

## **Ethics Opinion No. 95-4**

### **Standards Governing Charges to Clients for Disbursements and Other Expenses.**

In a 1993 opinion, the American Bar Association noted that the Rules of Professional Conduct "provide no specific guidance on the issue of how much a lawyer may charge a client for costs incurred over and above her fee." Formal Ethics Opinion 93-379 at 8. In the Committee's judgment, such guidance is necessary. Lawyers commonly bill clients for items labeled as disbursements, and there is a clear potential for honest misunderstandings concerning such charges, as well as the possibility of overreaching by attorneys practicing in an increasingly competitive and demanding business environment. Though this issue is among those addressed in Opinion 93-379, the Committee views the ABA's treatment of the issue as incomplete. We are, therefore, issuing an opinion setting forth the standards to be applied to these charges in Alaska.

It is permissible for a lawyer to require clients to pay for actual out-of-pocket costs. In addition, clients may be charged a reasonable amount for in-house services, such as photocopying. Charges for certain overhead items are also permitted. With regard to all of these charges, the lawyer is obligated to make explicit disclosures to the client of

- (a) the client's liability for the charges; and
- (b) the basis on which the charges will be computed.

In reaching this opinion, we have been guided by two principles. First, "all transactions between client and lawyer should be fair and reasonable to the client." Comment, Alaska Rule of Professional Conduct ("ARPC") 1.8. Second, the standards which govern reasonableness and disclosures with regard to fees for professional services should also be applied in the context of non-fee expense items. This means that such charges should not be unreasonably high in light of the nature of the service and the amount customarily charged in the community. *See*, ARPC 1.5(a). It also means that in a new lawyer-client relationship, the fact that the charge will be made, as well as its basis, must be communicated to the client, preferably, in writing, before, or within a reasonable time after, commencing the representation. *See*, ARPC 1.5(b).

The statement that disclosures can be made within a reasonable time after the commencement of representation requires further elaboration. The Comment to Rule 1.5 states as follows:

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be *promptly* established.

(Emphasis added.)

The requirement for a prompt understanding also applies to the charges under discussion here. Any disclosures which can reasonably be made at the outset of the representation should be made. If, at the beginning of the representation, it is not apparent that a particular expense will be incurred, advance disclosure should be made as soon as the need for the expense becomes apparent. Having stated the guiding principles, we will turn to a discussion of their application to specific categories charges.

### **A. Out-of-Pocket Expenses.**

This category encompasses actual disbursements to third party vendors and service providers paid in connection with the provision of legal services in a particular matter. It includes items such as filing fees, deposition costs, travel expenses, and fees paid to experts. It is reasonable to require clients to reimburse the lawyer for actual payments made for such expenses. (endnote 1) A lawyer who obtains a discounted airline ticket or hotel room should not charge the client the cost for the undiscounted fare or room. The benefits of any discount must be passed on to the client. (endnote 2)

At the beginning of the representation, clients should be told that they will be expected to pay for actual disbursements. Though we agree with the ABA that such a disclosure should lead clients to "expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf" [Formal Opinion 93-379 at B], further express approval should be sought and obtained in advance of incurring major expenses in the course of the representation. For example, a lawyer should not incur the expense connected with ordering a lengthy deposition transcript, out-of-town travel, or retention of an expert without obtaining the client's approval in advance. It will not always be possible to advise the client of the precise amount of an anticipated expense, but he or she should be given a reasonable estimation.

### **B. In-House Services.**

The best example of items in this category are charges for photocopying. Secretarial overtime presents another example. Such charges may be made if they are disclosed to the client with specificity in advance. Furthermore, there is no reason why such charges cannot be disclosed at the outset of a representation. (endnote 3) Thus, if a firm charges 10 cents a page for photocopying, the client should be informed of this fact. If a lawyer wishes the

client to pay for secretarial overtime, this fact must be disclosed in advance, along with the overtime rate. Charges for in-house services should be limited to the charge disclosed and agreed to by the client.

Sometimes law firms utilize surcharges to recoup the cost of capital improvements such as phone systems or hardware acquired in connection with on-line computer services. Such charges are permissible provided their nature and amount are disclosed and agreed to by the client. In the absence of an express disclosure, the client has every right to expect that overhead charges are subsumed in the lawyer's fee. As the ABA has noted,

[I]n the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of legal services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.

Formal Opinion 93-379 at 9-10. The standards outlined above represent the minimum which are appropriate given the special relationship which exists between lawyers and their clients.

Approved by the Alaska Bar Association Ethics Committee on February 2, 1995.

Adopted by the Board of Governors on March 17, 1995.

1. Former DR 5-103(B) required the client to be held ultimately responsible for costs incurred in the course of litigation. ARPC 1.8(e) now permits lawyers to make the repayment of court costs and litigation expenses contingent on the outcome of a matter and to pay such expenses on behalf of indigent clients.
2. ABA Formal Opinion 93-379 seems to imply that surcharges can be added on to discounted third party services so long as they are disclosed. Opinion 93-379 at 9. The Committee declines to adopt such a standard for Alaska. Given the lawyer's overriding obligation to treat clients fairly and reasonably, we can see no justification for not passing the benefits of discounts on to clients.
3. The ABA would permit lawyers to charge clients for the actual cost of in-house services without prior disclosure of the amount. *See*, Formal Opinion 93-379 at 9. Here again, the Committee disagrees with the ABA's approach and declines to adopt it in Alaska