Center *for* Professional Responsibility

When Two Plus Two Doesn't Equal Four

By Peter H. Geraghty, Director*

I. You are taking a two hour plane trip from Chicago to New York to conduct a deposition in a matter involving client A. While on the plane, you review materials for a brief you will be filing for client B the following week. You normally bill clients for your time spent traveling on their behalf.

Can you bill clients A and B for two hours each for a total of 4 hours?

II. Your firm concentrates in real estate transactions and frequently uses a messenger service to deliver time sensitive documents. The service charges $10.00 per mile for deliveries.

Can the firm add a $2.50 surcharge to this amount and bill the client for $12.50 per mile?

I. Double Billing

In 1993, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 93-379 *Billing for Professional Fees, Disbursements and Other Expenses* (1979). This opinion discussed a number of billing related issues, including "double billing" and the appropriateness of adding surcharges on to out of pocket disbursements for services purchased on behalf of clients. With regard to the double billing issue, Opinion 93-379 stated:

> ...In addressing the hypotheticals regarding (a) simultaneous appearance on behalf of three clients, (b) the airplane flight on behalf of one client while working on another client's matters and (c) recycled work product, it is helpful to consider these questions, not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned. A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated. Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of

> an unreasonable fee, therefore is contrary to the mandate of the Model Rules. Model Rule 1.5. ABA Formal Opinion 93-379 at 7.

The Opinion noted that the ABA Model Rules of Professional Conduct provide guidance under these circumstances, citing to the Rule 1.5 FEES requirement that fees must be reasonable. The Rule lists a number of factors that go into making the determination of whether a legal fee is reasonable. Rule 1.5 states:

> **(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:**
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> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
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> **(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
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> **(3) the fee customarily charged in the locality for similar legal services;**
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> **(4) the amount involved and the results obtained;**
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> **(5) the time limitations imposed by the client or by the circumstances;**
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> **(6) the nature and length of the professional relationship with the client;**
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> **(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and**
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> **(8) whether the fee is fixed or contingent.**

(Please note that in 2002 the ABA Model Rules underwent a substantial revision pursuant to the ABA Ethics 2000 Commission's (E2K) recommendations. The E2K's Web site is located at www.abanet.org/cpr/e2k/.

The "time and labor required" language in 1.5(a)(1) has been a standard in ABA ethics rules for nearly 100 years. It derives from DR 2-106(B)(1) of the ABA Model Code of Professional Responsibility, which in turn derives from Canon 12 *Fixing the Amount of the Fee* from the 1908 ABA Canons of Professional Ethics. For a history of the development of ABA ethics standards, see the Preface to the ABA Model Rules of Professional Conduct at www.abanet.org/cpr/mrpc/preface.html.

There have been several state and local bar association ethics opinions issued on this topic. They are in general agreement with the ABA position. See , e.g., Oregon State Bar Legal Ethics Committee Op. 2005-170 (2005), Alaska Ethics Op. 964 (1996), California Ethics Op. 1996-147 (1996), Nassau County (N.Y.) Ethics Ops. 95-4 (1995) and 95-10

(1995). See Also McClain, Anthony J., Opinions of the General Counsel of the Alabama State Bar, *Billing Client For Attorney's Fees, Costs And Other Expenses*, 67 Ala. Law. 212 (2006).

Both the Oregon and Alaska opinions recognize that clients can be billed on an other than hourly basis that might exceed the lawyer's normal hourly rate. The Oregon opinion made note of this, stating:

> The answer to this question depends on the nature of the fee agreements between the firm and the clients. Some firms have fee agreements that allow for "value billing," flat fee billing or other arrangements. If so, it would be appropriate to bill the clients pursuant to those agreements rather than simply by the hour. Oregon State Bar Legal Ethics Committee Op. 2005-170 (2005).

There is caselaw on point. See, e.g., *Disciplinary Counsel v. Holland*, 835 N.E.2d 361, 2005 and *Disciplinary Counsel v. Johnson*, 835 N.E. 2d 354 (2005) (Attorney's pattern of double-billing juvenile court for her time as appointed counsel, resulting in claims for compensation for as many as 33 and a half hours of work in single day, warranted one-year suspension from practice of law, with six months stayed on conditions.) The court stated:

> "Padding client bills with hours not worked is tantamount to misappropriation. *Toledo Bar Assn. v. Batt* (1997), 78 Ohio St.3d 189, 677 N.E.2d 349. And when professional misconduct involves misappropriation, disbarment is the presumptive sanction..."

For further information and analysis of the ethical issues surrounding double billing See, William G. Ross, "The Ethics Of Double Billing", 17 NO. 4 Acct. & Fin. Plan. for L. Firms 1 (2004). See Also the following annotation from the 2003 edition of the ABA *Annotated Model Rules of Professional Conduct*, which states:

> The practice of "padding" billing records and "double-billing" – that is, billing the same work or time to two or more clients – is clearly prohibited. See, e.g., *People v. Espinoza*, 35 P.3d 552 (Colo.2001) (lawyer inflated entries in billing statement and charged for "phantom time expenditures"); *In re Inlow*, 735 N.E.2d 240 (Ind.Ct.App.2000) (if participation of more than one lawyer unnecessary, court will allow reasonable compensation for one lawyer only; case remanded to determine if unnecessary duplication of effort led to double-billing); *In re Dyer*, 750 So.2d 942 (La.1999) (disbarring lawyer who overcharged client by "padding" legitimate expenses and charging for fictitious expenses; court rejected lawyer's suggestion that charges were "mistakes": "it defies belief that so many 'mistakes' could occur in favor of respondent, and none in favor of his client"); *In re Haskell*, 962 P.2d 813 (Wash.1998) (lawyer directed and knowingly participated in double-invoicing scheme to bill client for first-class air travel after client notified him it would pay only for coach; lawyer also directed staff to "bury" his personal expenses on client bills). See generally Hopkins, "Law Firms,

Technology, and the Double-Billing Dilemma", 12 Geo. J. Legal Ethics 93 (1998) (discusses pressure to double-bill clients for "recycled" work.)

For an opposing view with regard to the specific instance of a lawyer billing for travel on behalf of client A while at the same time billing client B for work performed while en route, See, Douglass R. Richmond, PROFESSIONAL RESPONSIBILITIES OF LAW FIRM ASSOCIATES, 45 Brandeis L.J. 199, (2007):

> …Assuming that associates recognize the wrongfulness of deliberately falsifying their time, and understand the obvious, such as not being able to bill for time spent sleeping, and not being able to double bill for time spent in court on behalf of multiple clients, are there ways in which associates needing billable hours can artificially expand their time without committing ethics violations? There may be one. Consider the situation in which an associate is required to fly cross-country to take depositions for Client A. That trip takes six hours. While traveling, the associate spends four hours editing an appellate brief for Client B. In this case, each client is compensating the associate for very different tasks. Client A expects to compensate the associate for her time traveling to take depositions and Client B expects to compensate the associate for her time spent preparing an appellate brief. Assuming that her work on behalf of Client B is of acceptable quality, the associate has earned ten billable hours on this six-hour trip; six hours traveling for Client A, and four hours briefing for Client B. Although the law does not permit double billing this is not double billing. Working while traveling can be double billing only if the same client is billed for both, and that is not the case here. In this example, each client received independent value for the associate's time.

II. Adding Surcharges to Out of Pocket Expenses

With regard to adding surcharges to out of pocket expenses, Formal Opinion 93-379 states:

> ... Perhaps the most difficult issue is the handling of charges to clients for the provision of in-house services. In this connection the Committee has in view charges for photocopying, computer research, on-site meals, deliveries and other similar items. Like professional fees, it seems clear that lawyers may pass on reasonable charges for these services. Thus, in the view of the Committee, the lawyer and the client may agree in advance that, for example, photocopying will be charged at $.15 per page, or messenger services will be provided at $5.00 per mile. However, the question arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. We conclude that under those circumstances the lawyer is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator). ABA Formal Opinion 93-379 at page 9.

Paragraph 1 of the Comment to Rule 1.5 states:

> ... Reasonableness of Fee and Expenses
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> [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

State Bar opinions are in general agreement. See, e.g. Alabama State Bar Opinion 2005-02, Arizona Opinion 94-10] and Michigan Opinion RI-241 (1995).

For a general overview of billing practices, See the ABA Section of Business Law's Task Force on Lawyer Business Ethics Statements of Principles, 51 Bus --Law 1303 (1996).

More information on billing practices is available online at www.abanet.org/cpr/ethicsearch/billing.html.

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