

Calculation of Fees When Multiple Clients are Represented

By the NHBA Ethics Committee

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Billing Practices: May an attorney charge a fee for one client when the time charged includes time spent on representation of another client?

The cover story of a recent issue of the ABA Journal established the theme for a series of articles on legal fees by quoting Abraham Lincoln: "A lawyer's time and advice are his stock in trade." However, as Rule 1.5 of the Rules of Professional Conduct provides, no lawyer has unlimited freedom in charging for that commodity. The purpose of this article is to evaluate a certain type of billing practice in light of a lawyer's duties and obligations under the Rules of Professional Conduct.

The basic billing practice involved in this discussion is best described by the following hypothetical. A lawyer, either by serendipitous court scheduling or by design, must appear for a 9:00 a.m. call of the motion list for three separate clients. The attorney has agreed to represent each of these clients on an hourly basis. The attorney arrives at 9:00 a.m., has one hearing at 9:15 a.m. which lasts an hour; another hearing at 10:30 a.m., which lasts another hour; and a third hearing at noon, which lasts an hour. The attorney bills the first client for an hour and 15 minutes, the second for two hours and 30 minutes and the third for four hours. Although the attorney has been at the tribunal for four hours, the attorney has tallied 7 hours and 45 minutes.

Does this billing practice comport with the Rules of Professional Conduct? The discussion in this regard recalls one of the endless lawyer jokes with which our non-lawyer friends love to regale us. A lawyer dies and is inevitably presented to St. Peter. The lawyer complains to St. Peter that 35 years of life was inadequate. Upon reviewing the heavenly records, St. Peter notes with some satisfaction that according to that attorney's own billing records that attorney was at least 80 years of age at the time of death and thus had no cause to complain.

Rule 1.5 establishes guidelines for calculating fees. However, New Hampshire's revision of the rule "is a departure from the reasonableness standards set forth in the American Bar Association's model rules... [T]he prohibition against clearly excessive fees remains a bright line for New Hampshire practitioners." *See New Hampshire comments to Rule 1.5. emphasis added.* Consideration of this billing practice also involves Rule 1.1(b)(5) [legal competence requires attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interests]; Rule 1.3 [a lawyer shall act with reasonable promptness and diligence in representing a client]; Rule 1.4 (a lawyer shall explain the legal and practical aspects of a matter and alternative courses of action (to the client) to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation); and Rule 7.1 [a lawyer shall not make a false or misleading communication about services, either through commission or omission].

However, on the face of the "bright line" established by Rule 1.5, it would appear excessive if a lawyer charges a client for time dedicated to another client. It is difficult to objectively justify charging the client whose case was heard last for the entire amount of time that lawyer spent at the courthouse because the lawyer can easily and reasonably qualify the time devoted to each client. Recall that "the rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." *See Scope. The Rules of Professional Conduct. page 1.*

Two arguments can be made to justify the practice. first, if the lawyer who represented the client whose hearing was held Last had no other cases on the list, that lawyer would be justified for charging a fee for the entire time spent in court. Thus, why should that client not pay the same amount jst because other clients had hearings that day as well? Second, the practice is permissible if the client is informed of and consents to the practice.

With respect to the first argument, it would appear that Rules 1.1 and 1.3 strongly suggest that the client's interests are best and diligently served if the benefits to be derived from the scheduling of multiple hearings at one call be derived by the client rather than by the lawyer. Presumably, the hourly rate charged the client by the lawyer for the time spent representing that client is full and fair consideration for the services which were rendered. Moreover, the practice discussed at least pricks the conscience. As importantly, it is unlikely that the Supreme Court would sanction such a fee if it were one which was susceptible to its review. In *Couture v. Mammoth Groceries, Inc.*, 117 N.H. 294 (1977), the court stated that "a fee is clearly excessive when after 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." *Id. at 196*. In *McInnes v. Goldthwaite*, 94 N.H. 331 (1947), the court held that a lawyer is not entitled to a bonus or to double pay for services rendered. *Id. at 338*. St. Peter is in accord. The Court's emphasis on the time spent on a case as a determinant of a reasonable fee and the absence in this hypothetical of any of the factors listed in Rule 1.5(a) convince us that this type of fee would not survive judicial scrutiny.

Upon reaching the conclusion that a fee, as described in the hypothetical, is clearly excessive, the second argument pertaining to client consultation and consent fails because the ethical violation cannot be cured with a client's informed consent. See Rule I.S. However this analysis is grounded upon the assumption that the attorney has agreed to represent the client on an hourly basis. There may be other fee arrangements, such as a minimum fee or a flat fee for a specific task, which would not be viewed as being clearly excessive. But any such arrangement must necessarily include a complete disclosure of its ramifications and the client's consent. *See Rule 1.4 and 7.1.*