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Ethics and Hourly Billing

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by Grace M. Giesel

The basic ethics rules regarding fees are simple. The Kentucky Rules of Professional Conduct state that a lawyer’s fee must be reasonable.1 In addition, if a lawyer has not regularly represented a particular client, the basis or rate of the fee “should be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”2 Contingency fees must be in writing and:

should state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.3

In the contingency situation, when there is a recovery, the attorney must provide the client with a written explanation of the amount of recovery and the amount going to the client.4 In the process of collecting the fee, the attorney always must be mindful of the general rule which states that a lawyer must not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”5

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Occasionally, attorneys who bill by the hour run afoul of these rules. Unfortunately, the result is damage not only to the particular client, but to lawyers in general. A report of the American Bar Association Section on Litigation notes that there is a direct connection between the public’s low opinion of lawyers and fees. The report stated: “the greatest number of complaints arise around lawyers’ fees …. Lawyers are often not upfront about their fees; and are unwilling to account for their charges or hours.”6 The report noted client confusion about how lawyers bill and stated that two-thirds of the respondents of a survey agreed that “lawyers are more interested in making money than serving the clients.”7 To the extent that lawyers violate ethical principles regarding fees, the public perception suffers even more.

Over 24 Hours a Day?

In Iowa Supreme Court Board of Professional Ethics and Conduct v. Tofflemire,8 the Iowa Supreme Court faced a particularly egregious case of billing dishonesty. The attorney before the court had worked as a full-time employee for the state labor office, worked as a state public defender, and had a private practice. The attorney filed reports with the public defender’s office and the labor office, that when considered as a whole, claimed that the attorney had worked more than 24 hours multiple days. The court suspended the attorney indefinitely with no possibility of reinstatement for two years. The court noted that this was a case of “repeated deception.”9 First, the billing for the letters was a clear example of overbilling. Second, the practice of taking sick days from the labor office and billing the public defender’s office for those days was “illegal conduct involving moral turpitude.”10 Third, the misrepresented reimbursement amounts were clearly problematic. Fourth, the attorney admitted that she did not prepare contemporaneous billing records. The court noted that such a practice was a "recipe for disaster"11 and that later preparing reports with details that would lead the reader to believe that the attorney kept contemporaneous reports was reckless disregard for the truth. Lastly, the court noted that it had little faith in the accuracy of the billing.

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In Disciplinary Counsel v. Holland,12 the Ohio Supreme Court suspended an attorney for one year and required repayment of all fees in cases involving overcharges by the attorney. The attorney, appointed to represent juveniles, submitted forms for payment in excess of the possible. The attorney billed three in-court hours for each client he assisted on a given day. So if he assisted three clients during one three-hour period, he billed nine hours. The result was “outrageous” charges.13 The attorney filed 138 forms claiming nine to 24 hours on 34 days. The court found that the attorney engaged in dishonest and deceptive practices, engaged in conduct adversely reflecting on the attorney’s fitness to practice law, and charged a clearly excessive fee. The court noted the larger effect of this attorney’s conduct, stating: “respondent … lessened public confidence in the legal profession and compromised its integrity.”14

14% Admit to Dishonest Billing

Unfortunately, there is evidence that billing impropriety is not as unusual as one might hope. A study done in 1999-2000 in Texas asked law firm associates whether they had engaged in double-billing. Eighty-six percent of the 487 respondents answered “no.” In response to a question about whether the associates had billed clients for recycled work, 83 percent of the respondents answered “no.”15 The good news is that the percentage of attorneys denying wrongdoing is high. The bad news is that at least 14 percent of the respondents HAD engaged in dishonest billing practices and were willing to admit it. Indeed, the actual percent of attorneys who bill dishonestly may actually be greater given the economic incentive hourly billing attorneys have to bill a higher number of hours. Also, one cannot disregard the incentive law firm associates have to increase billable hours by ulterior means: the law firm associates billing rate.

Some attorneys may be engaging in questionable practices without thinking that the practices are improper. In an effort to provide guidance in this area, Formal Opinion 93-379 of the American Bar Association addressed several billing issues that arise with hourly billing. The opinion presented three scenarios. In the first scenario an at-
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torney spent four hours at the courthouse representing three clients. The question was whether he might bill each client four hours for a total of twelve hours. If the attorney had been representing any one of the clients alone, the matter would have taken four hours. The ABA opinion concluded that the attorney could not bill four hours to each of the three clients because “a lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours.”

In the second scenario the attorney worked on one client’s matter for five hours while flying six hours to a deposition for another client. The question was whether the attorney might bill not only the first client for five hours, while working five hours on behalf of another, has not earned eleven billable hours.”

In the third scenario the attorney researched a topic for a client and later used the research for a second client. The question was whether the attorney might bill the clients five and six hours, respectively, for the time. Once again the opinion concluded that this billing would be improper. “A lawyer who flies for six hours for one client, while working five hours on behalf of another, has not earned eleven billable hours.”

Note that these scenarios also present issues of dishonesty to the extent the attorney is claiming that he or she spent time on a matter and did not in fact spend that time.

Another hourly billing practice that has been questioned is the hourly increment used for billing. Many courts reviewing requests for fees in bankruptcy and other sorts of litigation have not approved of billing in increments of one-fourth of an hour. Most have approved of billing in increments of one-tenth of an hour. The bankruptcy court in In re Tom Carter Enterprises, Inc., disapproved of billing in quarter-hour increments, stating “professional persons who charge their clients fees in excess of $80 per hour, based upon time spent, cannot, in all honesty and reasonableness, charge their clients for increments in excess of one-tenth of an hour.”

An attorney wishing to avoid any or all of these dilemmas might avoid the hourly billing method entirely. If an attorney wishes to bill hourly, he or she should always be mindful of the excessiveness principle and the honesty principle in billing clients. All attorneys should be mindful of what the rules require and how the public might perceive even allowable attorney conduct regarding fees and billing.

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Endnotes

1 Kentucky Supreme Court Rule 3.130 (l.5a).
2 Kentucky Supreme Court Rule 3.130 (l.5b).
3 Kentucky Supreme Court Rule 3.130 (l.5c).
4 Kentucky Supreme Court Rule 3.130 (l.5c).
5 Kentucky Supreme Court Rule 3.130 (l.5c).
7 Id. at 7.
8 689 N.W.2d 83 (Iowa 2004).
9 Id. at 93.
10 Id. at 92.
11 Id. at 90.
12 835 N.E.2d 372 (Ohio 2005).
13 Id. at 363.
14 Id. at 366. The prosecutor charged the attorney with grand theft but the attorney was not found guilty because of lack of proof of intent to deceive. See also Disciplinary Counsel v. Johnson, 835 N.E.2d 354 (Ohio 2005) (junior attorney followed the teachings of attorney Holland, for whom junior attorney worked; suspended 1 year with 6 months stayed).
16 See Patrick J. Schultz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 Vand. L. Rev. 871 (1999).