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Billing Ethics

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In law school, billing gets little attention. In private practice, however, billing is a mundane, but central, part of firm management. Done right, billing provides the client with a timely and accurate report of the services rendered that is consistent with the fee agreement involved. Done wrong, billing can be a flashpoint between the client and the lawyer. “Billing ethics” broadly encompasses understandable fee agreements at the outset, accurate time and expense tracking along the way and reports at the end of the billing cycle reflecting the agreed services performed. In this column, we’ll look at all three. Before we do, though, it is important to note that billing ethics is not simply a concern from the perspective of avoiding regulatory discipline. Billing “done wrong” can lead to both problems with enforcing fee agreements and risks of civil liability.

Fee Agreements

RPC 1.5 generally controls whether a fee agreement must be in writing. RPC 1.5(b) strongly suggests, but does not mandate, that hourly fee agreements be in writing. RPC 1.5(c), in turn, requires that contingent fee agreements both be in writing and signed by the client. RPC 1.5(f), which was adopted last year, also requires that “flat fees” paid in advance be in writing and signed by the client if they are considered a lawyer’s property immediately. Finally, fee agreements

involving business transactions with a client (such as taking stock in lieu of fees) are also governed by RPC 1.8(a) and must be in writing and signed by the client. Illustrating the practical import of the writing requirement, the Supreme Court in *Barr v. Day*, 124 Wn.2d 318, 330-31, 879 P.2d 912 (1994), held that where a written fee agreement is required and none exists, the lawyer is (at most) entitled to quantum meruit recovery.

Each form of fee arrangement has additional specific requirements and both the rules and the accompanying comments involved warrant careful review. RPC 1.5(a)(9) governs the level of detail required in a fee agreement and, because it is one of the factors that goes to the baseline issue of whether the resulting fee is reasonable, applies to all fee agreements. RPC 1.5(a)(9) focuses on “whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer’s billing practices.” What is “reasonable and fair disclosure” will vary with the circumstances. Failure to meet this standard, however, can both lead to discipline (*see, e.g., In re Vanderbeek*, 153 Wn.2d 64, 85, 101 P.3d 88 (2004) (finding a collection provision unclear)) and put enforceability at risk (*see, e.g., Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 109 Wn. App. 436, 988 P.2d 467 (1999), *amended*, 109 Wn. App. 436, 33 P.3d 742 (2000) (fact issue whether hourly rates were described sufficiently)).

One of the key reasons for having a thorough fee agreement at the outset is that it can be difficult to change them later. Although lawyers can generally bargain at arms length before an attorney-client relationship is formed, once a lawyer's fiduciary duties attach with the creation of an attorney-client relationship modifying a fee agreement in the lawyer's favor is generally only permitted (under *Perez v. Pappas*, 98 Wn.2d 835, 841, 659 P.2d 475 (1983), and *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 432, 754 P.2d 120 (1988)) with client consent and additional consideration. Further, the Supreme Court held in *Valley/50th Avenue, L.L.C. v. Stewart*, 159 Wn.2d 736, 744-45, 153 P.3d 186 (2007), that taking *new* security for payment of *past* fees, which it viewed as the functional equivalent of security for a past debt rather than for future performance, invokes the heightened disclosure and consent requirements governing lawyer-client business transactions under RPC 1.8(a).

Timekeeping and Expenses

Simply put, in hourly-based billing it is critical that time be tracked and reported accurately. Again, failure to do so can both lead to discipline (see, e.g., *In re Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998) (initials switched on billings from lower to higher rate lawyer) and bar recovery (see, e.g., *In re Columbia Plastics, Inc.*, 251 B.R. 580 (Bkrtcy. W.D. Wash. 2000) (word processors shown as paralegals on billings). So, too, with reimbursable expenses regardless of the billing system (see, e.g., *In re Haskell*, 136 Wn.2d 300, 307-08, 962 P.2d 813

(1998) (first class airfare reported as coach)). On expenses in particular, Comment 1 to RPC 1.5 notes that “[a] lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.” WSBA Informal Ethics Opinion 2120 (2006) cautions, however, that “[t]o avoid misunderstandings, clients should be provided with advance disclosure of specific, foreseeable categories of expenses for which they will be charged, such as on-line research.”

Billing Forms

Whether providing the client with a monthly bill or a concluding contingent fee summary, only items within the scope of the fee agreement can be included (see, e.g., *In re Marshall*, 160 Wn.2d 317, 332-33, 157 P.3d 859 (2007) (contract lawyer time improperly included when not within agreement) and should be clear enough so that the client can make that determination (see RPC 1.5(b); see, e.g., *Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*). The need for scrupulous accuracy, of course, applies with equal measure to the billing statements the client receives (see, e.g., *In re Dann, In re Haskell*). In instances where a third party will be paying the bill, care also needs to be taken not to disclose confidential information in the billing entries (see WSBA Formal Ethics Op. 195 (1999)).

Comment 10 to RPC 1.5 notes that the requirement that fees and expenses be “reasonable” and the accompanying factors outlined in RPC 1.5(a) apply to “[e]very fee agreed to, charged, or collected” regardless of the compensation agreement used. The nine factors listed in RPC 1.5(a) range from the difficulty of the project to the skill of the lawyer to the terms of the fee agreement. Comment 1 to RPC 1.5 counsels both that the nine factors listed are not exclusive and that not all of the factors will apply in any given instance.

As with the other aspects of billing discussed, the risks involved with an unreasonable fee include (see, e.g., *In re DeRuiz*, 152 Wn.2d 558, 575, 99 P.3d 881 (2004) (“flat fee” unreasonable when unearned) *but are not limited to* regulatory discipline. In *Holmes v. Loveless*, 122 Wn. App. 470, 94 P.3d 338 (2004), for example, the Court of Appeals held that the “reasonableness” requirement extends over the life of a fee agreement and can even outlive the services performed when, as was the case in *Holmes*, continuing payment obligations from an investment in lieu of cash fees eventually became unenforceable as unreasonable. Further, when a fee agreement is voided on policy grounds for violation of the RPCs, the lawyer or firm may, but need not, receive quantum meruit recovery instead. The Supreme Court in *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982), found that the trial court has discretion to award nothing and in *Eriks v. Denver*, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992), held that a trial court also had discretion to require

disgorgement of fees already paid. Similarly, in *Cotton v. Kronenberg*, 111 Wn. App. 258, 269-272, 44 P.3d 878 (2002), the Court of Appeals found that a lawyer had breached his fiduciary duty to a client for charging a fee that was unreasonable in several respects. *Eriks* and *Cotton* also noted that the Supreme Court held in *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984), that the Consumer Protection Act (with its treble damages and attorney fee remedies) applies to the business aspects of law practice, including billing: “how the price of legal services is determined, billed and collected[.]”

Summing Up

For lawyers in private practice, billing is an essential part of the business side of running a firm. Billing is also an area where disputes can arise with clients and, if they do, lawyers are subject to close scrutiny flowing from the fiduciary duties that apply along with their purely contractual obligations. It pays, therefore, in both a monetary and a practical sense, to devote the same care to billing that lawyers bring to their legal work itself.

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