer has been talking to my client’s former employees and even some current employees. Can she do that ethically? It also appears that some DOJ types been asking questions of my client’s employees. Can they do that, or is it no-holds-barred on government snooping after 9/11? Also, my legal assistant has told me she’s been approached by one of the plaintiff’s employees, who wants to talk to our firm about the case. Since the employee made the approach, is it correct to assume that’s okay; would it be better if the legal assistant met the employee and did the debriefing?

**A:** You did not say in which state your case is filed or in which state the contacts were made. I will look mainly to the ABA's Model Rules of Professional Responsibility to answer your questions. You must remember, though, that state-adopted rules and case law govern lawyer conduct and that they differ from state to state. The Model Rules themselves are not law (although they are automatically adopted in the Virgin Islands and form part of the "national norms" of lawyer ethics that federal courts in the Fifth Circuit apply).

**Which State's Rules?** Variation in state ethics rules is increasingly important, as modern legal practice (particularly for antitrust lawyers) is increasingly multijurisdictional. The most recent amendments to the Model Rules, passed by the ABA House of Delegates at the August 2002 Annual Meeting, recognize the need for lawyers to act in jurisdictions other than the ones in which they are licensed, but also to subject themselves to the ethics rules of those other states.

Generally, litigation-related conduct is governed by the rules of the state in which the tribunal sits. (Model Rule 8.5(b)(1)). But before a case is filed, the Model Rules, as most recently amended in August, apply the ethics rules of the state in which the lawyer's conduct occurred or—if different—where the conduct has its predominant effect. (Model Rule 8.5(b)(2)). That would point us to the state in which the contacts are made. If the contacts were made, say, in an interstate telephone call, most likely a court or disciplinary body would look to the rules of the state where the contacted employees reside.

**General Rule Prohibiting Contact.** Model Rule 4.2 addresses contacts with a represented party: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

The purpose of the rule was clarified in amended comments the ABA adopted in February 2002:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

**Current and Former Employees.** A lawyer for a corporation, of course, represents the organization, not its individual employees. For purposes of the no contact rule, however, the concept of a represented party embraces a "constituent who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." These employees may not be contacted, except with the consent of the party's lawyer. If a constituent is represented individually by her own lawyer, consent of that lawyer suffices.

As recently amended comment 7 clarifies, former employees are fair game: "Consent of the organization's lawyer is not required for communication with a former constituent."

In talking with former or current employees, the lawyer must take care not to violate the organization's rights, including the right to preserve the confidentiality of attorney-client communications to which the employee may have been privy.

**Government Lawyers.** One of the most controversial legal ethics issues over the last decade has been the U.S. Department of Justice's effort to exempt its lawyers from state ethics rules, particularly those prohibiting contact with a represented party. This began with the infamous Thornburgh Memorandum in 1989, codified in the Reno Regulations of 1994, which were criticized by the ABA and the courts and were invalidated by the McDade Amendment to the 1998 Omnibus Spending

Bill. An effort last session to reverse the congressional action failed. In the recently amended comment 5 to Rule 4.2, the ABA reaffirmed no blanket exception for government lawyers, but did not close the door completely:

Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

The ABA has noted that a lawyer may be advised to seek a court order determining whether a particular communication is authorized. Again, you must look to the rules and interpretations in individual jurisdictions. The Massachusetts Bar Association Committee on Professional Ethics recently concluded that the state's ethics rules do not govern the actions of a federal government lawyer, admitted in Massachusetts, in interviewing witnesses in another jurisdiction while preparing for litigation before a federal agency in that other jurisdiction. Rather, the rules of the federal agency tribunal must govern the conduct of all lawyers involved in the proceeding.

**Contact Initiated by the Represented Party.** In February 2002, the ABA House of Delegates adopted a new comment 3 to Rule 4.2 that a lawyer cannot talk to a represented party who contacts the lawyer: "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule."

**Contacts by Lawyer's Agents.** Finally, you may not evade the Rule by having your legal assistant or another representative make the contacts for you. This follows from Rule 8.4, which generally forbids a lawyer from violating the Model Rules through the conduct of others. The ABA recently amended comment 4 to Rule 4.2 to leave no doubt that "A lawyer may not make a communication prohibited by this Rule through the acts of another." ●