

## Overbilling: What is it? Ethical Rules Provide Guidance For Attorneys

trary to the existing attorney/client fee agreement. Examples of overbilling include: a client who is billed consistent with an existing fee agreement but is nonetheless charged an excessive fee; or a legal fee that is reasonable but still violates the billing agreement with the client. Overbilling may be intentional or inadvertent. While overbilling is always improper, it is not always fraudulent, depending upon whether representations were or were not made to the client in connection with the fee.

### Is the fee reasonable?

Rule 4-1.5 of the Missouri Rules of Professional Conduct, titled "Fees," begins by stating "an attorney's fee must be reasonable." This general rule applies to all attorney bills and to any attorney fee agreement, whether hourly, contingent, fixed or otherwise.

But what exactly is a "reasonable fee"? To begin with, the term itself reveals some answers. "Reasonable" refers

to an objective, standard similar to the "reasonable man" standard for many tort claims. Subjective intent is irrelevant. It follows then that a legal fee may be unreasonable based on an objective standard, even though the attorney had no intent to overbill the client.

Rule 4-1.5 outlines the factors to consider in judging whether or not a fee is reasonable. These factors include the following:

- the time and labor required to complete the matter;
- the novelty and difficulty of the questions involved;
- the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved;
- the results obtained;
- the time limitations

imposed by the client or by the circumstances;

- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent.

What is apparent from Rule 4-1.5 is that no one factor controls and all factors should be considered. The "time and labor required to complete the matter" is only one of the factors outlined in the rule. It has become customary for attorneys to base their fee on an "hourly rate" or a "billable hour," but there is no ethical requirement that they do so on non-contingent or non-fixed fee matters. It is equally proper for the lawyer to bill based on the overall "product" if the client agrees.

Does The Bill Comply With The Fee Agreement? Overbilling also occurs any time a client is charged a fee that is more than the amount the client agreed to pay under the fee agreement. Absent an express fee agreement, an implied agreement to charge a reasonable fee for the services performed applies.

As the Missouri Supreme Court stated in *Reberds v. Sweltzer*, 733 S.W.2d, 444 (Mo. banc 1997), "A promise to pay the reasonable value of an attorney's services is implied where there is no express contract, if the services are accepted by the client or rendered at his request, and recovery may be had in quantum meruit, to the extent of the reasonable value of the lawyer's services to his client." When nothing is said about fees, "the universal rule is that courts will find an agreement to pay the attorney the reasonable value of the services rendered." *Reberds*, citing *Morfeld v. Andrews*, 579 P.2d 426, 429 (Wyo. 1978) (quoting 7 Am. Jur.2d Attorneys at Law § 204, at 165-66).

It is perfectly acceptable to See **ROLWES**, page 20A



By Edward J. Rolwes

Last month's article, titled "Overbilling: Reducing The Risk," outlined the consequences of an overbilling claim and suggested some steps that firms can consider in reducing the risk of attorney overbilling. This month's column takes a closer look at what specifically constitutes overbilling. While the meaning of the term is largely self explanatory, disciplinary rules and ethical opinions provide important guidance.

In general, overbilling occurs any time a client is charged legal fees that are either unreasonable or con-

to represent a client in most instances without an express fee agreement. It was common forty years ago for a client to receive a one-page bill for "services rendered" followed by a total fee charge without any itemization of a quoted hourly rate. In some ways, simply relying on the implied understanding that the lawyer will charge a reasonable fee better allowed both the attorney and the client to take into consideration all of the relevant factors that govern "reasonable" at the conclusion of the case. This type of arrangement requires a high degree of trust between the attorney and the client and assumes that the attorney will charge a reasonable amount for the overall product at the conclusion of the matter. These types of billing arrangements are less common today than in the past, which is perhaps a reflection of the increased emphasis on the business aspects of practicing law.

More frequently today, the attorney or firm enters into an actual fee agreement with the client, based on a quoted hourly billing rate, a flat fee, or a contingency fee arrangement. Although not always required, it is always a good idea to confirm the specific fee agreement in writing. Rule 4-1.5 requires that when the lawyer has not regularly represented the client, the "basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Continuing fees always have to be in writing. Rule 4-1.5(c).

Within the general umbrella of reasonableness, attorneys and clients have wide latitude in forming fee agreements. There is no ethical requirement that an attorney charge the same amount or the same hourly rate to all clients, nor is there any rule that requires that non-contingent cases be based solely on hourly billings.

In most non-contingent fee cases, attorneys do quote an hourly rate. Billing software programs reflect this trend as they are usually ill-equipped to include any method of billing other than billed hours. Charging solely by the hour makes it easier to determine if a bill complies with the fee agreement, absent "padding" or fraudulent billing by the lawyer, which is often difficult to detect.

On the other hand, charging a client based solely on reasonable, again, the key is that the overall fee remain reasonable and the client understands and agrees to the manner in which the fee is calculated. Contingency fees, where permitted, are also judged by the overall reasonableness of the fee. Usually, a contingent fee is based on an expected result. It follows that attorneys who bill solely based on actual time spent may not bill two clients for the same amount for certain hourly amounts for certain work products, such as recouped prior fees or a "recycled" fee on another matter. The ABA has previously issued an ethical opinion for practitioners. According to the opinion, "the lawyer who has agreed to bill solely on the basis of time spent is obligated to pass [any] benefit of these economies on to the client." See, A. Stevens, "ABA Tackles Tendencies For Creative Clockwork in Billing," Chicago Daily Law Bulletin, Dec. 17, 1993.

On the other hand, there is no requirement that a "billable hour" under an attorney/client fee agreement equate to an actual 60 minute hour, provided the attorney/client fee agreement allows a fee on an objective standard and can be intentional or inadvertent. Fraudulent overbilling may be rare, but it is not unheard of. On the other hand, even a reasonable bill may be fraudulent and subject to the attorney's discipline or even criminal penalties if the attorney represents that the bill will be based on one factor, such as actual time, and then bills a client a higher amount using some other method.

Again, overbilling occurs any time a client is charged legal fees that are either unreasonable based on the relevant factors or contrary to the existing attorney/client fee agreement. Overbilling is based on an objective standard and can be intentional or inadvertent. Fraudulent overbilling occurs if the attorney intentionally misrepresents how a fee will be calculated and then charges a client a higher fee based on other factors unknown to the client. While intentional overbilling may be rare, inadvertent overbilling should also be avoided by making sure that all fee agreements are reasonable and clearly outlined to the client in writing.

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Conclusion

Overbilling issues rarely arise in flat fee agreements. Flat fees are typically used in traffic cases, simple wills, real estate closings and dissolution of marriage cases. Since the fee is easily calculated, the only question usually is whether or not the services were actually rendered. Finally, it is important to note that while overbilling may involve fraud, even intentional overbilling is not always fraudulent. If no representations are made to a client regarding the amount to be charged, a client cannot use on another matter. The address of this subject and related ethical opinion for practitioners. According to the opinion, "the lawyer who has agreed to bill solely on the basis of time spent is obligated to pass [any] benefit of these economies on to the client." See, A. Stevens, "ABA Tackles Tendencies For Creative Clockwork in Billing," Chicago Daily Law Bulletin, Dec. 17, 1993.

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