

September 2007 *Multnomah Lawyer Ethics Focus*

Billing Ethics, Part 1: Time-Keeping & Fee Agreements

**By Mark J. Fucile
Fucile & Reising LLP**

When we are in law school, billing is an area that gets scant, if any, attention. Yet, for lawyers in private practice, billing is a mundane but essential element of the business-side of running a law firm. Billing is also an area where disputes with clients can arise and, in that event, lawyers often face heightened scrutiny. This month and next, we'll look at two primary facets of "billing ethics." In this column, we'll review the essential ethical elements of time-keeping and fee agreements. Next month, we'll look at client trust accounts. With both, the practical consequences of problems can run the spectrum from misunderstandings with clients to regulatory discipline to claims for breach of fiduciary duty and attendant fee forfeiture. Again with both, ready guidance is available from the Oregon State Bar's ethics opinions, which are available on-line at www.osbar.org.

Time-Keeping. If you are using the still-predominant hourly-based fee system, "the" essential ethical element of time-keeping is to accurately record and report your work. OSB Formal Ethics Opinion 2005-170 makes plain that the "dishonesty rule," RPC 8.4(a)(3), applies squarely to time records. The Oregon Supreme Court has made that same point in several disciplinary cases, including *In re Miller*, 303 Or 253, 735 P2d 591(1987), where it described (at 257) this duty

as “fundamental to the attorney-client relationship.” In *Miller*, the lawyer billed clients for time not worked and for expenses not incurred. He was disbarred.

Fee Agreements. Oregon law permits a wide variety of fee agreements, including hourly, contingent and “flat” fees (or combinations). Each presents discrete ethical considerations, but all fee arrangements are subject to RPC 1.5’s requirement that fees not be “clearly excessive,” which both the rule and the ethics opinions equate with a “reasonable” fee. RPC 1.5(b) lists the factors which, in a given representation, may be taken into account in determining whether a fee is reasonable. RPC 1.5(b)’s list, which is not exclusive, ranges from the time involved to the skill and experience of the lawyer.

Although some fee agreements, such as contingent fees for personal and property damage cases falling under ORS 20.340 and flat fees denominated as “earned upon receipt” governed by OSB Formal Ethics Opinion 2005-151 and associated court decisions, are required to be in writing, it is generally wise to have a written fee agreement in each matter or set of matters to avoid misunderstandings with clients. In particular, items such as categories of expenses to be charged, interest on past due bills, advance deposits or other security for payment should be explained. Similarly, although the RPCs do not specify a particular format for bills, we have a general duty to communicate under RPC 1.4 and, therefore, bills should contain enough detail to inform the client of the nature of the work performed for the amount charged. Further, if the lawyer

is to receive payment in a form other than money, such as stock in lieu of a fee, the special disclosure and consent requirements for lawyer-client business transactions under RPC 1.8(a) may apply.

With hourly fee agreements, the focus as discussed above in Formal Ethics Opinion 2005-170 and *Miller* is accurately recording and reporting time worked. Formal Ethics Opinion 2005-170 notes in particular that if a lawyer is billing multiple clients for simultaneous service, such as attending a deposition for two clients or reviewing a contract for one client while flying on a second client's business, the time must be divided rather than multiplied.

Contingent fees are generally permitted in a wide variety of practice settings, except for marital dissolution and attendant property division, spousal or child support determinations and criminal defense (see RPC 1.5(c); see *also* RPC 1.8(i)(2)). The form libraries available on-line from both the Oregon State Bar and the Professional Liability Fund (www.osbplf.org) contain model contingent fee agreements. Although as a matter of statutory law only some contingent fee agreements must be in writing, as a matter of contract law it is wise to put all contingent fee agreements in writing because regardless of the practice setting, the lawyer will be held to the arrangement negotiated with the client (see OSB Formal Ethics Op. 2005-15 at 33). Further, because ambiguities in fee agreements are generally construed against the lawyer (see, e.g., OSB

Formal Ethics Op. 2005-124 at 329), the elements of the contingent fee should be detailed for the client.

“Flat” fees for a particular matter, set of matters or individual services are generally permitted under OSB Formal Ethics Opinions 2005-98 and 2005-151. Like their hourly and contingent fee counterparts, they remain subject to RPC 1.5(a)’s standard that they cannot result in an unreasonable/clearly excessive fee. However, as OSB Formal Ethics Opinion 2005-151 observes (at 410), “[t]he mere fact that a fixed fee may result in a fee in excess of a reasonable hourly rate does not in itself make the fee unethical.” This ethics opinion (at 411), together with *In re Fadeley*, 342 Or 403, 409-11, 153 P3d 682 (2007), and *In re Balocca*, 342 Or 279, 286-90, 151 P3d 154 (2007), also find that agreements for fixed fees denominated as “nonrefundable” or “earned upon receipt” must both be in writing and must be clear on that point. The same opinion notes as well (at 411) that “[a] lawyer who does not complete all contemplated work will generally be unable to retain the full fixed fee” and *Fadeley* and *Balocca* concur.

With all fee agreements, the lawyer cannot change its terms unilaterally (see OSB Formal Ethics Op. 2005-97). Therefore, if the lawyer wishes to, for example, reserve the right to increase an hourly fee over the course of a matter, the lawyer should include a mechanism to do so in the original fee agreement with the client. If not, then any adjustment must be subject to an agreed amendment by the client and Formal Ethics Opinion 2005-97 notes (at 234) that

an adjustment in the lawyer's favor both "requires client consent based on an explanation of the reason for the change and its effect on the client" and "must be objectively fair." Both contingent and flat fees are also subject to these same criteria under, respectively, OSB Formal Ethics Opinion 2005-69 (contingent fees) and 2005-151 (flat fees).

Summing Up. For lawyers in private practice, time-keeping and billing are essential parts of the business-side of running a firm. At the same time, they are areas where disputes can arise with clients and, if they do, lawyers are generally subject to increased scrutiny. It pays, therefore, in both a monetary and practical sense, to devote the same care to time-keeping and billing that lawyers bring to their legal work itself.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly

Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.