Client Billing and Fee Collection: Ethical Considerations
Avoiding Sanctions and Malpractice Liability

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
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The conference begins at:
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Client Billing and Fee Collection: Ethical Considerations

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Overview of Program

• Setting the Stage
  o Billing forms
  o Fee agreements and charging interest

• Common ethical challenges and best practices for law firms
  o Resolving billing disputes
  o Withdrawal from representation
  o Pursuing fees: lawsuits, collection agencies and confidentiality issues
"Give me six hours to chop down a tree and I will spend the first four sharpening the axe."

• Abraham Lincoln

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THE CRISIS IN THE LEGAL PROFESSION LARGELY DUE TO BILLING

Legal commentators have predicted the end of the legal profession as we know it: It is on the “edge of chaos.” “The profession…as a profession is in extremis;” “The law has become a business like any other;” There is “a crisis in the legal world;” “Respect for lawyers seems everywhere on the decline;” “The legal profession is dead or dying. It is rotting away into an occupation”
THE CRISIS IN THE LEGAL PROFESSION LARGELY DUE TO BILLING

Lisa G. Lerman, one of the eminent scholars on bill padding by lawyers, ten years ago wrote:

• Some lawyers are just sloppy about keeping records.

• Some systematically “pad” time sheets, or bill one client for work done for another.

• Some create entirely fictitious time sheets.

• Some record hours based on work done by other lawyers, paralegals or secretaries, representing that they did the work. This may result in non-billable time being billed, or in work being billed at a rate higher than that of the person who actually did the work.

• Some lawyers bill for time that their clients might not regard as legitimately billable— for schmoozing with other lawyers, chatting with clients about sports or families, for doing administrative work that could be done by a non-lawyer, or thinking about a case while mowing the lawn or watching television.
THE CRISIS IN THE LEGAL PROFESSION LARGELY DUE TO BILLING

The Section of Litigation, in its 2002 report, *Public Perception of Lawyers Consumer Research*, found:

Of all the criticism that consumers have about their personal experiences with lawyers, the greatest number of complaints arise around lawyers fees. Consumers say that lawyers…are often not up front about their fees; and are unwilling to account for their charges or hours.
THE CRISIS IN THE LEGAL PROFESSION LARGELY DUE TO BILLING

Effective date January 2000 Base Salary and Bonus:

1st Year $125,000 Base $15,000 Bonus

On top of the $15,000 bonus, which is paid at 2,000 hours, the firm has an unlimited discretionary bonus.

2nd Year $135,000 Base

2nd Years who don’t meet minimum billable hours may have a base as low as $125,000

7th Year $205,000 Base $40,000 Bonus

7th Years who don’t meet minimum billable hours may have a base as low as $150,000. The firm pays 7th Years a $40,000 bonus for billing 2,200 hours. 7th Years are also eligible for an unlimited discretionary bonus.
THE CRISIS IN THE LEGAL PROFESSION LARGELY DUE TO BILLING

Hourly billing pressure may be the most serious problem faced by the legal profession. It has robbed many lawyers of the possibility of balanced lives, has caused a decline in mentoring, collegial relationships and professional satisfaction and has had a marked corrosive effect on the integrity of many lawyers… ~Lisa Lerman

Billing pressure is partly responsible for the low esteem in which the profession is held. Billing and expense fraud is only one product of the billing mania that has taken over the culture in so many large firms. ~Lisa Lerman
The Committee on Mandatory Fee Arbitration in its Advisory 98-03 Determination of a “Reasonable” Fee stated is objection to block billing:

One of the most significant factors in determining a reasonable fee is the amount of time spent…thus an attorney who fails to keep adequate time records, or uses the questionable practice of “lumping time” or “block billing” may have difficulty meeting the burden of proof. The block billing will also violate Bus. & Prof. Code par 6148 (b) where applicable.
BLOCK BILLING

In a recent case the Ninth Circuit Court of Appeals wrote:

The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. It was reasonable for the district court to conclude that Welch failed to carry her burden, because block billing makes it more difficult to determine how much time was spent on particular activities. See, e.g., Role Models Am., v. Brownlee, 353 F.3d 962, 971 (D.C. Cir., 2004) (reducing requested hours because counsel’s practice of block billing, “lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness”) see also Hensley, 461 U.S. at 437, 103 S.Ct. 1933 (holding that applicant should “maintain billing time records in a manner that will enable a reviewing court to identify distinct claims”)
BLOCK BILLING

The United States Court of Appeals in *Robinson v. Edmond* further explained its concern for block billing.

In its decision, the district court quite appropriately expressed concern about the use of “block billing” practices. The use of billing practices that camouflage the work a lawyer does naturally and quite correctly raise suspicious about whether all the work was actually accomplished or whether it was necessary.
EXCESSIVE INCREMENTAL BILLING

In re Tom Carter:

“Professional persons who charge their clients fees in excess of $80 per hour based upon time spent, cannot in all honesty and reasonableness charge their clients for increments in excess of one tenth of an hour.”

“…very few telephone calls last more than one-tenth of an hour, and…it rarely takes more than one-tenth of an hour to read an incoming letter or write a short letter.”
EXCESSIVE INCREMENTAL BILLING

In an article in U.S. Business Litigation the authors, Mai Henry Leigh, Miki Schroeder and Donna Wolf wrote:

Rounding up can easily inflate a bill by 15% to 30%, if not more, depending on how frequently and to what extent it is used. Rounding up when done to the nearest whole-hour, as seen in some invoices, can result in a gross overstatement of the fees incurred.

The presence of an excessive number of days with long hours or large whole hours (e.g. 8.00, 9.00 or 10.00) may indicate that the fees are excessive or that the biller is billing “door to door”…such excessive hours are suspect and generally non-reimbursable. At the very minimum even if the hours were actually expended, the efficiency of the attorney producing the work and thus the value of the work product may not be accurately reflected in the invoices and may require reduction.
HOW COURTS AND ARBITRATORS DETERMINE IF FEES ARE REASONABLE

• Billing on an hourly rate when billing on a fixed rate may be more appropriate
• Inflating billing rate
• Excessive revisions of documents
• Billing vague and ambiguous entries that conceal the services rendered
• Partner time billed for paralegal or secretary work
• Overstaffing produced duplication of work
• Overhead and “housekeeping” not billable
Forms of Billing
(or “Alternative Fees”)
Rates **Must** Be Reasonable

"A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

Model Rule 1.5(a)
"Not an Ordinary Business Contract"

"We have stated before and state again: 'a fee agreement between lawyer and client is not an ordinary business contract.' Although the lawyer is certainly free to consider his own interests, the primary concerns are those of the client. Fees must be reasonably proportional to the services rendered and to the situation presented."

*In re Dorothy (SD 2000); accord In re Swartz (Ariz. 1984)*
Types of Fees

• Time-Based (Hourly)
• Contingency/Risk-Sharing
• Fixed Fee
• Asset-Based
• Value-Based
Billing Time

• [Present verb] [object] for/with [object of preposition]

• “Draft/revise memorandum regarding waiver of lawyer-client conflict”

• “Research regarding statute of limitations for teaching malpractice claim”
Time-Based (Hourly) Billing

• Must bill accurate passage of time

• Can round up to lowest increment
  • . . . Within reason

• Typical problems:
  Billing multiple times for same minutes
  Automatic minimums (e.g., phone calls)
  Recycled work
Names in Billing Entries

• Use either title and last name or generic title for persons. For example:

  o “Conference with Dr. Smith regarding deposition of plaintiff’s cardiology expert” (where client will recognize Dr. Smith) or

  o “Conference with cardiology expert regarding deposition of plaintiff’s cardiology expert” (when client will not recognize the doctor)
Consistency of Descriptions

• “Draft” “draft/revise” instead of write, type, etc.
• “Correspondence” for any type of letter
• “Memorandum” for any internal firm communication
• “Review” – not look at
• “Email [recipient]” instead of “Draft email to . . . “
• “Telephone conference with . . . “ instead of talk on telephone with
• “Review and organize file”
• “Travel to . . . for”
• Use “same” instead of repeating information. Thus, an entry may state:
  o “Travel to Los Angeles for deposition of plaintiffs’ psychiatric expert; review file for same en route.”
Non-Billing

• Bill at $0/hour
• Include (X not billed) on entry
Alternative Fees

"It wouldn't be fair to charge two clients the same if one client's work took much longer."
Rates **Must** Be Reasonable

"A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

Model Rule 1.5
Time & Labor=33% of 1 of 8 Factors

The factors to be considered in determining the reasonableness of a fee include the following:

1. *the time and labor required*, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent.
Alternative Billing Anticipated

- Time & labor, novelty & difficulty of question, skill required
- *Preclusion from other employment*
- *Fee customarily charged*
- *Amount involved and results obtained*
- *Time limitations from client/circumstances*
- Nature and length of lawyer-client relationship
- Experience, reputation, ability of lawyer
- *Whether fixed or contingent*
Alternative Billing Alters Relationship

- No longer largely based on time or labor involved
  "Running clock" syndrome
- May become win-win relationship
Rates Must Still Be Reasonable

• *In re Swartz* (Ariz. 1984) – disallowed 1/3 contingency fee where ")there was, in short, no contingency, no difficult problem and little work. There was also no result for the client."

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May Be Stuck if Unprofitable

• "The element of risk . . . is an element of contingency fee arrangements. . . . Having contracted with [client] on a contingency fee basis, [the law firm] cannot now walk away from the contract because the case may not generate the return it expected at the . . . . Contrary to [the law firm's] suggestion, profitably is not a "basic assumption" of a contingency fee contract. . . . As with all contingency fee arrangements, [the law firm] knowingly assumed the risk that its arrangement . . . would not match its initial prediction of costs and returns." Haines v. Liggett Group (DNJ 1993)
Must Provide Competent Counsel

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.1
- "An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest." Model Rule 1.5 cmt [5]
Fee Arrangements Cannot Control Case

- *Compton v. Kittleson* (AK 2007) invalidated hybrid arrangement that thwarted settlement. Fee arrangement was a 33% contingency that could convert retroactively to $175/hr if client stopped case or settled.
- "[As limited by law and scope of representation], a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Model Rule 1.2
Changing Rates

• Lawyer agrees to represent Client on time-based (hourly) basis
• As fees mount, Lawyer and Client agree to convert matter to contingency arrangement.

• Does this raise particular ethical concerns?
A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
Do Same Concerns Apply to Increases in Rates?

- Does provision in Engagement Letter help: "The hourly rates are adjusted periodically (usually in January of each year)."
Expenses

• Must be accurately billed
• Must be handled consistent with agreement
Problems Usually Involve Deceit

  Initials switched on billings from lower to higher rate lawyer

  Contract lawyer time improperly included when not within the fee agreement
Handling Funds for Expenses

- Care must be taken from what account expenses are paid

- Client funds being held and then paid to third parties normally must go through a trust or escrow account
Fee Agreements
Fee Agreements

"Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding."

- Model Rule 1.5 cmt [2]
Writing Requirements

- Engagement letters
  New York requires for many engagements
  Other states require for specific types of representations (e.g., limited representations)

- Fee agreements
  Generally required for contingency fee arrangements
  Required for most matters in many other states (e.g., Wisconsin)
Fee Agreements

• Sample retainer agreements
  California State Bar  http://www.calbar.ca.gov
  look in attorney resources or search: Sample Written Fee Agreements (PDF and Word formats)

• The first two agreements forms for non-contingent fee arrangements:
  litigation on an hourly basis, and
  non-litigation on an hourly basis.

• The third form is for a contingency fee matter.

• Finally, there are "Other Clauses of Interest in Fee Agreements" which list optional clauses for specific circumstances.
Agreement Customization

• Put in *examples* with dollar amounts to illustrate how the language will work to deal with common circumstances:

  Example 3. If the arbitrator awards a net of $600,000 and also awards $100,000 in net attorneys fees AND this total of $700,000 is then agreed to be paid in 3 monthly installments of $233.3k per month, then 1/3 of the added $60k due as added attorney's fees will be paid to Lawyers in installments of $20k (1/3) each month when received.
Watch State Rules and Codes

• The headline: "Unhappy Lawyer Loses Potential $2,065,535 [50%] Contingency Fee Award Based On Noncompliance With California Business & Professions Code Section 6147. Quantum meruit award is for $364,110."

Charging Interest

• Normally permitted if disclosed in initial fee agreement

• Must be reasonable
  
  o Some states limit the use of compounded interest
Interest Charges

• CA Standard retainer language: "If a billing statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of .833% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid."
Choose Words with Care

- If the Retainer Agreement uses the terms "finance charges," "late fees," "penalty payment" or anything other than simple interest, this may create problems with the Federal Truth In Lending Law or state law.
Advance Payments and Retainers
Beware “Retainers”

- Classic retainer – pay for availability
  Lawyer's money once performance commences
- Security retainer – secure payment of fee (like security deposit on apartment)
  May deduct fees and seek replenishment
  May hold to secure final payment
- Advance payment "retainer"
  Money given to lawyer now for future services
  Very limited and regulated in some states (e.g., Illinois)
Who Owns the Money?

• May be attorney's money
  Classic retainer
  Advance payment retainer
• May remain client's money
  Security retainer

Trend?
Missouri now clearly requires all advance payments to go in the trust account
Non-Refundable Retainers

• Unethical in many jurisdictions

• Often confused with advance payment retainers or fixed fees
Third-Party Payers
Third-Party Payers

Rule 1.8(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. the client gives informed consent;
2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3. information relating to representation of a client is protected as required by Rule 1.6.

Rule 5.4 (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
Resolving Disputes
Avoiding Disputes

- Engagement letter spells out fees
- Client receives estimate of fees
- Client involved in decisions made
Collecting After Resistance

- Can the client pay
- Should the client pay
  Will there be a counterclaim
  *What is the risk, what is the reward?*

- Should preserve confidences
Who Should Collect

- Relationship partner
- Someone else at firm
- Collection agency

- Beware Fair Debt Collection Practices Act violations
Attorney Liens

• Lien on matter

• Lien on file
Resolving Billing Disputes

• ADR Language in retainer agreement?
  o Most jurisdictions allow arbitration for fee disputes
  o Many jurisdictions are more troubled by arbitration of malpractice claims

  o Must be fair process for client

  o May want to consider mediation or mandatory pre-claim meeting
ADR for Fees

• Advantages
  o Confidentiality
  o Cost
  o Potential expertise

• Disadvantages
  o Cost
  o Lack of experience as judge
  o Client may be able to avoid
  o May not cover everything in dispute
Withdrawal
Withdrawal – Model Rule 1.16

• 1.16(b): Either no material adverse effect on client or good cause
  o Nonpayment may constitute good cause

• 1.16(c): Court permission requirement

• 1.16(d): Protecting the client upon withdrawal
Model Rule 1.16(b)(5)

"(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if . . .

"(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;"
Model Rule 1.16(c)

"(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."
Model Rule 1.16(d)

"(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."
Problems Upon Withdrawal

• Avoid injury to the client
  o Cooperation with new counsel

• Ownership of the file
  o State law varies, but may require lawyer to surrender file even if not paid
  o Law may treat unpaid third-party work product (e.g., transcript) differently
Fees Upon Withdrawal

• Lawyer normally can recover if terminated – unless fired for improper or illegal conduct

• Lawyer who quits generally can only recover for contingency/future payment if “good cause”
Model Rule 1.16 cmt [9]

"[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15."
Suits for Fees
Suing for Fees

• Do not take suit for fees lightly
  o Often result in counterclaim for malpractice
  o Often result in negative publicity for firm
  o Often cause considerable scrutiny of firm and its operations

• May create problems on insurance coverage for related claims (or premium issues)
Eight Step Evaluation

- *Assess amount really at issue*
- Exhaust non-litigation options
- Discuss potential claim with all involved lawyers and staff
- Review relevant documents
  - Including administrative, substantive, and intrafirm communications
- Assess file internally
- Subject file to independent review
- Communicate with LPL insurer
- Consider waiting out statute of limitations
Continue to Represent the Client?

- Ethical Conflict?
  Consider whether claim against client creates “significant risk of material limitation”

Consider extent to which law firm’s work will be called into question
Confidentiality and Fee Collections

• Duty of Confidentiality is broad
  (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)
Lawyer-Client Disputes

Model Rule 1.6(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client
Thank You

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