SDCBA Legal Ethics Opinion 2013-3
(Adopted by the San Diego County Bar Legal Ethics Committee July 16, 2013)

I
BACKGROUND FACTS

Lawyer enters into an hourly fee agreement with Client that sets forth the nature of the engagement and the specified hourly rate. The fee agreement has the following language:

In addition to and independent of Lawyer’s fees for legal services on Client’s behalf, Client is also responsible for costs and expenses Lawyer incurs representing Client. Some typical costs and expenses include fees of expert witnesses, investigators, and consultants, filing fees, the cost of hearing and deposition transcripts, jury fees, copy services, travel expenses, and any other costs or expenses Lawyer incurs on Client’s behalf.

Lawyer bills the Client for all her costs and expenses in connection with the representation. Eventually the Client becomes dissatisfied, severs the relationship with the Lawyer and claims, inter alia, that the Lawyer breached her fiduciary duty to the Client because, the Client claims, the Lawyer disguised her general overhead expenses as Client costs in violation of the Rules of Professional Conduct and the State Bar Act. Specifically, the Client claims that charges for secretarial overtime; photocopying at $0.25 a page; processing electronic discovery; electronic research (Westlaw, Lexis/Nexis); the cost of CDs for document storage; mileage and parking; meals; Federal Express; postage; and long distance telephone are all part of the Lawyer’s general office overhead expense for which it was unethical to charge the Client.¹

II
QUESTION PRESENTED

May an attorney ethically charge a client for providing in-house services such as secretarial overtime, photocopying, processing electronic discovery, electronic legal research, the cost of CDs, mileage and parking, meals, Federal Express and postage and long distance telephone?

III
AUTHORITIES ADDRESSED


¹ Client also challenges Lawyer’s bills and billing practices which are not the subject of this opinion.

IV
DISCUSSION

Fiduciary Duty and Billing.

The fiduciary duty a lawyer owes a client requires, inter alia, that fee agreements and billings “must be fair, reasonable and fully explained to the client.” (Bird, Marella, Boxer & Wolpert v. Superior Court (2003) 106 Cal.App.4th 419, 430-431, quoting Lynch v. Warwick (2002) 95 Cal.App.4th 267.) No fee agreement “is valid and enforceable without regard to considerations of good conscience, fair dealing, and … the eventual effect of the cost to the client.” (Id. at 431, quoting Coscia v. McKenna & Cuneo (2001) 25 Cal.4th 1194, 1199-1200.) “Rule 4-200(A) of the Rules of Professional Conduct expresses this fiduciary requirement … The fiduciary duty to charge only fair, reasonable and conscionable fees applies to all members of the bar.” (Id.)

Rule of Professional Conduct 4-200 and Costs.

Rule of Professional Conduct 4-200(A) prohibits a lawyer from entering into an agreement for, or charging or collecting an illegal or unconscionable fee. Rule 4-200(B) sets forth 11 factors to be considered, as appropriate, in determining the conscionability of a fee.2

None of the factors identified in Rule 4-200(B), however, or anything else in Rule 4-200, explicitly identifies which costs or other charges a lawyer may appropriately pass on to a client. Moreover, scarce California authority addresses the issue.

In Ojeda v. Sharp Cabrillo Hosp. (1992) 8 Cal.App.4th 1 (4th Dist., Div. 1)—approval of a minor’s compromise in a medical malpractice action—the principal issue was whether a contingent fee for a medical consultant was appropriate in light of, inter alia, MICRA. With respect to billing costs to clients, the court observed:

2 The factors include: the amount of the fee in proportion to the value of the services; relative sophistication of lawyer and client; novelty and difficulty of the work and skill required; likelihood of precluding other employment; amount involved and results obtained; time limitations client or circumstances impose; nature and length of relationship with the client; experience, reputation and ability of lawyer; whether the fee is fixed or contingent; time and labor required; client’s informed consent to the fee.
The line between “costs” and attorney overhead included as part of the lawyer’s fees is an undefined and changing one. Traditionally, the costs associated with a lawsuit have included items such as transcript, filing, service and jury fees and hourly compensation paid to experts who serve as witnesses or consultants [citation omitted]. Increasingly, lawyers are attempting to expand their ability to recoup certain expenses such as travel, postage, photocopying, word processing and computer research charges.

Id. at 8.³

The Ojeda court, however, did not address whether such an “expansion” is ethically permitted. Moreover, no California authority states explicitly whether a lawyer may charge a client for providing in-house services such as those identified in the question presented. Nor has any California authority determined whether such expenses are part of a lawyer’s general office overhead.⁴

Costs Versus Overhead.

Some federal courts in California, however, have concluded that some such charges are overhead—albeit in very different contexts—such that they would not properly be billed to a client. Accordingly, the courts refused to award such charges as costs. For example, in Allen v. City of Los Angeles (C.D. Cal. January 13, 1995) 1995 WL 433720, at *20, in deciding the award of attorney’s fees and costs in the Rodney King civil rights case “the court … disallows costs for meals, parking and telephone charges.” In Zynga Game Networks v. Ekran (N.D. Cal. August 31, 2010) 2010 WL 3463630, a Lanham Act case, the court determined that Lexis/Nexis computer research and telephone charges were overhead and in In re Media Vision Technology (N.D. Cal. January 23, 1996) 913 F.Supp. 1362, 1370, in approving the settlement of a securities class action, the court held that “private express mail services are a part of the firm’s overhead and should be absorbed as the cost of doing business.” The court also reduced photocopy charges of $0.25 per page to $0.08 to reflect the average price charged by most commercial copy services. (Id. at 1368.) In Ringcentral, Inc. v. Quimby (N.D. Cal. April 8, 2010) 711 F.Supp.2d 1048, 1066, another Lanham Act case, “the Court considers expenses incurred as a result of long distance telephone calls to be overhead not properly included in an award of costs.” And in American Small Business League v. U.S. Small Bus. Admin. (N.D. Cal. September 12, 2005) 2005 WL 2206486 at *2, a FOIA action, “the court finds that the $1,660.83 in ‘Westlaw legal research costs’ should properly be treated as overhead, not costs.”

None of these federal cases, however, addressed the ethical propriety of charging a client for these kinds of expenses; rather, the only issue was whether the court would award them as costs.

⁴ Vapnek, et al., would allow billing secretarial overtime to a client. “Secretarial services may not be billed as attorney time, although secretarial overtime may be billed as a cost or disbursement,” citing Los Angeles Bar Assn. Form. Opn. 391 (1981). That opinion, however, is limited to billing secretarial (or law clerk or paralegal) services as attorney time—a violation of former Rule 2-107(a), now, in substance, Rule 4-200. The Los Angeles opinion does not address billing secretarial overtime as a cost.
Business & Professions Code Section 6148(a).

Business & Professions Code section 6148(a) requires a written fee contract to contain, *inter alia*, a statement of “charges applicable to the case.” Vapnek, *et al.*, without discussion, treats “charges applicable to the case” as costs and compares that section with the provision of section 6147(a)(2) which requires, in a contingency fee agreement, a statement how disbursements and costs will affect the contingent fee and the client’s recovery. (*Id.* at 5:651.) Nothing in 6148(a)(1) states what level of detail such a written fee agreement must provide. Further, no California case has construed this clause in section 6148(a)(1).

Non-California Authority.

Given the absence of direct—or even indirect—California authority on this question, and for that very reason, we look to ethics opinions outside California for guidance. The Rules of Professional Conduct, the State Bar Act, and the opinions of California courts interpreting that authority bind California lawyers. Although the ABA Model Rules are not binding in California, they may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852.) Thus, in the absence of related authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associates for guidance. (Rule 1-100(A) (ethics and rules and standards promulgated by other jurisdictions and bar associations may also be considered); *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656.) “Thus, especially where there is no conflict with the public policy of California, the ABA Model Rules serve as a collateral source for guidance on proper professional guidance in California.” (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1210 [internal quotation marks and citation omitted]; *Legacy Villas at La Quinta Homeowners Assoc. v. Centex Homes* (C.D. Cal. April 30, 2012) 2012 WL 1536036 at *7).

ABA Formal Opinion 93-379.

In 1993, the American Bar Association issued Formal Opinion 93-379 (Billing for Professional Fees, Disbursements and Other Expenses). In addressing ABA Model Rule 1.5, the opinion concluded that a “lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing, and equipping an office.” The “overhead” expenses the opinion cited included:

[C]osts in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like [that] would be subsumed within the charges the lawyer is making for professional services.

ABA Model Rule 1.5(a), on which the opinion is grounded, prohibits “an unreasonable fee or an unreasonable amount of expenses;” California Rule 4-200(A), on the other hand, prohibits an

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5 How the voidability provision of section 6148(c), “upon the agreement being voided, [shall] be entitled to collect a reasonable fee,” would apply to unspecified costs.
“illegal or unconscionable fee.” While many of the same factors in Rule 4-200(B) are set forth in Model Rule 1.5(a)(1), the difference between “illegal or unconscionable” and “unreasonable” is both noteworthy and not insignificant.6

If a California court were to follow the federal cases cited above,7 and determine that the cost of certain in-house services are part of a lawyer’s general overhead, then a lawyer may not properly bill them to a client, absent express, advance agreement with the client.

The ABA Formal Opinion 93-379 goes on to conclude, however, that:

> The lawyer may recoup expenses reasonably incurred in connection with the client’s matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services so long as the charge reasonably reflects the lawyer’s actual cost for the services rendered.

In addition to the direct cost of the in-house service (i.e., the actual cost of making a copy) the opinion would also allow “a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator).”

The ABA opinion further concludes that, absent specific agreement in advance, the lawyer may not charge a client more than the direct cost associated with the service such that it would be improper for a lawyer to add a surcharge to the actual cost of a disbursement. So also, if the lawyer receives a discounted rate from a third-party provider, it would be improper not to pass the benefit of the discount to the client rather than charge the client the full rate and reserve the profit to the lawyer.

Applying Model Rule 1.5’s mandate that fees be reasonable, the opinion concludes:

6 Some California courts, however, have used “unconscionable” and “unreasonable” in tandem. For example, in People v. Millard (2009) 175 Cal.App.7th 31 (4th Dist. Div. 1) the court, in a restitution case, found that the trial court abused its discretion because, inter alia, it “awarded attorney’s fees it found were unconscionable/unreasonable… [T]o the extent it found [the contingency fee] ‘unconscionable,’ it appears it implicitly, if not expressly, found that fee was unreasonable.” In Ojeda, supra at 17, the court said that “attorneys are ethically prohibited from charging an unreasonable or unconscionable fee,” citing both Rule 4-200 and Model Rule 1.5(a) and (c). Finally, in Bird, Marella, Boxer & Wolpert, supra at 431, the court found that Rule 4-200 expresses the “fiduciary duty to charge only fair, reasonable and conscionable fees.”

7 In Margolin v. Regional Planning Comm. of Los Angeles County (1982) 134 Cal.App.3d 999, 1003-1004, the court acknowledged that California cases have devoted little attention to the determination of the reasonable hourly value of an attorney’s services. “Federal cases have examined the subject more closely, however, and their reasoning is both persuasive and appropriate for consideration.” Whether a California court would find the federal cases cited “persuasive and appropriate for consideration,” in addressing the propriety of billing a client for in-house services is unknown.
Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in 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 professional services themselves. The lawyer’s stock and trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services. (Id.)

**ABA Model Rule 1.5.**

Thus, the opinion tracks Comment 1 to ABA Model Rule 1.5 which states:

> A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

**California Endorsement of ABA Formal Opinion 93-379.**

In, *In the matter of Kroff* (1998) 3 Cal. State Bar Ct.Rptr. 838, the court endorsed the conclusions of ABA Formal Opinion 93-379. In *Kroff*, the court was unable to conclude that the lawyer’s collection of estimated lump sum cost reimbursements ($105) resulted in an unconscionable fee or was an act involving moral turpitude since there was no evidence that the $105 was excessive or that the lawyer hid his lump sum costs reimbursement procedures from his client. The *Kroff* court, however, found that failure to disclose costs violated Rule 4-100(B)(3). (Id. at 854; see also *In the Matter of Elstead* (2012) 2012 WL 5406777, *6, and *In the Matter of Fonte* (1994) 2 Cal. State Bar Ct.Rptr. 752, 757-758 [requiring detailed summary of hourly fees and costs in hourly fee agreement].)

**Other Authority.**

In 2000, ABA Formal Opinion 00-420, reiterated the conclusion reached in Opinion 93-379 in addressing lawyer billing a client for a contract lawyer services as a cost or disbursement. 8

Likewise, the Association of the Bar of the City of New York’s Formal Opinion 2006-3, in addressing outsourcing of legal support services, followed ABA Formal Opinion 93-379 and concluded that a lawyer may charge the client no more than the direct cost associated with the outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service.

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8 Formal Opinion 00-420, however, would permit a lawyer to bill the services of a contract lawyer either as a cost or disbursement or as legal fees. In the latter circumstance, the reasonableness provision of Model Rule 1.5(a) applies and, so long as the total fee is reasonable, the lawyer may add a surcharge to the amount paid to the contract lawyer.
Both ABA Opinion 00-420 and New York Opinion 2006-3—following ABA Opinion 93-379—would permit charging more than the direct cost of the service and reasonable allocation of overhead related to it if the initial fee agreement specifically identified the costs to be charged.

V
APPLICATION TO BACKGROUND FACTS

With the exception of “copy services,” Lawyer’s fee agreement fails to disclose that lawyer will be billing client for in-house services in addition to costs paid to third-party providers. Indeed, even the term “copy services” is ambiguous because it fails to state whether the charge will be limited to third-party copy services or also includes in-house copying expenses. To the extent that Bus. & Prof. Code section 6148(a)’s “charges applicable to the case” is read to include a statement of specific costs and expenses, Lawyer’s fee agreement arguably fails adequately to set forth the in-house services she charged the Client.  

Obviously the better practice for Lawyer would have been to specify in her fee agreement that, in addition to costs paid to third-party vendors, she would bill, and Client would be expected to pay, certain in-house expenses related to the engagement. There is not, however, sufficient authority to conclude that such explicit disclosure is ethically required. 

Applying ABA Formal Opinion 93-379, as endorsed by Kroff, and Model Rule 1.5’s Comment 1, Lawyer could legitimately charge Client the actual direct cost of photocopying, processing electronic discovery, electronic research, the cost of CDs, mileage and parking, meals, Federal Express, postage and long-distance telephone, provided that those costs were directly related to her representation of the Client. Since nothing in Lawyer’s fee agreement establishes that the Lawyer may charge Client more than the direct cost associated with each service, Lawyer is ethically prohibited from doing so.

Because Lawyer’s fee agreement did not specify a specific per-page charge for photocopying, Lawyer can bill Client only Lawyer’s actual cost of making each copy together with “a reasonable allocation of overhead expenses directly associated” with making those copies. How a lawyer is to make that “reasonable allocation” was deemed beyond the scope of ABA Formal Opinion 93-379, and is beyond the scope of this opinion except that it cannot be a disguised profit. 

Secretarial overtime, however, presents a different issue. If the overtime was incurred, for example, because work for other clients was done during the normal workday and work for Client was, thus, performed on an overtime basis, charging Client for that secretarial overtime would not comply with ABA Formal Opinion 93-379. It would not be an expense reasonably incurred in connection with Client’s matter; rather, it reflects how Lawyer prioritized her office workflow. If, on the other hand, some emergency or time exigency required that some work for

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9 See discussion at pp. 3-4, above.
10 To avoid confusion, Lawyer’s fee agreement should advise Client that all billed costs may not be recoverable costs even if Client prevails.
11 See discussion at pp. 5-6, above, and conclusion, below.
the Client necessarily had to be performed on an overtime basis, then, arguably, passing that expense on to the Client is ethically permissible.

VI
CONCLUSION

Given the absence of California authority, a California lawyer should look to, *inter alia*, the ABA Model Rules and ABA Formal Opinions interpreting them for guidance on the issues which this opinion raises. Relying on ABA Formal Opinion 93-379, and specifically its favorable endorsement in *Kroff*—itself a decision involving State Bar discipline—a California lawyer may bill a client for costs and expenses actually specified in the initial fee agreement so long as they are not unconscionable. Absent such specification, a California lawyer may bill a client for the direct cost of in-house services necessary for the lawyer’s representation of a client. The intent of such charges, however, is not that the lawyer make an additional profit, but rather solely that the lawyer be compensated—at actual cost—for expenses necessarily incurred in the client’s representation. In addition, a lawyer may bill a client for a reasonable allocation of overhead expenses directly associated with providing the in-house service.

**Disclaimer:** The Legal Ethics Committee of the San Diego County Bar Association issued this opinion. It is advisory only and is not binding on any member of the SDCBA, any other member of the State Bar of California, the State Bar of California or its Board of Governors.