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Q: Dear Ethics Lawyer,

For most engagements, our Firm charges a fee (hourly, fixed or contingent), plus certain expenses for travel, electronic legal research, large photocopy or scanning projects, overnight deliveries/couriers, outside vendors, etc., as specified in our engagement letter and an accompanying set of explanatory terms and conditions.

Our charges for these expense items seem to be within the range of what other firms charge, but I have no idea whether we are taking a loss, making a profit or breaking even on them. The expense tracking only gets more complicated because of costs depending on the volume of services and the allocation of expenses between clients that we incur in larger increments in contracts with vendors. If what we are charging is disclosed and agreed to in engagement letters, and is reasonable in comparison to what others charge, is this OK?

A: The billing of fees and expenses are governed by Model Rule 1.5, which simply says that a lawyer may not charge or collect “an unreasonable fee or an unreasonable amount for expenses.” It also requires the basis or rate of the fees and expenses for which the client will be responsible to be communicated to the client before or within a reasonable time of the start of the engagement, preferably in writing.

ABA Formal Ethics Op. 93-379 (1993) then engrafted onto this “reasonableness” standard some more specific limitations not actually found in the rule. It opines that lawyers may not bill things that are "general overhead" to clients (that is part of what is covered in "fees"), but may separately bill and recover specific non-overhead expenses incurred in a representation as long as it reasonably reflects the cost to the lawyer and is not being used as a "profit center." ABA Formal Ethics Op. 93-379 at 8. The opinion famously says that “The Lawyer’s stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.” *Id*.

The key is to recover costs only attributable to the particular client being billed. In the context of photocopy expense, for example, "[a]ny reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass muster." *Id*. Therefore, in setting the amount of the charge, it is less important what

competitors are doing, more important to have a supportable basis for calculating the charge that is "reasonable," *i.e.*, based on reasonable assumptions as to projected costs, amounts of projected costs per projected copies, past years' experience, etc.

As discussed in this column almost a year ago, the ABA Committee doubled down on the concepts of Op. 93-379 in its more recent Formal Op. 512 (2024), opining that law firms may only bill for generative AI services as an expense either to recover the client-specific amount paid to a vendor, or to recover "no more than the direct cost associated with the [AI] tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379," at least "[a]bsent an agreement." The type or content of an "agreement" that would permit billing differently is left undefined.

One could argue that Rule 1.5's "reasonableness" standard does not or should not limit the manner or construction of a lawyer's charges as long as they are reasonable overall, *i.e.*, that the ABA Committee's specification of what can be billed as component fees or expenses is not part of the rule, and is an unnecessary attempt to limit competitive market forces in a way that may restrict innovation to the detriment of clients. For example, if law firms cannot set rates or recover expenses that capture and reward (with "reasonable" profit) investments in technology and new ways of providing more efficient services, they will arguably not have incentives, or perhaps sufficient resources, to do so. This is particularly the case with Generative AI, given that the more sophisticated versions of this are now substituting their intelligence for that of lawyers and paralegals, in a real sense performing basic legal services for which lawyers have traditionally billed. But that is an argument for another day.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 132 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

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