

FORMAL OPINION NO 2005-170

Fraudulent or Dishonest Conduct: Billing Multiple Clients for Simultaneous Service

Facts:

Lawyer practices in a jurisdiction where the court holds a daily “call” of cases set for trial the next day. The purpose of the call is to confirm that the parties are ready for trial and to assign a trial judge. Lawyer works for a firm that has four clients whose cases are set for call on the same day. The firm sends Lawyer to attend call on behalf of all four clients. Lawyer spends a total of one hour attending call.

Question:

Can Lawyer bill each client for the entire hour spent at call?

Conclusion:

No, qualified.

Discussion:

The answer to the question depends on the nature of the fee agreements between the firm and the clients. Some firms have fee agreements that allow for “value billing,”¹ flat-fee billing, task-based billing, or other arrangements. If so, it would be appropriate to bill the clients pursuant to those agreements rather than simply by the hour. *See* OSB Formal Ethics Op No 2005-98 (discussing flat-fee agreements). However, the question appears to assume straight hourly billing agreements with all four clients, and this analysis is based on that assumption.

¹ The term *value billing* refers to a category of client-approved billing methods that focus “on the value received by the client rather than the amount of time spent by the attorney.” William G. Ross, *The Honest Hour* 238 (1996).

Oregon RPC 1.5(a) and (b) provide:

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Oregon RPC 8.4(a)(3) makes it professional misconduct to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” As used in that rule, *misrepresentation* includes both affirmative misstatements and knowing nondisclosure of material facts. *In re Kluge*, 332 Or 251, 255, 27 P3d 102 (2001); *In re Benett*, 331 Or 270, 277, 14 P3d 66 (2000). A fact is “material” if it is information that, if known, would be significant to the recipient. *In re Brandt*, 331 Or 113, 138, 10 P3d 906 (2000); *In re Gatti*, 330 Or 517, 527, 8 P3d 966 (2000).

A lawyer who has agreed to charge a client by the hour for services rendered violates these rules if the lawyer bills the client for more time than the lawyer actually works. *In re Miller*, 303 Or 253, 256–57, 735 P2d 591 (1987) (billing for hours never worked); *In re Willer*, 303 Or 241, 246, 735 P2d 594 (1987) (billing for hours before work was performed). In such cases, the lawyer’s bill itself constitutes a “misrepresentation” under Oregon RPC 8.4(a)(3), *In re Willer*, 303 Or at 246, and a “charge” for a “clearly excessive fee” under Oregon RPC 1.5(a), *In re Miller*, 303 Or at 257.

A lawyer who bills more than one client for the same time expended on the same service has billed more time than the lawyer actually worked. Lawyer in this question worked a total of one hour for four clients, not four hours. The fact that Lawyer could have billed each client a full hour had each client’s case been the only one set for call that day does not change the conclusion. The lawyer-client relationship is “one of special trust and confidence” and “must be characterized by fairness, honesty and good faith.” *In re Howard*, 304 Or 193, 210, 743 P2d 719 (1987). Lawyer must bill the client in accordance with what actually occurred, not on hypothetical facts that did not occur. *See In re Miller*, 303 Or at 257 (lawyer acted unethically when he billed client for first-class air travel but actually flew coach class and used extra money to purchase coach-class ticket for spouse).

A lawyer cannot rely on the absence of any provision in a fee agreement regarding multiple billing as indicative of client consent for such billing. Ambiguities in a fee agreement drafted by the lawyer are construed against the lawyer. *In re Irwin*, 162 Or 221, 236–37, 91 P2d 518 (1939).²

² If a lawyer concludes that a straight hourly fee agreement is not in the lawyer’s interests, the lawyer should, if permissible, enter into a fee agreement that contains alternatives to straight hourly billing or should, if permissible, modify the existing hourly billing agreement to provide a nonhourly component. *See* OSB Formal Ethics Op No 2005-97 (discussing principles for modifying fee agreements in manner favorable to lawyer).

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The question of how the lawyer should divide the hour spent at call among the four clients is beyond the scope of this opinion. It should be done, however, in a manner that is fair and equitable to all of the clients. *See In re Howard*, 304 Or at 210 (lawyer-client relationship “must be characterized by fairness, honesty and good faith”).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.2-1 (excessive or unreasonable fees) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 5, 16, 34, 98 (2000) (supplemented periodically); ABA Model RPC 1.5; and ABA Model RPC 8.4(c).