fucile & reising | LLP

July-August 2022 WSBA *Bar News Ethics & the Law* Column

Check Please!
Risk Management for Timekeeping and Billing

By Mark J. Fucile
Fucile & Reising LLP

Last year in this space, we looked at fee agreements and related modifications.[1] Accurate timekeeping and clear billing play equally critical roles in law firm risk management. In this column, we'll survey both.

Before we do, however, three qualifiers are in order.

First, we'll focus on bills that are submitted to clients or other financially responsible parties such as insurance carriers rather than to courts as fee petitions. That said, intentional inaccuracies in fee petitions can lead to both regulatory discipline and court-imposed sanctions.[2]

Second, we'll focus on timekeeping and billing rather than collection. Again, however, mishandling collection can also lead to both regulatory discipline and defenses to the fee sought.[3]

Finally, we'll focus on hourly billing, which remains a predominant economic model in private practice.[4] Once again, however, other forms of billing can lead to regulatory discipline and defenses to collection if not done with appropriate care.[5]

Timekeeping

Two Washington disciplinary cases decided within a month of each other in 1998 offer stark examples of intentionally misleading timekeeping and, in doing so, underscore the absolutely essential duty to record time accurately.

In re Dann, 136 Wn.2d 67, 960 P.2d 416 (1998), involved a Seattle law firm that did construction litigation. *In re Haskell*, 136 Wn.2d 300, 962 P.2d 813 (1998), concerned a Spokane firm that handled insurance defense. With both, the senior partners at the respective firms were disciplined for participating in schemes in which work was performed by, among others, firm lawyers ordinarily billing at lower rates and then the timekeeping records involved were changed internally to misidentify the lawyer as a partner billing at a higher rate.[6]

RPC 1.5(a) prohibits charging an "unreasonable" fee.[7] Understandably, time that is intentionally manipulated to reflect knowing inaccuracies results in an "unreasonable" fee. More fundamentally, however, RPC 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation[.]" The lawyers in *Dann* and *Haskell* were both disciplined under RPC 8.4(c) for the schemes involved.

Lawyer discipline for intentionally inaccurate timekeeping is clearly a serious consequence with, for example, the lawyers in *Dann* and *Haskell*

receiving lengthy suspensions.[8] Lawyer discipline, however, is not the *only* potential consequence. Clients are not likely to pay for intentionally inaccurate timekeeping or may want their money back if the bills involved have already been paid before the inaccuracies came to light. If undertaken in a systematic way, inaccurate timekeeping may also risk Consumer Protection Act claims—which can, depending on the circumstances, apply to the business aspects of law practice.[9] While rare, financial improprieties involving clients can also lead to criminal prosecution.[10] Regardless of the mix of legal consequences, reputational harm can be profound. The deceptive timekeeping in *Dann,* for example*,* made the front page of the Sunday edition of the Seattle Times.[11]

"Initial switching" like in *Dann* and *Haskell* is not the only form of knowing inaccuracy that can lead to problems on multiple fronts for lawyers and their firms. "Bill padding"—where a lawyer or firm simply adds time or entries for work not undertaken—is equally pernicious and exposes the lawyers involved to similar risks. The lawyer in *In re VanDerbeek*, 153 Wn.2d 64, 101 P.3d 88 (2004), for example, was disbarred on charges that included "bill padding" in violation of RPCs 1.5(a) and 8.4(c).[12]

Most lawyers did not enter law school with the vision of documenting their professional lives in tenths of an hour or similar increments. That mundane

routine, however, lies at the core of the predominate hourly fee model. The hourly fee model, in turn, supports the business plans of law firms large and small. While the past generation has seen much discussion of "alternative fees," most law firms will likely continue to structure the economic side of their practices for the foreseeable future around hourly billing.

For law firms, the risks noted suggest implementing technology appropriate to firm size and practice allowing lawyers and non-lawyer timekeepers to easily record their activities roughly contemporaneously with the work performed.[13] Firms also need to couple technology with adequate supervision to encourage accurate timekeeping and to detect the hopefully rare outlier.[14] For individual lawyers, recording their work accurately in terms of both time and task is an essential step—along with ensuring the time spent is commensurate to the task—to complying with RPC 1.5(a) and avoiding RPC 8.4(c).

Billing

RPC 1.5(a)(9) notes that fee agreements should generally include "a reasonable and fair disclosure of the material elements . . . and of the lawyer's billing practices." RPC 1.5(b), in turn, counsels that a fee agreement must generally include "the basis or rate of the fee and expenses for which the client

will be responsible[.]" Comment 2 to RPC 1.5 emphasizes both of these points and suggests that a client receive a written summary of billing practices at the outset of a representation so the client understands the financial aspects of the lawyer's engagement. Although these provisions speak to fee agreements, it is good advice when it comes to bills as well.[15]

Although we have probably all heard apocryphal lore about firms that sent clients bills that only described the work as "for services rendered," case law suggests three practical areas in billing that will lower the risk of disputes and will also increase the corresponding probability of prompt payment.[16]

First, bills should be consistent with the underlying fee agreement. The Washington Supreme Court in *In re Marshall*, 160 Wn.2d 317, 335, 157 P.3d 859 (2007), noted that "[i]t can be a violation of . . . RPC 1.5 to charge fees or costs outside the fee agreement."[17] The logic is straightforward: charging for something the client didn't agree to pay for makes the charge "unreasonable" under RPC 1.5(a). In *Marshall*, for example, the lawyer was disciplined for charging for contract attorneys who were not included in his fee agreement.[18]

Second, bills should have enough detail that clients know what they are being asked to pay. In *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 109 Wn. App. 436, 33 P.3d 742 (2000), for example, the Court of Appeals found in

the context of a fee dispute that there were fact issues precluding summary judgment for a law firm on whether as a matter of contract law there had been "full revelation" of hourly rates on the bills involved.

Third, accuracy is just as important in the bill to the client as in the underlying timekeeping. The misleading time entries in *Dann* and *Haskell*, for example, became bills sent to clients.

Summing Up

For most lawyers in private practice, timekeeping and billing are mundane but essential aspects of the business side of running a law firm. They are also areas that can become flashpoints with clients if not done with the same care that lawyers bring to the legal work involved.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a

partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

---

[1] Mark J. Fucile, *Get It in Writing: Practical Approaches to Documenting Fee Agreements and Modifications*, 75, No. 7 Washington State Bar News 16 (Sept. 2021).

[2] *See, e.g., In re Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004) (regulatory discipline); *In re Columbia Plastics, Inc.*, 251 B.R. 580 (Bankr. W.D. Wash. 2000) (court-ordered disgorgement).

[3] *See, e.g., In Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999) (regulatory discipline); *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982) (voiding attorney lien over real property).

[4] Regionally, the Oregon State Bar periodically surveys various facets of law practice economics. The last survey, which was completed in late 2017, reflected that roughly 75 percent of surveyed lawyers in private practice there still used hourly billing as their primary model. Oregon State Bar, 2017 Economic Survey 43 (2017), available on the OSB web site at www.osbar.org.

[5] *See, e.g., In re Van Camp*, 171 Wn.2d 781, 257 P.3d 599 (2011) (discipline arising from ambiguous agreement lawyer contended was a flat fee); *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 223 P.3d 1276 (2010) (reduction of contingent fee determined to be unreasonable under RPC 1.5(a)).

[6] *Haskell* also involved falsified expenses. 136 Wn.2d at 307-08.

[7] RPC 1.5(a) also prohibits making or collecting an unreasonable fee. RPC 1.5(a), in turn, prohibits making an agreement for, charging, or collecting an "unreasonable amount of expenses."

[8] Dann was suspended for a year and Haskell for two years. *See* 136 Wn.2d 67 (Dann); 136 Wn.2d 300 (Haskell).

[9] *See generally* RCW Ch. 19.86 (Washington Consumer Protection Act); *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984) (discussing application of CPA to business aspects of law practice); *Rhodes v. Rains*, 195 Wn. App. 235, 245-46, 391 P.3d 58 (2016) (alleged "bill padding" stated CPA claim as "deceptive act"). By contrast, simple disagreements over the amount charged—without more—ordinary do not fall within the CPA. *See Quinn v. Connelly*, 63 Wn. App. 733, 742-43, 821 P.2d 1256 (1992).

[10] *See, e.g., State v. Kinneman*, 120 Wn. App. 327, 84 P.3d 882 (2003) (lawyer convicted of theft from client trust account). The lawyer in *Kinneman* was also disbarred: https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=1541&dID=86.

[11] 136 Wn.2d at 76.

[12] ABA Formal Opinion 93-379 (1993) discusses scenarios where a single lawyer appears for multiple clients in the same proceeding and counsels that the lawyer should generally split the time among the clients rather than charge each of them for all of the time spent.

[13] The Supreme Court in *Dann* also noted that the lawyer reconstructed his own time from notes on scraps of paper at the end of the month. 136 Wn.2d at 72. Although it did not discipline him for this practice, the Court did not look favorably on it either.

[14] *See generally* RPCs 5.1, 5.3 (supervision of, respectively, lawyers and staff). *See also* Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S. C. L. Rev. 63 (2008) (discussing lawyer overbilling and related law firm internal controls).

[15] RPC 1.5(b) also states: "Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee."

[16] This is not intended as an exhaustive list. If a bill is being sent to a third party for payment, for example, care should be taken not to reveal attorney-client communications or other client confidential information. *See generally* WSBA Advisory Op. 195 (rev. 2009). In another area related to billing, RPC 1.15A(h)(3) and WSBA Advisory Op. 2177 (2008) address providing bills to clients before shifting funds from an advance fee deposit held in trust to a law firm business account as an earned fee. *See, e.g., In re Simmerly*, 174 Wn.2d 963, 285 P.3d 838 (2012) (lawyer disciplined, in relevant part, for not submitting bills to clients for review before transferring funds from trust to business account).

[17] *See also* RPC 1.5, cmt. 1 (addressing expenses that are either passed along at cost or through a reasonable percentage estimate); WSBA Advisory Op. 2120 (2006) (same).

[18] ABA Formal Opinion 00-420 (2000) surveys billing for contract lawyers.