Are Your Firm's Billing Practices in Line with Rule 1.5?

By: Erik Crep, Esq.

Often when a client hires an attorney for legal representation they are doing so out of necessity. Whether they are being sued and in need of a strong defense team or beginning the process of a difficult divorce, a client may be willing to put their every last dime toward retaining the best attorney they can afford. Unfortunately, some lawyers use questionable billing methods to inflate their legal bills. Certain tactics are in clear violation of the professional ethics rules while other violations may not be as easily identified.

ABA Model Rule 1.5(a) governs the ethics rules regarding reasonable fees and expenses. Rule 1.5(a) mandates that "a lawyer shall not make any agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[1] The Rule then enumerates factors that determine the reasonableness of the fee, including the time and labor required; the skill required to perform the legal services properly; and the fee customarily charged for similar legal services.

Therefore, an attorney may not charge fees that are unreasonable given the amount of work necessary to accomplish the client's goal. In *In re Levingston*, the Supreme Court of Louisiana held that probate counsel's flat fee of 5% of the value of the decedent's estate, worth more than $1.14 million, was unreasonable and sanctionable since no administration was required, and counsel's duties were limited to placing the heirs in possession of the estate. [2] Similarly, in *In re Gerard*, the Supreme Court of Illinois suspended an attorney who gave the client a choice – an hourly rate of $175 or a 1/3 contingent fee – for legal services to "recover" $450,000 in assets belonging to the client. The client chose the contingent fee, but the client's entitlement to the assets was never at issue, and the negligible work necessary to secure them was purely ministerial.[3]

Rule 1.5 also establishes that attorneys may not use a case to educate themselves (or an associate) on certain areas of law. In a recent case, an attorney billed 19 hours for research on well-established 11th Amendment defense issues and included 49 invoice entries for discussions with co-counsel in a case that would not normally require collaboration. The court's ruling stated that the lawyer's inexperience "resulted in counsel using this litigation as an educational forum in the area of civil rights law." [4] The judge noted that this was a simple civil rights claim with moderate discovery and evidentiary issues so the request for compensation based on 555.27 hours was clearly excessive and reduced the fee claim.

While significantly overcharging a client for legal services may be a more obvious ethical violation, other billing challenges may not be as apparent. Some attorneys, especially young associates, can overlook or misconstrue what is considered an unreasonable fee or expense. For example, it is a violation of 1.5(a) to bill multiple clients for the same trip. Therefore, on days where an attorney has multiple hearings at the same courthouse, they cannot bill each client for travel time. So if there is a 9:00 a.m. hearing before Judge Smith for Client X and a 9:30 a.m. hearing before Judge Rodriguez for Client Y, it is a violation of Rule 1.5(a) to bill both clients for travel time to the court house.

This was the case in a recent matter in which the Iowa Supreme Court Disciplinary Board held that an attorney was in violation of 1.5(a) when he billed multiple clients for full round trip mileage to the same location on the same day. Despite the lawyer's claim that he was mistaken about how to properly bill for mileage due to his past billing practices as an electrician and his previous

continued on next page

Rule 1.5, cont. from previous page

law firm incorrectly teaching him how to bill mileage, the court suspended his license to practice law indefinitely for a period of at least one year. [5]

So lawyers are charged with deciding which client to bill and which to essentially give free services. In order to comply with the ethics rules, an attorney should either split the miles between the clients or bill all miles to one client and nothing to the other client. Furthermore, while most clients reimburse miles at the IRS approved rate, attorneys should submit accurate reimbursements and avoid "ballpark" miles. The best practice is to use an Internet map service to accurately chart the distance travelled.

Under Rule 1.5(a) lawyers may recover expenses reasonably incurred in connection with the client's matter for services performed in-house, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered. For example, a lawyer and the client may agree in advance that 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?

Law firms should not use unnecessarily high billing rates for research, administrative work, and other lower-level tasks. For instance, it is most likely unreasonable to charge a client a billable associate attorney rate to deliver a letter to the court when it is more cost efficient to use FedEx and/or a courier delivery service. It would also be considered unreasonable for an attorney to charge a client for excessive overhead expenses. In a bankruptcy case involving a former professional athlete, the attorneys' proposed fee included reimbursement for costs associated with using the law firm's air conditioning on the weekend and approximately 7,200 billable hours over a ten month period which would equate to one attorney working on the case 24 hours straight for 300 days. After coming under fire for the rates from creditors, the firm reduced the fee from $2.6 million to $1.5 million and cut the expenses to $160,000.

Attorneys should be diligent and accurate in charging clients for case related expenses. Like any violation of the Rules of Professional Conduct, a violation of Rule 1.5(a) exposes a lawyer to potential sanctions under the disciplinary rules in their jurisdiction. When contemplating whether a firm's legal fees and expenses pass ethical muster, words of wisdom dating back over a quarter of century still ring true. "In the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services."[6]

Sources

1 Mod. Rule Prof. Cond. § 1.5 (a)
2 *In re Levingston*, 755 So. 2d 874 (La. 2000).
3 *In re Gerard*, 548 N.E. 2d 1051 (Ill. 1989).
4 *Heavener v. Meyers*, 159 F. Supp. 2d 1278 (2001).
5 *Iowa Supreme Court Attorney Disciplinary Board v. Noel*, 923 N.W.2d 575 (Iowa 2019).
6 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379.