



BILLING

PRACTICES FOR DIFFICULT FINANCIAL TIMES

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"If you want to make it in this firm you've got to learn how to double bill. That's the key to success here. You bill them, and then you bill them again, and if you can, you bill them again."¹

"[B]illing [seems to be] the art of seeing what charges you can get the client to accept."²

"Lawyers prefer to fly from the East Coast to the West Coast because then they can bill 27 hours in a day."³

Although the statements on the previous page are not meant to malign the entire legal profession, they touch on an uncomfortable reality facing modern day law practice: the Great Recession has dramatically decreased law firm profitability and placed lawyers under even more pressure to increase their billable hours. In recent years, clients have become increasingly unable or unwilling to pay legal fees and some have even declared bankruptcy without paying their bills. Consequently, once-profitable law firms have seen their balance sheets suffer. In an age where revenue-per-lawyer and profits-per-partner are seen as the two most important metrics of law firm success, lawyers are under increased pressure to bolster their billable hours. Indeed,

a lawyer who can now only collect on three-fourths of the work that he or she once could, must now bill one-third more to maintain past revenues. As most lawyers are already working far more than other professionals, this benchmark is impossible to meet through increased workload. As a result, lawyers face a heightened incentive to pad their hours through questionable billing practices. Additionally, clients who, at one time, did not complain about bills or billing practices are now, because of the economic downturn, taking a much harder look at their law firms' bills. Accordingly, law firms need to be aware of these issues and incorporate better billing practices and more efficient work processes to combat them.

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Ethical Considerations in Billing

Many lawyers mistakenly believe that Nevada Rule of Professional Conduct 1.5(a), which provides that a "lawyer's fee shall be reasonable," is the only ethical consideration concerning billing.⁴ Accordingly, these lawyers engage in mental gymnastics to convince themselves that any method of recording time is acceptable as long as they find it to be subjectively reasonable. Fortunately for the client (and unfortunately for these lawyers), there are several other ethical constraints that govern billing.

ABA Formal Opinion 93-379

In response to widespread misconceptions regarding billing, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion on billing practices on December 6, 1993.⁵ In that opinion, the committee discussed three billing practices that were common at the time. The first practice at issue is illustrated as follows. A lawyer who has three court appearances on the same day for three different clients, bills all three clients for the time spent at the appearances, thus tripling the ratio of her billable hours to actual hours worked. The second practice is illustrated by a lawyer who flies cross-country to attend a deposition for one client, works on a matter for another client during the flight, then bills both clients for the time spent, thus doubling the billable-to-actual-hours ratio. The third practice occurs where a lawyer charges a new client for research she has already completed for another client, despite the fact that she need not perform the research again. The committee explained that all three of these practices are unethical. In doing so, the committee made clear to the profession that lawyers are held to an extremely high ethical standard when it comes to recording time.

Honesty and Truthfulness in Billing

The Nevada Rules of Professional Conduct require that lawyers disclose to their client the basis on which they will bill for their professional services.⁶ Although one would think it requires no explanation, the rules further clarify that lawyers must **honestly and truthfully** disclose their billing practices to their client.⁷ Specifically, "[i]n 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 she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour)."⁸

Despite this, some lawyers seek to justify their unethical over-billing practices by claiming that it would be unfair to a lawyer who is not properly compensated for expertise and efficiency while the client receives work product that another lawyer could not have created in the same time. Still,

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other lawyers argue that their clients refuse to pay for certain legitimate work (i.e., intra-firm conferences), and so the lawyers are justified in deceptively relabeling this time or padding their hours.

However, these purported justifications miss the mark entirely. If a lawyer is dissatisfied with the billable hour model, then that lawyer is free to enter into alternative fee arrangements with their clients. Indeed, if a lawyer truly is able to create work product more efficiently and effectively than their peers, all parties benefit from an alternative fee structure. However, if a lawyer chooses to bill by the hour, he or she must do so ethically.

In short, a lawyer who has undertaken to bill on an hourly basis *is never justified* in secretly charging a client for hours not actually expended working on that particular matter for that particular client.⁹ Notwithstanding, nothing prohibits a lawyer who has agreed to hourly compensation from – *with full disclosure* – suggesting additional compensation because of a particularly efficient or outstanding result or for any other reason. The key is that the lawyer must disclose this proposal to the client.

The Canard of the Zealous Advocate

Some lawyers who never “overbill” nonetheless harm their clients by artificially increasing fees through excessive work. For example, a lawyer may proceed to trial on a matter that could be won on summary judgment. Alternatively, a lawyer may move for summary judgment when the lawyer knows that she is unlikely to prevail, and without disclosing this fact to her client. The most cited justification for this behavior is the Model Rules’ preamble, which states that “[a]s advocate a lawyer *zealously* asserts the client’s position under the rules of the adversary system.¹⁰” However, this conduct is unethical. As explained in the comment¹¹ on Model Rule 1.5,

“[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.” Further, Model Rule 3.2 provides that the job of a lawyer is to expedite the legal process.¹² The duty of zealous advocacy does not trump other duties, but is rather just one consideration. When a lawyer is deciding how much time to spend on a project or matter, the lawyer should be motivated by the client’s best interest, not the lawyer’s or the firm’s.

Practices for Firms to Adopt and Problems to Consider

Supervise Associates and Their Billing Practices

Unfortunately, the current billing system provides more incentives for, than constraints against, unethical billing. Indeed, it is extremely rare for a lawyer to be fired or disciplined for unethical billing, and next to impossible for a lawyer to be disbarred for doing so. Because a firm’s profits are directly tied to the number of hours its lawyers bill, rather than to the quality of work provided, senior lawyers are unlikely to question profitable practices. Moreover, associates – whose salaries are often directly tied to billable hours – are implicitly encouraged to overbill. The concerns these incentives raise are only heightened when one considers that only the billing lawyer actually knows how many hours she spent on a particular task, leaving clients unable to tell if a lawyer has inflated their hours.

In order to combat the dangerous incentives hourly billing creates, senior lawyers must be willing to scrutinize and criticize associate time sheets and billing practices. This involves taking a hard look at associates who post excessive billable hours.

The following scenario is illustrative. If one assumes that a lawyer normally spends three hours in the office for every two billable hours, a lawyer would have to work 10½ hours per day, six out of seven days a week without taking any days off, to bill 2,200 hours in a year. If the lawyer were to take off holidays and two weeks of vacation, the lawyer would have to average about 11½ hours a day in the office. If this same lawyer did not enter time daily, she would have to average more than 12 hours a day in the office, every day.¹³ While it is certainly possible for an associate to bill in excess of 2,000 hours per year by working around the clock and limiting non-work activities, prudent partners need to investigate annual billings in excess of 2,000 hours. Either the associate is being overworked, or the associate is inflating his or her hours.

Train Associates in Ethical Billing Practices

In many law firms, associates are never taught how to bill their time. This creates two problems. First, many associates remain wholly unaware of proper billing practices. Second, billing practices vary widely among lawyers at the same firm. If law firms expect associates to bill ethically, which they should and must, law firms must invest time to train them to do so.

Invest in Time-Saving Technology and Train Lawyers to Use It

Law firms need to take advantage of the latest time-saving technologies. Although most firms now use word processing and document management programs, they do not always use the best technology. Indeed, many lawyers feel that capital investments in technology are harmful because there is an upfront cost for the technology, and a back-end cost in the form of reduced billable hours. However, it is imperative that decisions be made based on the best interests of the client, rather than

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the law firm. Moreover, it is critical that firms not only implement time-saving technology, but also invest time in training their lawyers to use the technology, so that the client reaps the full benefit of the time-saving technology.

Assign Work to the Appropriate Employee

Some partners ask associates to perform work that is more suited to a secretary. This happens for two reasons. First, the partner may simply desire that a greater level of attention be paid to the work. Second, the partner may want the additional revenue that will be generated by asking a timekeeper to perform the specified task. Although it may make sense to have an associate perform work that a secretary could perform when delegating the work would take more time than completing it, or the task is of particular importance, this practice should be the exception and not the rule. Moreover, because lawyers may not ethically bill for clerical work, a partner who routinely requests that an associate

perform clerical work must consider the difficult situation in which they are placing the associate: the associate can either bill for time which they believe to be non-billable or suffer the consequences of having fewer billable hours. Accordingly, partners should be thoughtful in their assignment of clerical work to associates and inform the associates that they can bill for it if it is assigned (and then be willing to write off that time so that the client is not improperly billed).

Correctly Staff Cases

Firms should not assign more lawyers to a matter or project than necessary. For example, when a partner brings an associate to a hearing so the associate can learn, the client should not be billed for the associate's time. If, on the other hand, a partner brings an associate to a hearing because the associate can actually add value to the client's matter through attendance at the hearing, then it is appropriate to bill the client for both the partner's and the associate's attendance. Although there is no hard and fast rule

to determine when such attendance is appropriate, the partner should weigh the benefit of the associate's attendance against the resulting cost to the client. Moreover, partners should remember that there is no prohibition against billing the client for just a portion of the associate's time.

Utilize a Compensation System That Does Not Encourage Overbilling and Inefficiency

The problem of unethical billing is made worse by most firms' evaluation systems, which value quantity over quality. Indeed, in many law firms, associate compensation is tied directly and entirely to hours billed. When a firm's internal processes reward associates solely for their billable hours, two major problems arise. First, associates are more likely to inflate their hours, whether motivated by greed or merely a desire to survive. Second, such a system encourages inefficiency and discourages associate development. Indeed, if a lawyer is effectively rewarded for inefficiency, there is no reason for her to spend non-billable time organizing her work or attempting to increase her productivity. If a firm honestly intends to develop partners through its hiring of associates, it should use a system that encourages their development.



Conclusion

Producing quality legal work takes time. In fact, it takes a lot of time. Nothing in this article should be taken to suggest that a lawyer produce inferior work, that a lawyer not perform necessary work or that it is easy to distinguish necessary work from unnecessary work. Nevertheless, for the reputation of the individual attorney, of the firm and ultimately of the profession, we need to take a hard look at the behaviors we incentivize. Billable hours are, beyond a doubt, one measure of productivity; but to suggest they are the only one, or even the most important, is an assertion that should be subject to considerable debate. ■

- 1 Lisa G. Lerman, *Gross Profits? Questions About Lawyer Billing Practices*, 22 Hofstra L. Rev. 645, 645 (1994).
- 2 Lawrence W. Schonbrun, *The Clock Is Running*, California Lawyer, January 1991.
- 3 Raymond M. Kelin, *Putting a Lid on Legal Fees: How to Deal Effectively with Lawyers* 57 (1986).
- 4 See Model Rule of Professional Conduct 1.5(a). Rule 1.5(a) lists eight factors which are considered in determining whether the fee is reasonable, including the time and labor required; the novelty and difficulty of the legal questions; the skill needed to perform the service; the fee customarily charged in the

- region for similar legal services; the amount in controversy; the results obtained; and the experience, reputation and ability of the lawyer.
- 5 Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses) (1993).
- 6 Nevada Rule of Professional Conduct 1.5(b).
- 7 Nevada Rule of Professional Conduct 7.1 (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it . . . [c]ontains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”).
- 8 Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses).
- 9 Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses)
- 10 Preamble to Model Rules of Professional Conduct
- 11 Although the Nevada Rules of Professional Conduct do not adopt the comments to the Model Rules of Professional Conduct, the Nevada Rules explained that the Model Rule comments “may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct.” Nevada Rule of Professional Conduct 1.0A.
- 12 Nevada Rule of Professional Conduct 3.2.
- 13 Assuming this lawyer lost only 5 percent of her time because of non-daily billing.



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