

## DOLLARS AND SENSE

By  
Marcia A. Johnson, Director  
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (November 1995)

Let's blame it on the health care crisis. After all, health insurance may have eviscerated the notion that one actually has to pay real money for professional services. When a patient sees a health care professional, the discussion or exchange of money rarely occurs, only an exchange of insurance cards and submission of forms. If the patient is really lucky, or belongs to an HMO, he or she may never have to confront the actual bill. When that same person comes to see a lawyer, however, there likely will not be insurance for the attorney fees. Unless the lawyer has met the obligations imposed under the Minnesota Rules of Professional Conduct ("MRPC"), the bill can come as a cruel surprise to the client, and one that all too many times damages the attorney/client relationship itself.

The lawyer discipline system generally does not get involved in matters that can best be described as fee disputes. Since 1985, the Supreme Court Advisory Committee has strongly recommended that the limited resources of the Director's Office not be used to review fee disputes, most of which do not involve conduct that violates the professional rules. The MSBA has fee arbitration committees around the state to help resolve disputes between attorneys and clients regarding legal fees. Participation in fee arbitration has historically been voluntary. Since July 1995, a pilot project commenced in certain bar association districts has made attorney participation in fee arbitration mandatory.<sup>Ftn.1</sup>

The discipline system does sometimes get involved in an attorney's billing practices. Rule 1.5, MRPC, sets the basic standards.

### FEES MUST BE REASONABLE

Rule 1.5(a) sets out a lawyer's obligation to the client as to the amount of the fee--the fee must be reasonable. The rule includes a list of factors bearing on what may be reasonable under the circumstances, including common sense factors such as the amount of time required, the difficulty of the legal question presented, the fee customarily charged in the area, the experience of the lawyer retained, etc. While "excessive fees" or "overcharging" issues generally fall into the category of fee disputes not handled by the discipline system, "fee arbitration has never been an alternative to attorney discipline where the allegations of misconduct go to issues beyond the details of the fee."<sup>Ftn.2</sup> The examples that follow involve unreasonable fees which in fact resulted in discipline.

**BLUE HAWAII.** An attorney represented a woman in a personal injury case. The client had been injured in a fight in a bar, where she had been inadvertently pushed over a railing and had fallen to the floor below. During the investigation, the attorney learned of the identity of a person who might have information

concerning the incident. The potential witness lived in Hawaii. The attorney took an 8-day trip to Hawaii in May during which time he spent all but two days in the company of a personal friend and on activities unrelated to the client's matter.<sup>Ftn 3</sup> He did take the witness's statement while in Hawaii. He then billed the client for the round trip airfare from Minneapolis to Honolulu, for airfare from Oahu to Maui (where the witness lived) and back, for a portion of his lodging expenses, and attorney fees of \$185 an hour for three days. Reasonable?

While the attorney and the client had discussed the benefits of determining the witness's testimony, the client did not know the lawyer had gone to Hawaii until after he was back. Further, the witness had informed the lawyer the previous fall that he would be coming to Minneapolis the next spring (which he in fact did). Finally, the attorney had made no arrangements prior to his arrival in Hawaii to meet with the witness or take the statement. For the fees and expenses associated with the trip, along with numerous other illegal, inappropriate and excessive fees and expenses in connection with this case, the attorney was suspended for a period of three months.<sup>Ftn 4</sup>

**INTEREST CHARGES.** A retainer agreement provided that interest would be charged at an annual percentage rate of 12 percent on all invoices and unpaid balances. Truth-in-lending disclosures did not accompany the retainer agreement. For approximately a one-year period, the law firm charged the client interest at the rate provided in the retainer (totaling about \$11.00 a month). The client complained, objecting to the reasonableness of the underlying fees charged for the services provided. The discipline system directed the client to fee arbitration. However, the lawyer received an admonition for violating Rule 1.5(a) and LPRB Opinion 16, which provides that a lawyer will be subject to discipline if the lawyer charges interest of more than 8 percent per annum and fails to comply with federal truth-in-lending disclosures and other requirements.<sup>Ftn 5</sup>

### FEE BASIS AND RATES

Rule 1.5(b), MRPC, provides that when a lawyer "has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." It is the lawyer's obligation to explain the fee, whether or not the client asks. This only makes good business sense. It protects not just the client, but the lawyer, who, one must assume, wishes to have the bill paid. Failure to explain billing practices adequately may come back to haunt the lawyer at fee arbitration or a suit for fees. It can also result in discipline for the lawyer.

**TOO LITTLE, TOO LATE.** A lawyer represented the trustee for a trust of which a woman was a beneficiary. The lawyer met with the woman about the trust, at which time she also discussed the possibility of the lawyer representing her boyfriend in a criminal proceeding. The lawyer later spoke with the woman about the criminal representation, where they agreed that she would pay for that legal work from her share of the annual trust distribution. They did not, however, discuss the amount of the legal services in the criminal case or the amount of the trust distribution expected. The lawyer met with the boyfriend, but decided he should not handle the case because of lack of criminal experience. No bill was submitted to the woman at the time. Some five months later the lawyer met with the heirs of the estate to make the annual trust distribution. Before the lawyer would release the check to the woman, he demanded payment of \$275 from her for the legal services provided to the boyfriend. After argument, the woman agreed to pay \$150 to the lawyer. The lawyer received an admonition for his failure to explain the basis or rate of the fee to be charged until five months after the representation had concluded.

**UNCOMMUNICATED UP-CHARGES.** A law firm represented a partnership. The following written "non-contingent fee agreement" was signed by the law firm partner on the matter and the client partnership.

Client agrees to pay Firm for said representation at the normal hourly rates charged by the firm for legal services rendered by it. Normal hourly rates for attorney time at the time of the execution of this agreement are \$125-\$180. Law clerks and paralegals will be billed at lower rates

...

The client partnership reasonably understood the agreement to mean that each attorney had set hourly rates and that the firm would charge for each individual attorney's services at that rate. Consistent with that, each lawyer submitted monthly time sheets to the partner for review reflecting their set rates between \$125 and \$180. On the final bill submitted to the client, however, the partner adjusted the actual time charges upwards each month throughout the representation. These "up-charges" were determined by the firm partner apparently without reference to any mathematical formula. The lawyer claimed the "up-charge" was determined by considering such things as valuation of what the services were worth, whether all of the firm's time had been recorded when working on the matter, and whether the client had paid previous billings on a timely basis. The client did not learn of the "up-charges" during the representation because the bill did not identify the attorney(s) who had worked on the file, any attorney's hourly rate, or the amount of time any attorney spent working on the case. The client only learned of the "up-charges" during litigation commenced by the firm against the client. Perhaps not surprisingly, the client complained, and the firm partner who adjusted the bills (unbeknownst to the rest of the firm) was admonished.

In next month's column, contingent fees, fee splitting, and other fee related issues will be discussed. In a time when lawyer referrals are eagerly sought, knowing how to ethically manage the fees is an important element of practice.

## NOTES

<sup>1</sup> See Rule 6Y, *Rules an Lawyers Professional Responsibility*.

<sup>2</sup> In re Selner, 529 N.W.2d 684, 687 (Minn. 1995).

<sup>3</sup> In re Simmonds. 415 N.W.2d 673 (Minn. 1987).

<sup>4</sup> E.g. *The bill submitted to the client and on which the attorney asserted a lien included over \$7,000 in charges for attorney, legal assistant, bookkeeper/secretary and receptionist time for the sole purpose of preparing time records on which the bill was charged. The bill and lien also included charges for time spent and expenses related to attendance at some 35 conferences over a six-year period, most or all of which were unrelated to the client's personal injury claim.* Id.

<sup>5</sup> See *Lawyers Professional Responsibility Board Opinion No. 16*, Yilek, "Interest and Late Charges: How to Charge Clients," *Bench & Bar*, March 1991, Johnson, "Interest on Attorney Fees," *Bench & Bar* (May/June 1993).