ILLINOIS STATE BAR ASSOCIATION™

Illinois Bar Journal

October 2016 • Volume 104 • Number 10 • Page 22

Practice Management

Top Billing

By Ed Finkel

Law firm billing is full of economic, ethical, and legal stumbling blocks for those who aren't systematic and conscientious about it - and opportunities for those who are, according to practitioners and billing consultants.

The basics of law firm billing are spelled out in Illinois Supreme Court Rule of Professional Conduct 1.5, which governs fees, says Charles J. Northrup, general counsel for the ISBA. But smart billing requires more than simply knowing the ins and outs of that rule.

For example, attorneys should keep in mind their clients' emotional state and put themselves in the clients' shoes, Northrup says. "I would want a lawyer to understand that for clients, receiving bills can be extremely stressful, and that the lawyer must be prepared to calmly discuss and respond to client questions or criticisms about bills - and make adjustments if necessary."

Billing can be stressful for lawyers, too - but should be less so for those who follow key, commonsense best practices.

Put it in writing

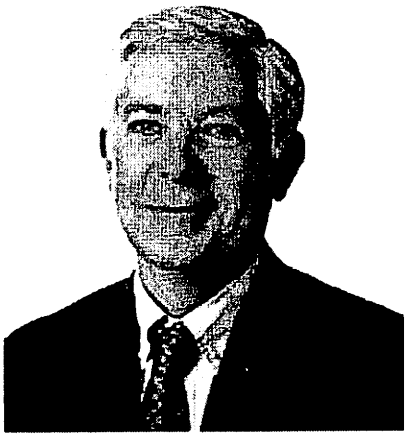
Probably the starting point for smart billing is knowing that an attorney's fee must be "reasonable" and the basis of that fee must be communicated to the client, Northrup says.

"The Rule does not mandate that the fee basis be communicated in writing unless it's a contigent fee, although it says it is *preferable* if [the fee basis] is," he says. "I would go a step further and say the best practice is to communicate fee information in writing. As noted in the Comments [to Rule 1.5], writing will minimize misunderstandings, but also serve as important evidence of the parties' intent in the event of a dispute or disciplinary issue."

Record, record, record - and be timely about it

Another critical step is keeping time entries that are "accurate, detailed, and contemporaneous," Northrup says, even when you're billing based on a fixed fee or contingency rather than hourly.

"The existence of such time entries may become important should the time spent on a matter come into dispute, potentially because a court is reviewing the reasonableness of the time spent on a matter, or the lawyer is attempting to recoup a fee based on quantum meruit after discharge or withdrawal," he says.



Charles J. Northrup

And don't wait too long before recording your time, Northrup says. "Timeliness is so very important because attempts to recreate time spent on a matter days, months, or even years before will necessarily be incomplete and inaccurate," he says. "Also, time entries need to be reasonably detailed to demonstrate to the client, and possibly others who might be reviewing the bills, the extent of services provided."

Lawyers do a poor job of tracking their time, which costs them money and also violates one of the 12 "Billing Commandments" of Debbie Foster, partner with Affinity Consulting Group (see sidebar). The ISBA is teaming up with Affinity to provide practice management and technology guidance to members.

"There are all kinds of studies about how much more time you capture if you keep track as you go," she says. "The whole concept of recreating time for a whole week or a month is a recipe for under- or overestimating and leaving things out. I talk all the time about how I am positive that no one comes to work today and decides to give away one hour for free - yet you do that if you're not contemporaneously tracking your time."

Debbie Foster

It helps to bill on a regular cycle, says Erica Minchella, a Skokie-based real estate attorney who will appear on a panel about "Technology Tools for Time Management and Billing" at the ISBA Solo and Small Firm Practice Institute in October (see sidebar). She does it like clockwork the first weekend of every month and says it takes about five hours.

"There are attorneys who get around to it when they get around to it,"

she says. "One of the things about forcing myself into that discipline is that it allows me to do a malpractice check. I'm going through every client's file, and it gives me an opportunity to check and make sure there aren't any dates I'm missing, there aren't any documents I'm missing. It's not just getting money in the room, it's making sure I'm doing best practices in the office."

Don't be afraid to follow up

Once you've sent a bill, your work isn't necessarily done, Foster warns. If you set terms that an invoice is due within 30 days, you should probably be picking up the phone on day 31, which attorneys are sometimes hesitant to do.

"Nobody wants to be the bad guy," she says. "We just ignore the fact that the client hasn't paid, and we keep working, and then we don't follow up until far too late into a case," when it's unlikely that an attorney will be paid the full amount - or that a judge will let them out of the case due to non-payment.

Erica Minchella

If you're billing irregularly or not following up, Minchella says, "The billing gets out of control. You don't know that your clients have racked up bills they may not be able to pay, and you should withdraw. You don't have that ability to make sure."

Charging interest

When a bill is past due, should you charge interest? Minchella never does, and she's only sued one client in 35 years of practice. "I generally try to work things out with my clients so they can afford to pay my fees and don't walk away," she says. "If I don't think they're going to pay me, I just withdraw from the case. I don't let it get out of hand."

"Billing Bonanza," a summary of best practices that Foster co-wrote with Affinity Consulting colleague Steven J. Best, notes that some firms consider charging interest to be unprofessional but that these same firms often have the longest receivables period - because clients have no incentive to pay in a timely manner aside from the possibility that their attorney may withdraw.

Foster and Best counsel showing interest on your past due bills and then offering to forgive that additional amount if a client calls and wants to make good by paying today with a credit card. "Interest can not only be an incentive to pay your bill timely, but also is a great bargaining tool for prompt payment of an overdue balance," they write.

Not billing hourly? Keep track anyway

Foster agrees with Northrup that even those who are not billing hourly should keep track of their time. "It's about understanding how much work goes into those settlements - it's a data, data, data thing," she says. "If you don't have data to tell you what cases are profitable, what practice areas are profitable, you don't have a good story to tell about your firm being profitable. You need to do it until you have a good understanding of where people's time is going."

Minchella concurs that billing will help you understand how your business runs and whether you're being

efficient and effective, no matter whether you're billing on an hourly basis or not.

"It's not only important to keep track of the billable time for clients, but the time you are putting in on marketing, the time you are putting in running your business, paying your bills, managing your staff," she says. "It will help you have a much better handle on how your business runs."

Mixing and matching rates? Be careful

Certain types of matters lend themselves to switching how you bill midstream. For example, a matrimonial attorney might offer a flat fee for the initial stages of a divorce but then switch to hourly if the matter ends up in court. This is not necessarily a problem, but it needs to be clearly communicated upfront, Foster says.

"Those kinds of things are really important to address at the time of engagement," she says. "This boils down to managing the expectations of the client. There's nothing wrong with converting, as long as the engagement agreement says, 'We're going to charge $2,000 for intake and review, $5,000 for discovery, and beyond that X number of dollars per hour. As long as the client understands and reviews it, there's nothing wrong with that."

Northrup says the scope of what can be mixed and matched often comes back to the definition of what is considered "reasonable." And he notes the Comment to Rule 1.5 states that "a lawyer should not enter into a fee agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required."

The purpose of that prohibition, Northrup says, is to avoid the client getting into a situation where they have to bargain for additional services midway through the matter. Related to that, Illinois courts and the Attorney Registration and Disciplinary Commission tend to look askance at such midstream modifications.

"They consider such midstream modifications as potential evidence of undue influence, overreaching, or a breach of fiduciary duty to the client," he says.

Minchella doesn't encounter mixing and matching of types of fees in her real estate transactions, but she does often stipulate a variety of if-then scenarios upfront. For example, if a contract terminates after negotiations but before closing, she writes in that she's entitled to half of her fee. If a mortgage contingency extends repeatedly, there is a small add-on fee for redoing the same work. Likewise she charges a fee for negotiating pre-closing possession for the buyer - or post-closing for the seller.

"I send out a letter of engagement that spells out the [different scenarios] and where I'm entitled to compensation," she says. "Sometimes, it's a matter of making sure you're respected for the work you do."

"Billing Bonanza" also suggests considering task-oriented flat-rate billing, which shifts the risk of the work taking longer than expected away from the client and to the attorney. The client feels a stronger guarantee that there will be no surprises - yet the attorney knows that the firm has the forms and procedures in place that they are not taking that great a risk with the flat fee.

Be careful about 'rounding'...

Lawyers and firms that bill hourly need to figure out what increments to charge - and how to calculate time spent that falls in between those increments. Foster says most firms bill to the tenth of an hour, and she recommends that they start with 0.1 hours and round to the next 0.1.

"Some firms bill in quarter-hour increments," she says. "I can't say that's not ethical, but that's not something I would ever advise.... Rounding becomes a problem when you're trying to remember how much time you spent on a matter on July 8. But then I don't think it's rounding that's the issue, it's much more specific to not doing a good job tracking your time and having to recreate it after the fact."

Northrup notes that strictly speaking, rounding up constitutes billing for work not performed, which could be a violation of Rule 1.5, and he similarly suggests billing in the smallest, most precise increments to eliminate or minimize the issue.

But rounding up can pose issues even in a more precise time-entry system. "There are lots of examples, particularly in federal courts, where over the course of lengthy litigation, even rounding up a minute per six-minute entry can translate into significant sums of money," he says. "In these cases, the federal courts don't seem shy about reducing a lawyer's bills to account for the over-calculation of work performed that is reflected by rounding up."

Having said that, ethics opinions including ABA 93-379 and cases do recognize that a certain amount of rounding is commonly understood to occur, Northrup says. "It really comes down to what is reasonable," he says.

In "Billing Bonanza," Foster and Best counsel showing your actual time and not combining together time entries for a particular day, but rather showing the client what you did at each point and how long each task took to complete-even if it ends up being several lines worth of entries for a single day. "A client is less likely to complain about bill padding when he or she can review precisely what you did and precisely how much time it took," they write.

...and charging for your staff's work

Perhaps it goes without saying, but firm partners cannot upcharge the work of paralegals and associates at their own rates, even if they review and approve the work - although they certainly can charge their own rates for the time spent doing the reviewing and approving, Northrup says.

"Of course, the 'review' time should be quite a bit less extensive than the original work," he says. "And, many lawyers, depending on their relationship with the client, might not charge for such reviews."

Foster notes that billing a paralegal's work at your rate is a misrepresentation. "That means you're going to send your client a bill that says you did something that 'Susie' did," she says. "That's a real issue for insurance defense firms because most of them can't bill for a paralegal's time. But there's nothing wrong with a lawyer reviewing a document and billing at the lawyer's rate for the time it took them to do the task."

Minchella's paralegal and one of her two associates work on flat-fee transactions, while the other associate works hourly and is expected to record the proper time. If she and the hourly associate are both on the same conference call or in the same courtroom, Minchella only bills for one of them unless the client has specifically asked for both.

"If I do the arguing in court, I bill at my rate," she says. "If my associate does the arguing, I bill at her rate. I'm pretty sure it's unethical to bill for both if I choose to have the two attorneys there."

Finding the right billing technology

Getting your hands on the right technology tools can help to ensure that you follow these best practices and avoid the pitfalls, Minchella says. For example, if you're in court a lot, you need a program that operates in the online "cloud" so that you can keep your billing as contemporaneous as possible.

"If you want to modify your bills, it's a lot easier to do it if you have accurate information," she says. "You can always go back and say, 'I will give my client a credit for this.' If you don't have accurate information, it's hard to make an adjustment because you don't know the amounts of time you put into something. It's a discipline, and if you learn that discipline early on, it will serve you well throughout your career."

Minchella currently uses Clio time and billing software, which is cloud-based, and which also carries the advantage that her staff, including the associate who mostly works in court, can record their own time. "It helps me to manage her time," she says. "It also allows me to analyze the amount of time she's put in by providing me with reports."

Whichever system you choose, get as much information upfront as you possibly can about it so you don't end up dissatisfied and wanting to change gears, Minchella says. "Once you're involved with one, it's hard to switch out and go to something else," she says.

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