

Ethics and Time-Based Billing

By Michael Downey

In 1965, law firm associates normally billed about 1400 to 1600 hours and partners about 1200 to 1400 hours. *See* William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 2-3 (1996) (citing a 1965 ABA survey). Now, forty years later, www.infirmation.com reports that associates at large firms in many cities average more than 2200 hours billed. And anecdotal evidence suggests some firms unofficially require associates to bill 2100 hours or more if they want to keep their jobs.

Facing such billable hour requirements, or perhaps hoping to generate more revenue or reach the next bonus threshold, some lawyers fabricate, inflate, or “pad” their billable time. Extreme examples of fabricated billing are legendary and include:

- A Norwich, CT, lawyer who billed 94 hours for a single day’s work;
- A Raleigh, NC, lawyer who billed 13,000 hours for a thirteen-month (approximately 9500-hour) period; and
- A Baltimore, MD, lawyer who – with approval from the chairman of his firm’s finance committee – had computers automatically increase all time billed to a particular client by 15 percent.

While these extreme examples of fabricated billing capture the headlines, ordinary billing inflation or padding is probably rather common. In a 1991 survey, a majority of surveyed lawyers estimated 5 percent of all billed time is padding, and one-sixth of those surveyed said 25 percent of all billed time is padding. *The Honest Hour* at 29. Such “padding” may involve a lawyer’s increasing the amount of time spent on a project, for example billing a client 1.1 or 1.25 hours or more for 1.0 hour of work. Or it may involve a lawyer who regularly allocates 100 percent of his or her time in the office to billable matters, ignoring that a portion of that time was necessarily

spent on non-billable activities. (Billing experts generally believe about 70 or perhaps 80 percent of time in the office should generally be billed.) Or it may involve transferring time worked by a person who does not bill or bills at a lower rate to a person who bills at a higher rate.

Holiday distractions and year-end deadlines for bonuses and billable hours may make padding more common this time of year. Thus, it seems an appropriate time to review the guidelines for ethical billing set forth in the seminal advisory opinion on the issue, ABA Formal Opinion 93-379, and its guidance against inflating hours and billing multiple clients for the same time or same work.

When a lawyer has agreed to bill a client based on the time spent on a project, inflating, fabricating, or padding of hours violates a host of ethical rules. Rules that prohibit padding or lying about hours worked include ABA Model Rules 1.5 (requiring that fees be reasonable), 8.4 (prohibiting fraud, deceit, and misrepresentation by lawyers), and 7.1 (prohibiting false statements about a lawyer’s services), and the comparable rules in most states.

ABA Opinion 93-379 succinctly states the practical impact of these rules: “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 [he or she] actually spends on a matter, except to the extent that [lawyer] rounds up to minimum time periods (such as one-quarter or one-tenth of an hour).” “[T]he lawyer who has agreed to bill on the basis of hours expended does not fulfill [his or her] ethical duty if [that lawyer] bills the client for more time than [was] actually spent on the client’s behalf.” *Id.*

ABA Opinion 93-379 also explores the impact of this principle to two instances when lawyers often bill improperly: billing more than once for the same time or more than once for the same work. ABA Opinion

93-379 describes three common situations when over-billing occurs: (1) billing multiple clients each for the full duration of a court appearance when the lawyer spends some time during that appearance on each client's matter; (2) billing one client for travel time and a second client for the same time because the lawyer did work on the second client's matter while traveling for the first client; and (3) recycling work product and billing the client who receives the recycled work product time already billed to another client when that work product was originally created.

In each of these situations, ABA Opinion 93-379 directs that the lawyer may not bill more than the total amount of time *actually spent*. More specifically, a lawyer may

not bill all clients combined more than the amount of time actually spent in court or traveling. Rather, the duration of the court appearance or travel should be reasonably allocated among the clients whose work was performed during that time. Also, a lawyer who recycles work product may only bill the client receiving the recycled work product time spent updating the original work product. Billing the client otherwise is unethical and often illegal.

To explain the limitations on billing for the same time or same work, ABA Opinion 93-379 states these situations should be considered "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.

Instead of over-billing, in each instance "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." Billing several clients for the same time or work product results in an unreasonable fee, and thus violates Model Rule 1.5 in addition to rules against engaging in fraud or deception. Of course, if the lawyer and client agree the fees will be based on something other than the time spent (such as a fixed fee for each appearance in court or document prepared), the lawyer may be able to bill multiple clients for a single court appearance or for largely recycled work as long as the billing is consistent with the agreement and the total fee is reasonable.

Many lawyers understand that the rules do not allow them to inflate or pad time, bill multiple clients for the same time, or bill multiple times for the same work. For others, it may be useful to read (or re-read) ABA Opinion 93-379, or otherwise consider how the pressure to bill may be undermining a lawyer's ability to follow the ethical rules in this and other matters. One rather strong statement of this danger is voiced by Patrick J. Schiltz, whose article *On being a Happy, Healthy and Ethical Member of an Unhappy Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871 (1999), warns that the sliding slope to unethical behavior often "will start with your time sheets" and may lead to "stealing from your clients almost every day, and you won't even notice."

Good luck and – in the words of a former colleague – "back to your billing station."²

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