



Ethical Billing Practices and Retainer Agreements

Presented by

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What is a Bill?



What is a Bill?

No, not that kind of bill



What is a Bill?

COMMUNICATION



Who is Your Reader?



Who is Your Reader?

Client

Who Else?

- Courts (Judge/Jury)
- Arbitrator
- Successor Counsel/Co-counsel
- Adversary
- Disciplinary Committee
- Partners/Colleagues
- Others ...



Some Relevant Rules

- Rule 1.5 - Fees
- Rule 1.1 – Competence
- Rule 1.4 – Communication
- Rule 1.15 – Requirement to maintain accurate records
- Rules 5.1, 5.2, 5.3 – Duties of supervising/ subordinate lawyers
- NYCRR Part 1215 – Letter of Engagement



R. 1.5: Three Main Principles of Billing

Fees and Expenses:

- Cannot be excessive
- Cannot be illegal or prohibited
- Cannot be based on fraudulent billing



Time-Frames for Analyzing a Fee

- Cannot “make” an agreement for illegal/excessive/fraudulent fee
- Cannot “charge” an illegal/excessive/fraudulent fee
- Cannot “collect” an illegal/excessive/fraudulent fee



Consequences of Excessive Billing

- Non-payment/non-recovery
- Disgorgement
- Litigation costs to recover or defend fee
- Discipline
- Reduction in legal fee damages
- Unhappy clients
- Unhappy partners

What is an Excessive Fee?

A fee is **excessive** when, after a review of the facts, a **reasonable lawyer** would be left with a **definite and firm conviction** that the fee is **excessive**.

- R. 1.5(a)

In other words:

because circular reasoning works

Eight Non-Exclusive Factors – R. 1.5(a)

- Time, labor, novelty, difficulty, skill
- Preclusion of other work
- Customary fee in locality for similar services
- Amount involved and results obtained
- Time limitations imposed by client/circumstances
- Relationship with client
- Experience, reputation, ability of lawyer
- Fixed or Contingent

“Excessive” = “Unreasonable”?

Old Language:

“A lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in *excess of a reasonable fee.*”

- DR 2-106(b) (emphasis added)



Lodestar

A presumptively **reasonable** fee is calculated by multiplying a **reasonable** hourly rate by the number of hours **reasonably** expended.



Quantum Meruit

New York courts have held that an attorney who is discharged without cause before the representation ends is limited to *quantum meruit*, even in billable hour context.

So What's the Point ...

... of having a contractual
fee?

Or as one court put it:

“Our fee-setting jurisprudence has become needlessly confused—it has come untethered from the free market it is meant to approximate.”

-- *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany & Albany County Bd. of Elections*, 522 F.3d 182, 184 (2d Cir. 2008)



Examples of Excessive, Unreasonable, or Fraudulent Billing

- Padding or double-billing
- Doing nothing or very little
- Doing it badly
- Doing too much
- Too many lawyers
- Remedial or non-lawyer work
- Inflating Expenses or charging for overhead



Question

If a client willingly enters into an “unreasonable” fee agreement, should the lawyer be penalized?

Time-Keeping

ASSOCIATE TIMESHEET
Date: 1/2/09

Client	Task	Hours
BigCorp	Try not to stab eyes out. Review documents.	11.2
BigCorp	Get yelled at by partner. Discuss strategy.	0.5
		<i>Walter</i>

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How accurate should you be?



Problematic or Improper Time-Keeping Practices

- Not keeping contemporaneous time records
- Descriptions that are not detailed enough
- Descriptions that are too detailed or contain privileged information
- Delayed billing
- Unclear time entries, overuse of abbreviations or shorthand
- Insulting clients, colleagues, adversaries or judges in the bill



Hypothetical

Date	Timekeeper	Description	Time
12/15/11	ABC (Partner)	Travel to court and attend conference	2.5
2/6/12	ABC	Telephone conference with client re likelihood of success on motion – advised client that chances are low but client insisted on going forward	.5
2/6/12	DEF (Assoc.)	Legal research (2.0); draft brief (3.5)	1.6
2/7/12	GHI (Partner)	Conference with DEF re legal research on indemnification (.4); review indemnification cases (.6); review and revise section of brief concerning indemnification (.7)	1.7
2/7/12	DEF	Conference with GHI re legal research (.6); revise brief (1.0)	1.6
2/8/12	ABC	Conferences with DEF and GHI; review and revise brief; telephone conference with client; exchange emails with adversary re deposition schedule	4.0
2/9/12	ABC	Travel to court and attend court conference	2.5
2/9/12	DEF	Attend court conference	2.0
2/9/12	GHI	Attend court conference	2.2
2/13/12	JKL (Jr. Assoc.)	Legal research re whether offer and acceptance required to form contract (3.0); finalize and file motion (1.0)	4.0
2/13/12	MNO (Para.)	Conference with ABC and DEF re problems finding documents	0.4
2/15/12	DEF	Reviewed memo by JKL and corrected numerous errors	2.3
2/20/12	GHI	Travel to Florida for deposition (5.0); attend deposition (5.4)	10.4
2/28/12	PQR	Conference with ABC, DEF, and GHI re case (1.3); review complaint, answer, prior motions (2.0); review opposition to motion and begin working on reply (1.0)	4.3



Final Tips For Billing

- Have clear, enforceable, updated retainer agreements
- Bill consistently with your agreements
- Keep reasonably-detailed, contemporaneous time records
- Avoid block billing
- Send bills in a timely manner
- Maintain consistent collections practices



Retainer Agreements

Retainer Agreements – Rule 1.5(b)

- Lawyer shall communicate to client scope of representation and basis or rate of fee and expenses
- Reasonable time after commencement
- In writing where required by statute or court rule



Retainer Agreements – Rule 1.5(b)

No writing required where lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client

NYCRR Part 1215

- Scope of legal services
- Fees and expenses
- Billing practices
- Right to arbitrate under Part 137, where applicable (\$1000 to \$50,000)
- Some Exceptions
 - Fees under \$3000
 - Services are same general kind previously rendered and paid for



Some Tips for Retainer Agreements

- Define who your client is (and is not)
- Define scope of representation
- Joint clients and conflict waivers
- Consider limited scope representation – R. 1.2(c)
- Consider new retainer agreement for each new matter, if feasible
- Change in scope or fee must also be communicated to client



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