

EXAMINERS' ANALYSIS OF QUESTION NO. 5

Andy: Andy's value billing violates MRPC 1.5, MRPC 1.4, and MRPC 8.4.

MRPC 1.5(a) provides that "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a 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." The same rule identifies factors usually involved in determining whether a fee is "reasonable," and not excessive. e.g., time and labor required and the experience of the attorney involved.

In this case, Andy's fee is governed by fee agreements under which he is to charge only for time actually expended. Under value billing, he is charging in excess of time actually expended and is billing multiple clients for the same time, so much so that he has on occasion billed in excess of 24 hours in one day. RI-150 instructs that charging more than one client at full rate for the same time period, rather than apportioning the time between or among the clients, is an excessive fee in violation of MRPC 1.5(a).

Moreover, even if Andy believed his fee was reasonable when he recorded his time, upon seeing how his hours had "soared" in just one month, and/or after receiving client voice mails questioning his time, he had a continuing duty to review the time entries for reasonableness. MRPC 1.5(a) prohibits not only "charging" an excessive fee but also "collecting" one. See also RI-150 ("The wording [of MRPC 1.5(a)] clearly indicates that, although a fee may appear reasonable at the outset of the representation, a lawyer has a continuing duty before billing the client or attempting to collect the fee to review the facts and re-examine the reasonableness of the fee").

MRPC 1.4 concerns client communications. It required Andy to explain to the clients involved any proposed change in billing so that the clients could make an informed decision about whether they wanted to accept the proposed change or seek other representation. See MRPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). Not only did Andy fail to consult his clients prior to changing to value billing, he ignored their calls about invoices containing the value billing entries. MRPC 1.4(a) requires a lawyer to respond to client

inquiries, which Andy failed to do by not promptly responding to the client's request for information.

Andy also violated MRPC 8.4, which provides that "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." MRPC 8.4(b). Despite knowing the firm's fee agreements required him to bill only for actual time, Andy billed in clear excess of actual time expended, then lied to Peter when asked whether he had done so. MRPC 4.1 also requires truthfulness in statements to others. Andy arguably violated this rule by denying to Peter that he billed anything other than actual time worked. Andy likely has also violated MRPC 8.4(a) by violating other Rules of Professional Misconduct, specifically MRPC 1.4, MRPC 1.5, and MRPC 4.1.

Fred: Based on the facts given about Fred, there is no evidence he engaged in professional misconduct. Fred advised Andy that he had heard or read somewhere about value or block billing. While MRPC 8.4 provides that "It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another," nothing in the facts provide that Fred had adopted value billing himself or that he knowingly induced Andy to do so.

Peter: Peter will violate MRPC 5.1 and possibly MRPC 8.3 if he does not take prompt action.

Peter has an obligation under MRPC 5.1 to take action to correct Andy's fraudulent billings. MRPC 5.1 provides that "A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if . . . the lawyer is a partner in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action." MRPC 5.1(c)(2). Peter is both a partner in Andy's firm and Andy's direct supervisor. If he does not take action to correct Andy's time entries and refund any overpayments already made by firm clients as a result of those entries, Peter will himself have violated the Rules of Professional Misconduct. Points should also be given for a discussion of MRPC 5.1(b), which states that "a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

The answer as to whether Peter has a responsibility to report Andy to the Attorney Grievance Commission is less clear. MRPC 8.3(a) provides that "a lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission." The Comment to MRPC 8.3 provides that whether a violation is significant is a judgment call because a rule that requires reporting of all violations has proved unenforceable. Thus, the Comment instructs that "this rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to report." Here, Andy violated several rules, not just one, which weighs in favor of finding that his misconduct is a significant violation.

There is also the issue of whether Andy's violation of the Rules "raises a substantial question as to [his] honesty, trustworthiness, or fitness as a lawyer," which, per the Comment to MRPC 8.3, "refers to the seriousness of the offense and not the quantum of evidence of which the lawyer is aware." The fact that Andy, a junior associate, implemented a billing scheme that violated the firm's fee agreements with its clients, without at least consulting with his supervisor and then lied about it when Peter confronted him, raises a serious question about his trustworthiness or fitness to practice that should be reported. Add to that Andy's failure to disclose to Peter the client voice mails in response to a direct question about client complaints, an omission Peter would certainly discover as he implemented corrective action on the fraudulent billings, and it appears a report to the Attorney Grievance Commission would be the more prudent exercise of judgment.