# DO'S AND DON'TS OF BILLING
# OR
# HOW TO GET PAID, STAY PAID, AND REMAIN LICENSED

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Andrew D. Weisblatt earned his J.D. from **South Texas College of Law** in Houston, Texas. His initial practice was with Alvin M. Rosenthal, one of the great lawyers in Houston's history. After several years of practicing together, Alvin retired and Mr. Weisblatt grew the firm from a two lawyer shop to a nearly twenty person shop. In 2005, Mr. Weisblatt sold his firm and became General Counsel and Chief Operating Officer of a multi-national corporation. In 2009, Mr. Weisblatt opened The Weisblatt Law Firm, L.L.C. a boutique business and litigation firm.

Mr. Weisblatt has practiced continuously since becoming licensed in 1992 and has represented businesses ranging in size from one person start-up ventures to multi-national corporations employing hundreds of people in multiple countries. From 2005 through 2009 Mr. Weisblatt was in-house counsel and chief operating officer of a multi-national corporation in the steel products industry. That in-house position provided valuable insight into how businesses work and what they actually need from their lawyers – both in-house and outside counsel. In 2009 Mr. Weisblatt started the The Weisblatt Law Firm, L.L.C. with the goal of creating a special law firm which could cater to a few clients and provide them the best legal services coupled with the best customer service. It is a matter of great pride to Mr. Weisblatt that the very first customer who hired him when he started in 1992 was also the first customer of The Weisblatt Law Firm, L.L.C. continuing a many decade long relationship.

Mr. Weisblatt is proudly a member of the State Bar of Texas including the business, creditor-debtor, litigation, commercial law, real estate, and law office management practice groups. He also is an avid reader, an exercise buff, enjoys woodworking and participates each year in the MS150 bicycle ride from Houston to Austin to raise money to fight multiple sclerosis.

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## 1. INTRODUCTION

This short paper is intended to identify some of the important "dos and don'ts" that a new lawyer in a solo or small firm will face when preparing to send out his first invoice for legal services. It is not intended to be a comprehensive guide to all aspects of legal invoicing or recordkeeping. In writing this paper, the author relied heavily on State Bar of Texas published materials, including "A Lawyer's Guide to Client Trust Accounts" updated April 15, 2014 which is available on the State Bar of Texas website.

The invoices which lawyers send to their clients are among the most scrutinized documents which we produce. The clients read them (often with dismay!), they are regularly produced in discovery for the other side to read, judges and juries read them when deciding the amount of attorneys' fees to award, another lawyer may read them when evaluating, preparing or filing a malpractice suit against us, judges and juries may read them in the event of a malpractice case against us, and a disciplinary panel may read them when deciding the merits of a grievance. With so many eyes on our bills, it behooves us all to have a good understanding of the rules behind billing and a working knowledge of the tricks and traps that we must navigate to satisfy these varied and often diametrically opposed audiences.

This paper is intended to be a practical guide rather than an exhaustive review of the laws and ethics opinions regarding billing.

## 2. BILLING AND THE ENGAGEMENT LETTER

Contingent fee agreements must be in writing. Other than that rule, there is no law that requires you to have a written engagement letter with your client. That said, failing to have a written fee agreement is a profound mistake. Your fee agreement, if carefully thought out, will help you avoid a legion of problems. This paper is not about fee agreements, but I encourage you to make sure that your fee agreement at minimum includes the following information:

i. Identify your client

ii. Scope of representation

iii. Identify potential conflicts

iv. State Bar required disclosures vis-à-vis grievance procedures; and

v. the deal points of your agreement with your client.

When describing the deal with your client, you should include at the very least:

i. Hourly, flat rate, or contingent fee.

ii. Percentage of contingent fee

iii. Hourly rate

iv. billing increment

v. amount of retainer (if any);

vi. amount of deposit against fees

vii. amount of deposit against expenses (often combined with the deposit against fees)

viii. any requirement that the client refresh any of the deposits.

You should review these deal points with your client prior to their signing the engagement letter and make sure that you are starting with a clear, mutual understanding of each party's obligations. This meeting is the beginning of a very important dialog. Your client has to decide to pay your bill every month. Use this meeting to establish trust and confidence and an expectation with the client that you will expect and need to be paid so that you can help the client reach its goals.

***Practice Note:*** ALWAYS, ALWAYS, ALWAYS take the time to draft an engagement letter which is signed by you and your client.

***Practice Note:*** The contract used for hourly engagements by the author is attached as exhibit 1.

## 3. IOLTA ACCOUNTS

The Mechanics: The Texas Disciplinary Rules of Professional Conduct (particularly rule 1.14) require that all lawyers who are hold funds belonging to another hold such funds in a special account called an IOLTA account. IOLTA stands for "Interest on Lawyers Trust Accounts." The interest generated by these accounts are used by the State Bar to fund programs to provide legal services to indigent people.

All monies that are unearned, all cost deposits, all mixed earned and unearned money, and all settlement monies must be deposited into the lawyer's IOLTA account.

***Practice Note***: Lawyers can get into a lot of trouble depositing money that should be in an IOLTA account but not very much trouble at all depositing money that need not be in an IOLTA account into an IOLTA account. *If you aren't sure, deposit it into your IOLTA account and then sort it out*.

Confusion sometimes arises in new lawyers because of the word "account." You do not have to have a separate account at your bank for each client's trust money. You do, however, have to maintain a separate *ledger* for each client's trust funds.

For example, if client A gives me a deposit against fees and expenses of $2000 and client B gives me a deposit against fees of $1,000, I must deposit all of these funds into my firm's IOLTA account. At this point, all of that money belongs to the clients. I am simply holding it in trust for them.

I must however, at all times, be able to identify the owner of all of the funds in the account. So if at the end of the month assume I performed $3000.00 of work for client A and $500 dollars of work for client B, I could properly remove all of client A's money ($2000) and $500 of client B's money and put the sum $2500 into my operating account.

Note that I could not remove all $3000 of the money from the account because if I did so, I would be taking some money from client B to pay for client A's legal work.

***Practice Note***: maintain separate accounting records for each client's funds in your IOLTA account.

The Texas Rules of Disciplinary Procedure (Rule 15.10) requires that you keep the accounting records for each client who had funds in your IOLTA account for five years after the last of those funds is disbursed. If you were to be in a conflict with a client, you would not want to destroy those records until the conflict had resolved – even if it were more than five years after disbursement of the last funds.

As long as you have an IOLTA account, you must submit an annual report to the State Bar of Texas. The report is done contemporaneously with paying your annual lawyer tax and State Bar dues and the State Bar of Texas provides the form. It take just a few minutes to complete.

Retainers, Deposits And Flat Fees:
Retainers: a retainer is not a deposit against fees and expenses. A retainer is a sum of money paid to a lawyer to compensate that lawyer for the loss of opportunity to work on other projects. It could be described as a "signing bonus." Retainers are fully earned when paid and not subject to being broken into hourly increments. (See Professional Ethics Committee Opinion No. 611, attached as exhibit 2.)

Deposits: a deposit is an advanced payment for fees or expenses or both.

Flat Fee: a flat fee is a designated amount of money that the lawyer and client agree will compensate the lawyer for a specific task. Despite the fact that the lawyer and client may contract that the fee (at least some portion at least) is fully earned and non-refundable, the fee is always refundable until the lawyer has completed the scope of work. See *Cluck v. Commission for Lawyer Discipline*; 214 S.W.3d 736 (App.-Austin) 2007

Deposits and Flat Fees must BOTH be deposited into IOLTA accounts until earned. In the case of a flat fee, the fee is earned when the task is completed. A large flat fee could be earned according to certain milestones so it could be disbursed as those milestones are reached. Even though a client and attorney contract that a flat fee is fully earned and non-refundable, the attorney still must deposit it into the IOLTA account and not touch it until the task is complete.

A true retainer can be deposited into the lawyer's operating account as fully earned and non-refundable.

Why not designate every flat fee as a retainer? First of all, because they're not. Secondly, because the lawyer may be called upon to support the notion that the retainer reasonably relates to the "lost opportunity to do other work" and must also show that the retainer did NOT include compensation for actually doing the work. If the "retainer" both compensates the lawyer for the lost opportunity to work AND to do the legal work contemplated by the agreement, then it must be put into the IOLTA account until the work is completed. It if does both, then it is not a "true retainer."

In the event that a lawyer is unable to complete the flat fee project, then the lawyer must somehow demonstrate how much of the fee is earned and how much is unearned. The engagement letter can help with this problem by designating a method for accomplishing this such as milestones or an hourly basis.

Settlement Funds: All settlement funds must be deposited into the lawyer's IOLTA account. All of these funds should remain there until they have been collected.

Lawyers are wise to distinguish from "Available Funds" and "Collected Funds." Due to some idiosyncrasies in the banking laws, banks are required to make some funds available for withdrawal by the depositor before the bank has actually collected the funds from the payee's bank. This fact has been noticed by the con artists of the world and they have created a special set of cons just for lawyers.

The con works thusly: A new client approaches the lawyer and asks the lawyer to take on some task – typically the client is overseas and the task is collection of an unpaid invoice. The "client" will want the case taken on a contingent fee basis. The "client" will provide some information which the lawyer uses to establish the existence of the alleged debtor (who is actually a co-conspirator with the client). The lawyer makes a demand and almost immediately the alleged debtor makes payment. At this point, the lawyer is thinking – "great! Easy money. I've just earned a nice contingent fee without doing much work at all!" The lawyer deposits the money into her trust account and then the "client" begins to apply tremendous pressure on the lawyer to disburse the funds as soon as they are available. The "client" even threatens a grievance if the lawyer "continues to wrongfully hold the money." The lawyer sees that the funds are "available" and wires the "client's" share to the overseas "client." Of course, the check is fraudulent and once the bank realizes it, it reverses the deposit transaction and *takes back the full amount of the deposit.* This is a disaster for the lawyer as the deposit was made into an IOLTA account. When the bank reverses the deposit, the bank has then seized funds that do not belong to the lawyer – they belong to the clients of the lawyer. The lawyer must, of course, quickly reimburse the funds to the actual, real clients or face issues for not safeguarding the clients' trust funds. This situation can be devastating.

There are a number of ways to avoid this scam. The first and most important is to know your client. The scam clients will never agree to a telephone interview. The author receives about 3 – 10 e-mails a week from "clients" overseas who ask the same generic "does your firm handle contract disputes" and "does your firm handle collection matters." The first step is to ask for a telephone conference – if they refuse – they are a scam artist. The second good way to protect yourself from this scam is to include in your engagement letter the provision that you will not release any settlement funds until such time as they are "collected." See exhibit 3 for the most recent e-mail correspondence from one of these scam artists.

Lawyers should always prepare a settlement statement when disbursing funds. The settlement statement should include the full amount recovered, the amount of expenses, the amount of attorney's fees, the amount disbursed to the client. This document could prove invaluable in the event that there is later a dispute with the client regarding the fate of the settlement funds. The form of settlement statement used by the author is attached as exhibit 4.

***Practice Note***: Have your clients sign the settlement statement and instruct you, in writing, regarding how to disburse their funds. This will greatly reduce the possibility of conflict later.

Disputed Funds: There are many ways that disputes can arise regarding funds held by a lawyer in a trust account. The situation most applicable to this paper is the situation where the lawyer and client

disagree regarding the fees charged. In such a case, the lawyer should not disburse any funds from the IOLTA account to the attorney which are disputed. The attorney may disburse undisputed funds. In the event that the client and attorney are unable to agree as to the disposition of the disputed funds, the funds should be left in the trust account and a legal action commenced to resolve the question of ownership.

Abandoned Funds: If an attorney cannot find the owner of funds in the attorney's trust account, the attorney should turn the funds over to the Texas Comptroller of Public Accounts. See Opinion Number 602 attached as exhibit 5.

## 4. EFFECTIVE BILLING OF CLIENTS

Now that you have a contract with the client, and a place to put that deposit against fees and expenses, you need to do the work and then present the client with a bill that he, she or it will pay. The invoice that you send to your client (and all those other audiences referenced above) matters! Your client will read the bill and you want them to pay it. The balance of this paper discusses the lessons I have learned when billing my clients.

### The Dos

Set reasonable deposits: It is important that you set the deposit amount high enough to provide coverage for busy months. I try to set the deposit at about 1.5 times what I think a large monthly invoice will be. This way, most months my invoice is paid in full from the trust account balance on hand. If you set the amount too low, you will spend too much time chasing clients for payment and will not have enough time to perform productive work.

***Practice Tip:*** Remember – if your client cannot or will not pay you a reasonable retainer at the beginning, the client will not pay you in the middle or at the end.

Analyze your Hourly Rate: It is important to regularly analyze your hourly rate. Ask for a rate that is commensurate with your experience and your knowledge. You should regularly – at least yearly – review your rate. Be sure to include in your engagement letter the right to periodically increase your rate.

Bill Regularly: It is important to the efficient administration of a law office that the bills go out regularly. I typically bill once per month. This permits you to prepare your bills while they are fresh in your mind and also allows the client to receive the bills close in time to when the work is done. It also helps to keep the client informed about the work being done and prevents the situation of the client getting a bill for several months of work that might be difficult to pay at once. It also will keep you aware of the client's ability and willingness to pay – you will know sooner if the client is falling behind if you bill regularly.

Descriptive Entries are better: It's not just the quantity of words written in the entry, it's also the quality of the information. Most of your clients will be very interested in their cases. They will read your bill. You want them to have a feeling for the work that you did which is described in your entry. For example, compare the following billing entries.

"Legal research, application of law to facts. Email correspondence with client – 3 hours."

Compared to:

"Conducted online legal research relating to the issue of res judicata. Reviewed Texas Rule of Civil Procedure no. 97. Reviewed prior court case file to confirm that earlier case resulted in a final judgment as Rule 97 requires. Draft e-mail to client suggesting

revision to answer to include defense of res judicata. – 3 hours."

The second entry is, of course, more descriptive, but it also informs the client of the nature of the work that was done, why it was done, and reminds the client that you sent them an e-mail about it. This type of entry, in my experience, is much more effective and leads to a much happier client who is more likely to pay the invoice.

Take multiple forms of payment: Make it easy on your client. If they want to pay by credit card, paypal, wire transfer, check, or even cash, make sure that they can do so. Some of these forms of payment are more expensive to you than others, but it is much better to get paid and give up a few percent than to not get paid.

Reconcile your IOLTA Account: While this is tangential to your actual billing process, each month every client's trust account should be balanced. This will help you maintain your records and keep your client informed.

Consider a Credit Card "Backup": It is ethical to require your client to provide a credit card which you may charge in the event the client has not 1. disputed the invoice; and 2. Paid the invoice within a certain amount of time. (See Opinion 582 attached as exhibit 6). This system allows the client time to pay the invoice from alternate sources if it prefers, preserves the client's right to dispute the invoice, but also gives the lawyer a tiny bit more security that he will get paid.

Require "evergreen" deposits: It is good practice to require that your clients refresh their deposits against fees and expenses monthly. This will keep the client from having to come up with very large sums of money all at once and will let you know early if the client is falling behind.

Decide in advance if the work is pro-bono: You should decide in advance, if the project is going to be pro-bono or performed at a reduced rate. It is fine (and admirable) to take some cases at no cost or reduced cost. It should, however, be a decision that's made at the beginning by you and not in the middle by the client.

Listen to your clients: If your client is frustrated about an invoice – listen to them. Sometimes they are right! If you have made a mistake on an invoice, quickly correct it and send a revised invoice. If the client is particularly upset about a single time entry – waiving it is sometimes the best money you can spend.

Invoice everything! You should treat your clients fairly. If you make a very short call which you determine was so short you should not charge for it, bill it and then "no-charge" it on the client's invoice. This buys you good-will and lets your client know that you are being fair. Clients cannot help but like seeing the "no charge" items on their invoices.

## The Don'ts

Never comingle funds: Do not ever put IOLTA funds into any account other than an IOLTA account. Never, ever, ever. This is a fast way to be on the wrong end of a breach of fiduciary duty lawsuit – one in which your client does NOT have to prove one cent of damages to win. Your IOLTA account is your friend. When in doubt, deposit all funds into IOLTA – you can always sort it out from there without worry that you have accidentally comingled funds.

Do not get conned: Know your client and understand the rules relating to "available funds" versus "collected funds." (See discussion above.)

Beware of up charging expenses: While it is technically permissible to upcharge expenses, you must provide disclosure to the

client and obtain the client's consent. (See opinion no. 577, exhibit 7). This means that if the photocopy costs you a nickel, and you charge the client a quarter, you must disclose that you are up charging the copies and you must get the client's advanced consent. I tell clients that I will not charge them for anything that doesn't have a receipt, and they can look at the receipt anytime they would like. I have not had an expense questioned in at least five years.

Do not expense anything you would be uncomfortable discussing with a grievance panel or a judge: Some of the expenses that lawyers have charged or attempted to charge their clients are ludicrous. For instance, charging the client for gifts purchased for other members of the firm, charging clients for lavish meals, charging clients for private jets (without good reason), charging clients for clothing, etc… Just imagine how a breach of fiduciary duty jury is going to react to billing a client for a $300 dollar bottle of wine…

Do not charge unconscionable fees: You may not charge an unconscionable fee (TDRPC 1.04). An unconscionable fee is defined in TDRPC 1.04 as "A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable." This definition was used by the Texas Supreme Court in Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 568 (Tex. 2006).

Contingent Fees Must be in Writing: Contingent fees must be in writing. If you do not have a written contract, do not try to charge a contingent fee.

Do not charge illegal fees: Do not charge a fee that is greater than that which is allowed by statute. See, for instance, Texas Tax Code 34.04(i) which limits the fee an attorney may charge for assisting a person in obtaining excess funds from a tax sale to 25% of the excess or a $1000 *whichever is less*. (Tex.Tax Code 34.01(i)).

Do not move money out of an IOLTA account without sending an invoice: Take the situation wherein a client has $10,000 in the IOLTA account, and you have done $3000 of work. You are short on cash so you want to move just a little – say $1000 out of IOLTA into your operating account. You might think it ok since you have done much more than $1000 of work and the client easily has enough money to cover the move. You must not move any of that money without sending an invoice to the client before or contemporaneously with the move. This is true even though you KNOW that there is plenty of money in the account and there is no danger of invading another client's funds and you KNOW that you have done enough work to easily justify the amount moved. We have a lot of latitude. We are allowed to move the money as soon as we send the invoice. We get to bless our own decisions in that regard, however, we cannot move money without providing an invoice to the client.

Billing Clients for Contract Lawyers: If the contract lawyer is "in" the firm, the client can be charged a fee greater than the amount being paid to that lawyer. If the lawyer is not "in" the firm, then the contract lawyer must be billed as an expense – and expenses can only be up charged after disclosure and consent. If one up-charges a contract lawyer, that equates to "fee splitting" at which time all of the fee splitting rules will apply (proportionality, professional responsibility, written client consent etc..) (see TDRPC 1.04(f) and 7.01).

Exhibit 1 – Sample Engagement Letter

Exhibit 2 - Tex. Comm. On Prof'l Ethics, Op. 611 (2011)

# Exhibit 3 – Sample E-mail from Con Artist

## Exhibit 4 – Sample Settlement Statement

Exhibit 5 - Tex. Comm. On Prof'l Ethics, Op. 602 (2010)

Exhibit 6 - Tex. Comm. On Prof'l Ethics, Op. 582 (2008)

Exhibit 7 - Tex. Comm. On Prof'l Ethics, Op. 577 (2007)

## Exhibit 8 - Additional Resources

a. Texas Center for Legal Ethics
   a.i. http://www.legalethicstexas.com/Home.aspx

b. State Bar of Texas
   b.i. http://www.texasbar.com/AM/Template.cfm?Section=For_Lawyers
      b.i.1. See Particularly – Resource Guides section
      b.i.2. See particularly – Grievance and Ethics Info

c. Texas Disciplinary Rules of Professional Conduct
   c.i. http://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources&Template=/CM/ContentDisplay.cfm&ContentID=14125

d. Texas Rules of Disciplinary Procedure
   d.i. http://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources&Template=/CM/ContentDisplay.cfm&ContentID=11069

e. Texas Board of Disciplinary Appeals
   e.i. http://txboda.org/

f. Contact me anytime:
   f.i. www.weisblattlaw.com