

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 594**

February 2010

QUESTION PRESENTED

Is it permissible for a lawyer to recoup from a client an amount greater than the amount actually paid by the lawyer for an expense incurred in connection with the representation of the client?

STATEMENT OF FACTS

A lawyer represents a client on her personal injury claim and recovers from the opposing party an award. The fee agreement between the lawyer and the client allows the lawyer to deduct from any award the expenses paid by the lawyer in connection with the representation. The client had incurred medical expenses relating to the representation, which were intended to be paid out of the recovery, totaling \$5,000. The lawyer negotiates a release of these expenses for \$500 and pays this amount to obtain a complete release of the amount due. The lawyer then issues to the client a check in an amount equal to the client's gross recovery less legal fees as provided in the engagement agreement and less \$5,000 for the medical expenses that have been released. With the check the lawyer gives the client a document showing the amount of the award, the amount of legal fees charged, the \$5,000 medical expense charge that has been released, and the amount of the net recovery that is being paid to the client.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct generally require that a client understand and accept the basis on which a lawyer's compensation for legal services is computed. Rule 1.04(c) provides that "[w]hen the 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." In addition, Rule 1.03(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." These Rules permit a lawyer to follow the normal practice of including, in bills for legal services, expenses incurred in the provision of the services provided that the client understands and accepts such an arrangement. However, if a lawyer were to charge a client one amount when the amount actually incurred by the lawyer was a lesser amount, the excess paid by the client over the amount paid by the lawyer would be additional compensation for the lawyer's services. Under the Rules cited, even if such charge were part of an overall compensation arrangement that resulted in a total payment by the client that complied with the

standards for permissible legal fees set forth in Rule 1.04(a) and (b), such additional compensation to the lawyer would not be permissible unless the client understood and accepted that the amounts billed by the lawyer for expenses would include this additional compensation.

Accordingly, in the absence of disclosure and agreement to the contrary, a lawyer may recoup only the amount of expenses actually paid by the lawyer. In such circumstances, a client may reasonably be expected to understand that the amounts of third-party expenses incurred by a lawyer and recouped from the client, as reflected on a statement from the lawyer, are the amounts actually paid by the lawyer for the expenses shown. Absent an agreement to the contrary, a lawyer may not mark up or increase the amount of an expense being recouped from the client, and if a lawyer receives a discount on payment of the expense, the amount of the expense recouped from the client must take into account the discount. Billing more for expenses than the amount paid by the lawyer without disclosing that fact would constitute a violation of the requirements of Rule 1.04(c) and Rule 1.03(b) in that the lawyer would not have communicated accurately to the client the basis for the billing. In addition, it is the opinion of the Committee that, in the absence of disclosure and agreement to the contrary, charging, collecting or recouping more for a third-party expense than the amount actually paid by the lawyer would violate the prohibition of Rule 8.04(a)(3) against engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Thus, under the Rules discussed above, a lawyer may recoup from a client an amount for a third-party expense that is greater than the amount actually paid by the lawyer only if the lawyer specifically discloses that fact to the client and the client agrees following the disclosure. In the factual situation here considered, if there were no disclosure and agreement by the client, the lawyer would violate Rules 1.04(c), 1.03(b), and 8.04(a)(3) by charging the client \$5,000 for medical expenses when the actual amount finally paid for the medical expenses was \$500. This conclusion with respect to the billing to clients of expenses paid by a lawyer is consistent with that reached in American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (December 6, 1993) (“ABA Opinion 93-379”).

The factual situation considered in this opinion does not include the related but distinct subjects of additional charges for general office overhead and charges for the provision of in-house services. ABA Opinion 93-379 addresses these questions and concludes that, in the absence of disclosure and agreement to the contrary, when a client has engaged a lawyer to provide legal services for a fee, charging, collecting or recouping additional charges for general office overhead is prohibited because the client may reasonably be expected to understand that the lawyer’s general office overhead expenses are subsumed within the agreed-upon fee (whether determined on an hourly, flat fee, contingent fee or other basis). ABA Opinion 93-379 also rules that, in the absence of disclosure and agreement to the contrary with respect to in-house services such as copying, computer research and deliveries, a lawyer may charge the client only the direct cost for such services plus a reasonable allocation of overhead expenses directly associated with the provision of the service. Absent agreement with the client, it is not permissible for a lawyer to create an additional source of profit arising from charges for the provision of in-house services. For the reasons set forth above with regard to the treatment of medical expenses paid by a lawyer from an

award, the Committee agrees with the conclusions reached in ABA Opinion 93-379 concerning charges for office overhead and in-house services.

CONCLUSION

In the absence of disclosure to and agreement with a client to the contrary, charging, collecting or recouping from a client more for a third-party expense than the amount of the expense actually paid by a lawyer would violate the requirements of Rules 1.04(c), 1.03(b) and 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct.