

## Overbilling: Reducing the Risk

St. Louis attorney with one of the area's largest law firms was charged with criminal conduct in Federal Court after his law partners accused him of pocketing legal fees without telling them. According to published reports, the firm also reported that the attorney had improperly billed more than \$380,000 to about 50 of the firm's clients based on an independent audit. A firm spokesman said the billings sought reimbursement for gifts, tickets to athletic events, concerts, travel and dining that were described differently on client bills, also noting that all misrepresented items were repaid or credited to the affected clients. See T. Ganey; And T. Bryant, "Lawyer Here is Prepared To Plead Guilty In Federal Court," St. Louis Post Dispatch (June 13, 2000).

Overbilling charges have also surfaced in the past. Missouri attorneys may recall the criminal mail fraud charges that were brought against attorneys who were accused of overbilling Missouri's Second Injury Fund in the 1990's. One involved

attorney was accused of inflating legal bills and overcharging the state for postage and photocopying expenses, including billing more than 24 hours per day on numerous occasions. See T. Bryant, "Former Employee Says Lawyer Padded His Legal Bills to State," St. Louis Post Dispatch (Oct. 18, 1994).

Other states also have prosecuted attorneys for overbilling. One San Francisco law firm was prosecuted on federal mail fraud charges for allegedly padding billable hours and charging 15 percent of each bill for direct costs. The firm pleaded guilty to 12 counts of felony mail fraud and paid \$25,000 in fines and \$125,000 in restitution, according to the report. See D. Ricker, "Greed, Ignorance and Overbilling," ABA Journal (August 1994).

It is not unusual for attorney overbilling cases to result in criminal prosecution. In such cases the allegation typically is that the lawyer or law firm committed criminal mail fraud by transmitting false bills to the client

critical, as firms cannot assume that their lawyers know and understand the ethical rules or how to apply them.

Second, firms may want to consider whether hidden incentives relating to compensation systems encourage problematic billing practices. See M. Flaherty and R. Jacobson, "Striking Out Free Agents," ABA Journal, (July 1997). Firms need to examine whether low billing-hour or minimum billable-hour requirements create a climate that tacitly encourages overbilling.

Third, firms should also examine whether their "firm culture" encourages overbilling or at least tolerates suspected overbilling with little inquiry. Firms are usually quick to inquire if one of their lawyers bill too few hours. On the other hand, it is a safe bet that most firms would react to the attorney whose hours are "off the charts" with praise and bonuses without any pause to make sure that the attorney's billings are all in order.

through the U.S. Mail. Overbilling cases can also spawn common law civil suits, alleging fraud or breach of fiduciary duty as well as statutory suits based on state consumer fraud statutes and even the Federal RICO statute.

A RICO claim is usually available where the attorney used the U.S. Mail to forward the bill to client. In 1997 Missouri filed civil RICO claims against two attorneys seeking to recover money after they had pled guilty to criminal overbilling charges in connection with the Second Injury Fund. See K. Bell, "Missouri Wants Its Money Back; People Went to Prison For Bilking A Workers' Compensation Fund; Now State Is Seeking Damages," St. Louis Post Dispatch (June 15, 1997). As fee disgorgement claims typically are not covered by lawyers' professional liability policies, law firms cannot count on their carriers to absorb such losses.

Law firms can take specific steps to reduce the risk of an unexpected overbilling claim against a firm attorney. Internal education efforts are



By Edward J. Rolwes

Aside from the injury to the client, client overbilling by a firm attorney can be costly to law firms as well as their lawyers, both in terms of the negative publicity as well as the civil and even criminal exposure. While law firms have become more adept at implementing risk management efforts to educate firm attorneys on potential malpractice risk and how to avoid them, less attention has been placed in the area of attorney billing, even though billing problems can create costly liability. More attention to this area by firms can help the risk of exposure for over billing.

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Continued from page 6A

Fourth, firms should examine their existing attorney supervision efforts. Rule 4-5.1(a) of the Rules Of Professional Conduct require that "A partner in a law firm ... make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Rule 4-5.1(b) extends this same duty to attorneys who have "direct supervisory authority over another lawyer." Rule 4-5.1(c) makes supervisory lawyers and partners who "kno[w] of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action" liable for the other lawyer's violation of the Rules of Professional Conduct.

There is little guidance on exactly what firm measures are necessary to give "reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." One option in the area of fees may be a fee audit policy. As a practical matter, it is difficult for firm leaders at many firms to gauge whether all firm attorneys are consistently following ethical guidelines. Some level of trust is necessary and even healthy. Nonetheless, some type of regular firm audit of attorney bills and expense charges may be warranted. One option is to sub-

ject all firm attorneys to "spot check" audits where individual attorney bills are selected at random on a periodic basis for closer examination. While singling out one lawyer for an audit may be problematic, absent specific evidence, spot check audits of all firm attorneys on a random periodic basis may be more practical. These types of measures would certainly go a long way towards insulating the firm from a "failure to supervise" charge should a billing problem with a firm attorney later come to light.

Fifth, opportunities for informal evaluation of attorney billing practices should not be overlooked. Common sense is a helpful guide. What is the attorney's workload? What is his or her apparent work ethic? What is their billing rate? Are the attorney's billings consistent with prior year billings or has there been a "sudden spike" in billed hours? These questions can usually be answered without any active investigation.

Finally, some law firms designate one or more partners to serve as internal ethics counsel. Others retain outside counsel to address these issues in an effort to cloak risk-management advice with privilege. Many such firms believe that outside risk-management counsel may provide more candid assessments of law firm operations, as inside lawyers may

be reluctant to criticize existing business practices. In either case, having ethics counsel develop and implement an attorney supervision policy that also addresses billing issues can help focus firm efforts in this area.

An overbilling charge against a firm attorney is obviously harmful to the reputation of the entire firm. While that reputation can be restored over time, it is impossible to gauge the impact of such publicity on both firm morale as well as the bottom line. Given these risks, firms should examine whether their own billing practices and policies adequately discourage and detect attorney overbilling. While investment of firm time and resources towards creating or examining firm practices in this area has its costs, in the end these costs may be justified by the protection afforded to the law firm's reputation and its bottom line.

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