MARYLAND STATE BAR ASSOCIATION, INC.
COMMITTEE ON ETHICS
ETHICS DOCKET NO. 2019-02

Fees – Permissibility of Markup for Cost of Outsourced Legal Work

We have been asked to reconsider and rescind a 25-year-old opinion by this Committee, MSBA Ethics Opinion 1992-19. In the years since Opinion 1992-19 was first published, this Committee has had the opportunity to revisit the ethics surrounding the use of contractor attorneys. While we have not specifically rescinded Opinion 1992-19, we have authored more recent opinions that we believe effectively address your concern, as discussed below.

In MSBA Ethics Opinion 1992-19, this Committee addressed the permissibility of billing clients for legal research performed by an outside research service. At the time, this Committee concluded that, while the costs of outsourced research may be billed to clients as a cost of litigation, an attorney "may not bill the client for any amount greater than that which it actually paid for the contractual services." In reaching this conclusion, the Committee referenced MARPC 1.5, specifically sub-sections (a) and (e):

> **(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.** The factors to be considered in determining the reasonableness of a fee include the following:
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> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> > (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
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> > (3) the fee customarily charged in the locality for similar legal services;
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> > (4) the amount involved and the results obtained;
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> > (5) the time limitations imposed by the client or by the circumstances;
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> > (6) the nature and length of the professional relationship with the client;
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> > (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> > (8) whether the fee is fixed or contingent.
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> …
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> (e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the joint representation and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

In the last 25 years, there have been multiple ABA Formal Opinions[1] and opinions from many state ethics committees that have addressed this issue, including at least two opinions by this Committee.[2] Opinions regarding the permissibility of billing a client an amount higher than a firm's costs associated with procuring work product from a contractor attorney often turn on the facts of a given situation. For example, whether the costs associated with hiring a contractor attorney are billed as an "expense" or alternatively as a "fee" may be an important distinction ethically.[3] Other opinions turn on whether, and the degree to which, a hiring attorney supervises a contractor attorney; or alternatively whether, or the extent to which, a contractor's work is reviewed and adopted by a hiring attorney as firm work product.

Despite the factual divergences among the various opinions addressing billing practices in the context of contractor attorneys, all opinions on the issue agree that ethically, the ultimate question is whether the amount billed to a client is reasonable.

In MSBA Ethics Opinion 2017-07, this Committee addressed several questions related to the hiring of attorneys as contractors, including the ethics of a variety of billing practices related to "contractor attorneys," and confirmed the guidance offered in our opinion 2001-31:

> Your third question asks whether the hiring attorney can bill for your services at a rate higher than what you have charged. A prior opinion of the Committee, 92-19, concluded that a lawyer could not "bill the client for any amount greater than that which it actually paid for the contractual services" and also concluded that the fee of a contract attorney should be billed as a cost and not as a legal fee. The ABA provided a much more extensive analysis of the issue in ABA Opinion 88-356. That opinion reached a different conclusion allowing a lawyer to bill these expenses either as costs or as fees, but differentiated the method for doing so and the responsibilities of the lawyer to the client. In essence, ABA Opinion 88-356 provides that an attorney who bills the client for a contract attorney's work as legal services can include its costs for assuming the responsibility of the work and time to review it; whereas when the firm bills the client for the services of the contracting lawyer as an expense and not as legal services then the firm could not attach a surcharge, but must pass the expense along to the client in the amount incurred.

[1] ABA Formal Opinions are ethics opinions published by the *Committee on Ethics and Professional Responsibility* of the American Bar Association, which is similar in nature to the MSBA Ethics Committee.
[2] MSBA Ethics Opinion 2001-31 and MSBA Ethics Opinion 2017-07.
[3] Some committees have found that a Maryland Rule 1.5(e) (or a differently numbered corollary) analysis should be triggered when a firm bills expenses associated with hiring a contractor attorney as a "fee," rather than an "expense."

> This Committee followed with its opinion 2001-31 regarding how a hiring attorney can structure billing arrangements for a contract attorney and commends that opinion to your attention.

In MSBA Ethics Opinion 2001-31, the Committee addressed a variety of permissible billing arrangements, when contemplating the use of contractor attorneys, and the ways clients may be billed under the different billing methodologies. With regard to the specific question of whether a firm may bill a client an amount higher than a firm's costs associated with procuring work product from a contractor attorney, this Committee said:

> Rule 1.5(a) requires that a lawyer's fee shall be reasonable, and that is so whether or not the retainer agreement is in writing. … In accordance with the ABA's 1995 'Statement of Principles In Billing For Legal Services', "If the client and the lawyer reach an agreement with respect to a billing arrangement after disclosure and understanding, fees for legal services calculated in accordance with such agreement should be presumed reasonable."
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> **Accordingly, subject to Rule 1.5(a) (reasonableness of fees), the retainer agreement with the client can provide for the engagement of a contract lawyer at a stipulated rate or amount, which rate includes a surcharge or profit for the retaining lawyer.**

We again state that the practice of marking up the costs associated with hiring a contractor attorney can be permissible, ***provided that such mark up is done in a way that renders the ultimate fee reasonable, thereby complying with Rule 1.5(a)***.

The extent to which the client must be informed of, consent to the use of, and consent to the billing arrangement associated with contractor attorneys have been discussed by multiple ethics committees. We believe the ABA Opinion 88-356, which this Committee adopted in our opinion 2001-31, provides the appropriate guidance:

> "[W]here the contract lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the contract lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, when the contract lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a contract lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel and the disclosure of those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm."

Although we believe the extent to which the client must be informed of, consent to the use of, and consent to the billing arrangement associated with contractor attorneys attorney are highly fact dependent, we feel that in all situations, attorneys continue to have an ethical obligation to be truthful and to apprise the client sufficiently for the attorney to comply with the MARPC, including, but not limited to, the reasonableness requirements of Rule 1.5(a). The Committee also cautions that an attorney who blithely subcontracts work without any oversight of a contractor attorney is disregarding obligations to a client that are separate and distinct from any fee issue at hand. An attorney who reviews and adopts the work of a contractor attorney, consistent with the attorney's billing agreement with a client, may bill the client as agreed, provided that the billing agreement complies with the MARPC. Attorneys who do not review and accept responsibility for the work product of contractor attorneys may not claim the work product as their own. Moreover, where a firm hires a contractor attorney and does not closely supervise that attorney's work, the specific facts of the situation may change the relationship sufficiently to trigger a Rule 1.5(e) analysis.

In summary, we believe it is permissible for a firm to charge an amount higher than the actual costs associated with procuring work product from an outside attorney on a contract basis in certain situations, subject to the reasonableness limitations of MARPC Rule 1.5. The Committee collectively feels that (1) disclosure of the use of contractor attorneys, (2) disclosure of the billing arrangement under which a client will be charged for the services provided by contractor attorneys, (3) the express consent of a given client to the use and billing arrangement associated with contractor attorneys are paramount to the ethical analysis of a particular billing arrangement. Disclosure of such details in a retainer agreement at the outset of representation would be the best practice for attorneys considering implementing either the use of contractor attorneys or any sort of charge (fee, expense, or otherwise) for the costs associated with the use of such attorneys.