



Double Billing Your Clients Is Double Trouble

One of the foundations of our profession is that a lawyer must put the interests of the client ahead of his own. If some lawyers would only remember this rather straightforward proposition, most ethical problems could be easily avoided.

For instance, take the recent inquiry concerning billing practices that resulted in a formal ethics opinion from the Oregon Bar Association.¹ There, a lawyer had four clients whose cases were set for a status call on the same day. The lawyer attended on behalf of all four clients. The lawyer spent a total of one hour attending the call and asked if each of the four clients could be billed for the entire hour.

The Oregon Ethics Committee

interpretation, teaching and enforcing of ethics rules, the ABA opinion observed that the public still does not generally regard lawyers as particularly ethical, especially concerning the billing practices of some of its members.

The ABA Opinion considered three hypotheticals:

1. lawyer making a simultaneous court appearance on behalf of three clients
2. lawyer on an airplane flight on behalf of one client while working on another client's matters
3. where research on a particular topic for one client later turns out to be relevant to an inquiry from a second client, and the lawyer wants to charge

has not earned five billable hours. And the lawyer who was able to reuse old work product has not re-earned the hours previously billed.

In all three situations, the lawyer who has agreed to bill solely on the basis of time spent is obligated to pass on the benefits of these economies to the client. In other words, the lawyer is expected to put the clients' interests in economical service ahead of the lawyer's interest in making a lot of money.

The practice of billing several clients for the same time or work product, the opinion holds, results in the earning of an unreasonable fee and is therefore contrary to the mandate of ER 1.5. ▀

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For a humorous look at modern-day billing practices, see the "memo" on the facing page. →

referred to its equivalent of ER 1.5 (a lawyer's fee shall be reasonable) and 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation)² and stated that a bill for more time than a lawyer actually worked constituted a charge of a clearly excessive fee, was a misrepresentation and was unethical.

The Oregon opinion should come as no surprise.

The American Bar Association, in a Formal Opinion published almost 10 years ago,³ concluded that it was unethical to bill a client for more time than the lawyer actually spent on that client's behalf. After stating that the legal profession spends a substantial amount of time and energy in the

the second client for the time originally spent

The ABA analyzed these hypotheticals using ER 1.5 and ER 7.1(a) (a lawyer shall not make false or misleading communication about the lawyer or the lawyer's services). No mention is made of ER 8.4. The results, however, were the same.

The ABA stated that the issue should be resolved by looking at it from the perspective of what the lawyer actually earned in each situation. Thus, a lawyer who spends four hours of time on behalf of three clients has not earned 12 billable hours. Similarly, a lawyer who spends three hours in an airplane for one client while working two of those hours on behalf of another

endnotes

1. Oregon State Bar Legal Ethics Committee, Op. 2002-170 (May 2002).
2. Rule 42, ARIZ.R.S.C.T.
3. ABA Formal Op. 93-379 (Dec. 6, 1993) (Billing for Professional Fees, Disbursements and Other Expenses).

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Ethics Opinions are available on page 45 and at www.azbar.org/EthicsOpinions

MEMORANDUM

LEGAL LEVITY
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TO : All Lawyers
FROM : Your Executive Committee
SUBJECT : Charging Time to Clients
DATE : July 22, 2002

We have recently received several inquiries from both attorneys and billing staff concerning the charging of time to various clients. In order to introduce a modest measure of uniformity in the firm, the following guidelines should be followed. In any doubtful situation, it should be remembered that the ultimate purpose of billing is to charge as much as possible.

Charging Thinking Time

The basic rule is that time spent thinking about a client's problems (which includes musing and pondering) is charged to the client on whose behalf the thinking is undertaken to the extent that the thinking takes place during normal working hours. It will be presumed that, at the least, the hours between 6:30 a.m. and 9:30 p.m., Friday through Thursday, are normal working hours, and that the normal working day includes a minimum of eight (8) thinking hours. However, in the case of those lawyers who regularly think prior to 6:30 a.m. or after 9:30 p.m., time spent thinking during extended working hours is also to be charged. Only waking hours are to be counted, absent special circumstances.

The following additional principles apply:

1. **Charge double time for double-thinking.** "Double-think," as defined by George Orwell, is thinking good is bad and bad is good. Because of the intellectual and emotional strains placed upon lawyers engaged in double-think, a surcharge is deemed appropriate. For example, thinking that it is good to destroy a neighborhood so that it can be rezoned to allow an office building should be charged at twice the normal rate.
2. **Travel.** If travel is undertaken during regular working hours and on the same day actual thinking is done for the client outside normal working hours, both the travel time and the time spent thinking is chargeable. One is not offset against the other. This principle leads to the rather obvious corollary that no thinking about a client's business should be undertaken while traveling.
3. **Thinking in the lavatory.** This time should be charged to the client, as should time spent in the lavatory reading the *Wall Street Journal* or other publications that assist the lawyer in helping solve the client's problems.

Maximum Hours

We have been particularly distressed with the apparent misunderstanding on the part of some lawyers that no more than 24 hours can be charged to clients in any one day. While this rule would, in general, apply, it should be very clear that in appropriate circumstances more than 24 hours' time can be charged. For example, if during the course of a day the lawyer flies from Phoenix to New York, working on a client's matter en route, it might well be that his total charges (travel + working + thinking) for that day would exceed 24 hours. Nothing in this memorandum should be taken to discourage such practice.

Moreover, when a lawyer working for Client A establishes a principle in litigation that has direct applicability to Client B, both Client A and Client B can be charged. Obviously, this can result in many 48-hour days. Thus, lawyers are encouraged to exchange information on the possible interrelations of their work. It should be noted that Client B may in some circumstances be charged for time spent in losing a case for Client A. In such a case, the knowledge gained in the loss for Client A may give Client B a competitive advantage for which he should pay.

Finally, a word about rounding. Three tenths (.3) of an hour should be charged for any period spent on a client matter in excess of 1 second but less than 18 minutes. Periods of less than 1 second, such as instantaneous flashes of anxiety, may also be charged in appropriate circumstances, depending on the intensity of the flash and its value to the client. Any time in excess of 18 minutes should be rounded to the nearest half hour, and time in excess of 30 minutes should be rounded to the nearest hour. Lawyers are encouraged to shift back and forth from one matter to another as frequently as possible in order to maximize time charged under this rule.

We hope this memorandum will clarify the questions you have had about our billing practices. You will be promptly advised of any new techniques discovered in this area and of any changes in firm policies.