



## Billing Practices

# Beware the Slippery Slope of Padding

By Thomas A. Gilligan, Jr.

**A**s the year ends, many law firms will suffocate under pressure of one of the worst economies in decades. Some associates will need to make their budgeted hours to avoid the bloodletting that occurred at many firms at the beginning of the year. Some partners will need to maximize individual realization to maintain their historic compensation and standing in their firms. Some firms will need to squeeze every last dollar out of their clients to stay in the black. This extraordinary climate is the perfect breeding ground for unethical billing practices, commonly known as “padding.”

More often than not, unethical padding involves either billing for an attorney’s time not actually spent working on a client matter, or billing unnecessary time actually spent working on a client matter—usually work by an associate at the instigation of a supervising partner. But what about more subtle billing practices, such as changing a time entry from an associate to a partner, rationalizing the increase in a time entry or the total bill because a firm achieved a particularly good result for a client, or even waiting until the end of the month to record time entries?

Logically, analyzing whether billing practices are unethical should start with the few rules that directly address attorney’s fees—the ABA’s Model Code of Professional Responsibility DR 2-106 and Model Rules of Professional Conduct Rule 1.5, which provide factors for determining reasonableness of fees. For context, however, let us take a step back and indirectly approach the problem of unethical billing.

Providing a client with the power to understand a lawyer’s billing practices demands effective communication. Model Rule 1.4(a)(2) provides that a lawyer shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Model Rule 1.4(b) provides: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” In the context of billing, “the means” to accomplish a client’s objectives obviously means work, which will likely be billed to the client. Similarly, explanations about billing certainly empower a client to make informed decisions about the lawyer’s representation.

The client should be informed, preferably in writing, about the billing practices of that firm. *See* ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993); Sonia S. Chan, *ABA Formal Opinion 93-379: Double Billing, Padding and Other Forms of Over-Billing*, 9 GEO. J. LEGAL ETHICS 611, 620 (1996). The retainer letter should explain to the client how the lawyer will bill time and what the bill will entail. If adjustments have been made to a bill, tell the client. *See* Formal Op. 93-379 at 6–7. If the client provides a set of billing guidelines to the firm, that client should also expect those guidelines, rather than the applicable rules of ethics, to govern billing practices.

These communication rules are also triggered when a client tries to determine whether a bill has been padded. If the client did not know that a young associate would work on a matter, the client may be much more likely to question a billing entry than the client who approved of that associate working on the matter. If the client does not understand that the legal issues are complex, requiring research by an associate, the client may much more likely question that associate’s research time than a client who has been informed of the issue’s complexity, the associate’s importance to achieving the desired result, and that the associate is the right person to do the work.

In similar, somewhat indirect fashion, Model Rule 7.1 provides guidance on a lawyer’s bill. This rule provides that:

[a] lawyer shall not make a false or misleading communication about... the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact... or omits a fact necessary to make the statement considered as a whole not materially misleading.

Model Rules of Prof’l Responsibility R. 7.1. This rule may be implicated any time a lawyer communicates false or misleading information regarding work that the lawyer has completed or inflating the amount of time it took to complete the work. Chan, *ABA Formal Opinion 93-379*, at 619.

What about when a lawyer “borrows” another’s work, incorporating it into the lawyer’s own work product, and then bills the client for the entirety of the ultimate product? Again, a lawyer who does not do the work—but bills his or her client as if he or she did—has padded hours

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**Ethics**, from page 66 and, consequently, has charged an unreasonable fee under Rule 1.5(a).

Finally, padding can implicate Model Rule 8.4(c), which provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation...” See Chan, *ABA Formal Opinion 93-379*, at 619. This rule is

not simply triggered in situations in which billing is considered fraudulent because the time was never spent by a lawyer on the client’s matter. The rule can also apply in situations in which a partner substitutes his or her initials and billing rates for an associate who actually did the work, overbilling a client. Even if not overbilled, initial-switching likely violates Model Rule 8.4(c), because

initial-switching misleads a client about which lawyer actually did the work.

In the end, as former Notre Dame Law School Associate Professor and now United States District Court Judge Patrick J. Schiltz has warned: the slippery slope towards unethical behavior will start with time sheets. 