Ethics in Billing

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Rules of Professional Conduct

- Made them substantially similar to the Model Rules of Professional Conduct, except for advertising. Now advertising is substantially similar too.

Extreme Examples

- A Norwich, CT lawyer who billed 94 hours for a single-day’s work.
- A Raleigh, NC lawyer who billed 13,000 for a 13-month period.
- 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%.
Legal Bill Auditors – “It’s a growth industry.”

Businesses that suspect their law firms of padding time sheets are turning to a new breed of watchdog to guarantee an hour billed is an hour worked.

Small businesses, insurance companies and even corporations with in-house counsel are adopting this new “trust, but verify” approach by hiring specialized consultants who can determine if legal bills are too high.

And while it may strike some attorneys as an unwarranted impeachment of their professionalism, the sticker shock experienced by some clients justifies auditing legal bills, say practitioners of the trade.

“It’s a growth industry,” says Lisa G. Lerman, an associate professor of law at the Catholic University in Washington.

Questech, a government contractor with $50 million in revenue last year, spent up to $1 million annually on legal fees — until an audit uncovered overbilling.

“The company had used the services of a large and prestigious law firm in Washington for over 30 years. [But] the company came to the conclusion that they were getting top dollar and not getting top quality,” says Questech’s in-house counsel, Christina Burkholder.

“It was hired as a result of that study,” she adds.

Fees – Rule 32:1.5

“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses, or violate any restrictions imposed by law.”

-- Iowa Rule of Prof’l Conduct 32:1.5(a)
Factors to be considered in determining the reasonableness of a fee

- the time, novelty and difficulty of the questions involved, and the skill requisite to perform service;
- the likelihood of precluding other employment by the lawyer;
- customary fee in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship;
- the experience, reputation, and ability of the lawyer;
- whether the fee is fixed or contingent.

-- Iowa Rule of Prof’l Conduct 32:1.5(a)(1)-(8)

Other ethics rules in play

Other ethics Rules cited by Supreme Court that prohibit padding or lying about hours worked:

- Rule 32:8.4(c) (prohibiting fraud, deceit, and misrepresentation by lawyers)
- Rule 32:8.4(d) (prohibiting conduct prejudicial to the administration of justice)
- Rule 32:7.1 (prohibiting false statements about a lawyer’s services)

Limited, even if reasonable

- A fee that is otherwise reasonable may be subject to legal limitations, of which the lawyer should be aware.
- For example, a lawyer must comply with restrictions imposed by statute or court rule on the timing and amount of fees in probate.

-- Iowa Rule Prof’l Conduct 32:1.5, cmt 1.
Basis of fee communicated to client

“The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.”

-- Iowa Rule of Prof'l Conduct 32:1.5(b) (emphasis added)

In 1965...

- Law firm associates normally billed about 1,400-1,600 hours.
- Law firm partners normally billed about 1,200-1,400 hours.


Common Methods of Overbilling

“Padding” the amount of time spent on a project by, for example, billing a client 1.2 or 1.25 hours or more for only 1.0 hours of work.

See William G. Ross, The Honest Hour: The Ethics of Time-Based Billing by Attorneys
Common Methods of Overbilling

“Non-stop meter” – a lawyer who regularly allocates 100% 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 estimate about 70-80% of time in the office is actually billable.

See William G. Ross, The Honest Hour: The Ethics of Time-Based Billing by Attorneys

Common Methods of Overbilling

Biller up-charge: Attorneys transfer time worked by a person who does not bill, or bills at a lower rate, to a person who bills at a higher rate.

- ABA Formal Opinion 93-379.

See William G. Ross, The Honest Hour: The Ethics of Time-Based Billing by Attorneys

Common Methods of Overbilling

- "Churning" – the creation of unnecessary work to drive up a client’s bill.

- "Featherbedding” – throwing armies of bodies at every problem.
DLA Piper's troubles


“I hear we are already 200k over our estimate — that’s Team DLA Piper!” wrote Erich P. Eisenegger, a lawyer at the firm.

Another DLA Piper lawyer, Christopher Thomson, replied, noting that a third colleague, Vincent J. Roldan, had been enlisted to work on the matter.

“Now Vince has random people working full time on random research projects in standard ‘churn that bill, baby’ mode,” Mr. Thomson wrote. “That bill shall know no limits.”

A DLA Piper spokesman said the firm did not comment on pending litigation.

Practical Impact of the Rules

“In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, the lawyer may not bill more time than he actually spends on a matter, except to the extent that he rounds up to minimum time periods (such as 1/4 or 1/10 of an hour) . . . The lawyer who has agreed to bill on the basis of hours expended does not fulfill his ethical duty if he bills the client for more time than he actually spent on the client’s behalf.”

--ABA Opinion 93-379.

Examples of improper billing

• Billing multiple clients for the full duration of a court appearance when the lawyer spends some time during the appearance on each client’s matter;
• 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
• 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.
If hourly, it's arithmetic, not art.

An attorney may not bill more than the total amount of time \textit{actually spent}.

- Specifically, a lawyer may not bill all clients combined more than the amount of time actually spent working. For example, 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 perhaps illegal.
- "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."

Out-of-pocket expenses as profit generators

- May a lawyer add surcharges to out-of-pocket expenses?

- Example: In the absence of a specific agreement to the contrary, when the client has simply been told that costs for items will be charged to the client, the attorney charges $1 for photocopies for which the firm only pays $0.20.

Out-of-pocket expenses as profit generators

Formal opinion 93-379 states: "We conclude that under these 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 the 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)."

Iowa Supreme Court Att'y Disciplinary Board v. Laing & Railsback

- Provided conservator services to a ward spanning three decades
- Sued by the ward who alleged the attorneys charged and received excessive fees
- Appointed conservator in 1974 for Vietnam vet with history of paranoid schizophrenia, depression, substance abuse
- Inherited 160 acres from mother’s estate (and more later)

Iowa Supreme Court Att'y Disciplinary Board v. Laing & Railsback

- Submitted annual reports to the court detailing receipts and disbursements for the reporting period and summarized the status of the ward’s assets, including an investment account managed by an investment firm
- Each year Laing sought, and a district court judge entered, an order approving fees for the services provided

Iowa Supreme Court Att'y Disciplinary Board v. Laing & Railsback

Many of the reports revealed services that did not require legal training or asset management expertise. Examples:

- transporting ward to numerous medical appointments
- taking him shopping for clothes and stereo equipment
- assisting in purchasing and delivering gifts for others
- attending ward’s birthday parties
- accompanying ward to a play and other outings for pleasure
Iowa Supreme Court Att’y Disciplinary Board v. Laing & Railsback

- Hourly rates increased from $42 in the earlier years to $125 by the end
- The number of hours claimed during those years ranged from a low of 31.75 hours to a high of 236 hours by the end
- Court found the reasonable hourly rate for non-legal services was **$15** per hour

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Iowa Supreme Court Att’y Disciplinary Board v. Laing & Railsback

- Court found unreasonable time and fees for the preparation of several of the annual reports
- Average 10-15 hours for initial 11 reports
- Rose steadily over the years; 26th report, claimed spent **76 hours** in its preparation
- Expert testimony said preparation of the annual reports should have taken no more than **8 hours**

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Iowa Supreme Court Att’y Disciplinary Board v. Laing & Railsback

- Court found the lawyers charged and submitted claims “for clearly excessive fees” arising from “claims of unreasonable time expended for management of [the ward’s] assets, drafting annual conservator’s reports, and preparing tax returns.”
- Court further found the attorneys “charged excessive hourly rates for performing a wide array of services not requiring legal training or other professional skills and commonly performed at a much lower cost by guardians.”
- How long a suspension?
What if the fee agreement is not based on hourly timekeeping?

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.

Contingent fees

- A contingent fee agreement must be in a writing signed by the client.
- Must state the method by which the fee is to be determined, including percentages accruing to the lawyer in the event of settlement, trial or appeal
- Must state expenses to be deducted from the recovery
- Must state whether such expenses are to be deducted before or after the contingent fee is calculated.
- Must “clearly notify” the client of any expenses for which the client will be liable whether or not the client is the prevailing party.
- At conclusion of the case, lawyer must provide client a written statement stating the outcome of the matter and showing payment to the client and the method of determining the client’s share.

No contingent fees in cases of:

- Representation in a domestic relations matter upon the securing of a divorce, or upon the amount of alimony or support or property settlement; or
- Representation of a defendant in a criminal case.
### Fee division

A division of a fee between lawyers who are not in the same firm may be made only if:
- the division is proportional to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation – financial and ethical
- the client agrees in writing to the fee division arrangement
- the total fee is reasonable

### Retainers and advance fee payments

- Are payments for contemplated services made prior to the lawyer’s having earned the fee.
- Advance expense payments are considered to be advance fee payments.
- Advance fee payments must be deposited in the trust account and withdrawn only as fees are earned or expenses incurred.

### Advance fee payments

- When such advance funds are withdrawn, the client must be notified in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting.
- The notice must be transmitted “no later than the date of the withdrawal.”
- Fully refundable if fees are not earned or expenses not incurred.
Special Retainer

- Is a fee for contemplated services.
- Such fees are advance fee payments.

General Retainer

- Is a fee in exchange for retaining the attorney's availability during a specified period.
- Such fees are not advance fee payments and should not be deposited in the trust account.

Flat Fee

- Is a fee that encompasses all services that a lawyer will perform.
- If payment is made prior to performance of the services, the funds must be deposited into the trust account.
- Client and lawyer may agree on a proportional withdrawal system, but the client's right to refund of unearned fees must be protected.
- The attorney may not withdraw unearned fees.
**Bd. of Prof’l Ethics & Conduct v. Apland,**
577 N.W.2d 50 (Iowa 1998)

- Advance fee payments must be placed in the client trust account until earned.
- "Flat fees" and "special retainers" are considered to be advance fee payments.
- Advance fees to cover expected expenses are also considered to be advance fees.
- Fees paid as true retainers – in exchange for a promise of future availability – are not advance fees.
- When such advance funds are withdrawn, the client must be notified in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The notice must be transmitted "no later than the date of the withdrawal."

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**Notice to client regarding interest to IOLTA program**

- If funds of a client or third party are placed in a pooled trust account because the funds are nominal in amount or are short-term in nature, the client or third party must be notified that net interest will be paid to the Lawyer Trust Account Commission under the IOLTA program in Chapter 43.

-- Client Trust Account Rule 45.4(1)

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**Conflicting claims on funds in trust**

- If the lawyer has possession of funds or property to which there are conflicting claims, the lawyer shall separately maintain such funds or property and refuse to disburse the funds or property where the claims are not frivolous until the claims are resolved.

-- Iowa Rule of Prof’l Conduct 32:1.15
## Board Determination By Type of Complaint - 2012

### TABLE I: BOARD DETERMINATIONS BY TYPE OF MISCONDUCT ALLEGED

<table>
<thead>
<tr>
<th>Misconduct</th>
<th>Grievance Comm'n</th>
<th>Public/Nepotism</th>
<th>Private Adversion</th>
<th>Total</th>
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<tr>
<td>Inability, Misrepresentation</td>
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<td>Criminal Conduct</td>
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<td>Avoiding or Engaging in ULP</td>
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**Note:** (see reasons for type record in Board because many complaints allege more than one type of misconduct.