FLORIDA BAR ETHICS OPINION
CONSOLIDATED OPINION 76-33 and 76-38
March 15, 1977

Advisory ethics opinions are not binding.

In billing a client a lawyer may separately itemize for legal research and other similar services performed by salaried nonlawyer personnel, but care should be taken to avoid the double-billing that could result if such charges are already accounted for in overhead.

CPR: EC 2-19; Canon 3; EC 3-1, 3-4, 3-6; DR 3-104
Opinions: 73-41, 73-43, 74-35, 75-29; ABA Informal 343, 1333

Vice Chairman Lehan stated the opinion of the committee:

Members of The Florida Bar ask about the propriety of separately itemizing on a bill to a client time devoted to a legal matter for that client by a lawyer's nonlawyer employees for work involving legal research, investigation, or drafting of pleadings done under the supervision of the lawyer.

The Code of Professional Conduct [sic] does not specifically answer the present inquiries. However, the Code does specifically authorize the delegation by a lawyer of functions of the lawyer to "nonlawyers such as secretaries, law clerks, investigators, researchers, legal assistants, accountants, draftsmen, office administrators, and other lay personnel to assist the lawyer in the delivery of legal services," subject to certain qualifications. EC 3-6. DR 3-104, as to "nonlawyer personnel," specifically sets out circumstances and conditions under which such personnel may and may not be utilized. Both EC 3-6 and DR 3-104 stress, among other things, that the work should be done under the direct supervision of the lawyer, who shall be responsible for such work, which will be merged into the lawyer's own completed product.

This Committee's Opinion 75-29 states that a lawyer may not charge a client as a cost item for the secretarial time the firm spends for the client if such time is a part of the lawyer's regular and usual overhead. However, that opinion does not proscribe such charges for extra and unusual secretarial services, e.g., overtime or other work for the client not ordinarily done by the legal secretary.

The Committee believes that the Code does not contemplate that such work of nonlawyer personnel described in EC 3-6 and DR 3-104 will be free of charge and believes that the Code does not prohibit a lawyer from separately itemizing on his bill to the client the time of nonlawyer personnel of the type referred to in the inquiries.

We believe that the foregoing conclusion of this Committee is not inconsistent with Opinion 75-29 and that the types of work described in the present inquiries and in EC 3-6 and DR 3-104 are work which might otherwise have been done by the lawyer himself and which is delegated by the lawyer and is not that referred to in Opinion 75-29 as ordinarily done by a legal secretary, the salary for which is a part of the normal office overhead which a lawyer would routinely incur without reference to a particular matter for a particular client.

The work described in the present inquiries is such that the lawyer, in our opinion, could charge therefor as separate itemization on his bill if done by outside independent contractors, e.g., legal research services, research computer systems, private investigators and the like, and there should not be a difference in that respect if those same types of services are performed by salaried personnel employed by the lawyer. See ABA Informal Opinion 343 (1970 Supplement to The Digest of Bar Association Ethics Opinions, No. 5050), stating that where a lawyer employs an accountant with the client's consent, he can bill the accountant's fee as a separate item of expense.

Also, see especially ABA Informal Opinion 1333, which does not prohibit such separate itemization for time devoted to a legal matter by a nonadmitted law clerk, with or without degree, subject to the caveat, to which this Committee also subscribes, that care is taken to avoid the appearance of the unauthorized practice of law. We add the further, more specific caveats that all conditions of DR 3-104 be fully complied with, that care is taken to avoid the slightest appearance otherwise, that the charges for such nonlawyer work only reflect the time spent on the particular matter which is being billed and are not based upon the nonlawyer's salary as a whole, and that such charges not be excessive or disproportionate to charges for like services, if reasonably available, performed by independent contractors.

The use of nonlawyer personnel should never be permitted to detract or appear to detract from the "fiduciary and personal character of the lawyer-client relationship." EC 3-1. See our Opinion 74-35 that a lawyer may not delegate to nonlawyer personnel the handling of negotiations with adjusters, and stressing EC 3-4, which says that

> "[p]roper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession."

See also our Opinions 73-41 and 73-43, proscribing the use of nonlawyer personnel in the taking of depositions and attending closings without the presence of the lawyer-employer.

The Committee also believes that, consistent with ABA Informal Opinion 1333, the lawyer is not *required* to so separately itemize such work of nonlawyer personnel described in EC 3-6 and DR 3-104 but that time for such work may, in the alternative, be included as an element considered in arriving at the lawyer's fee in the same manner as the lawyer's normal and usual overhead expenses are treated. See also our Opinion 75-29. However, the lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee. If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee.

As to whether knowledge and specific advance consent of the client as to such uses of nonlawyer personnel, and charges therefor, are necessary, the Committee majority feels that it is in some instances and is not in others. For example, it would not seem appropriate for a lawyer to always have to seek the consent of the client as to use of a law clerk in conducting legal research.

And under EC 3-6 and DR 3-104 the work delegated to nonlawyer personnel should be so much under the lawyer's supervision and ultimately merged into the lawyer's own product that the work will be, in effect, that of the lawyer himself, who presumably has entered into a "clear agreement with his client as to the basis of the fee charges to be made." EC 2-19. However, we feel that such "clear agreement" could not exist in many situations where the lawyer intends to make substantial use of nonlawyer personnel, and to bill directly or indirectly therefor, unless the client is informed of that intention at the time the fee agreement is entered into.

Therefore, if there is a potentiality of dispute with, or of lack of clear agreement with and understanding by, the client as to the basis of the lawyer's charges, including the foregoing elements of nonlawyer time, whether or not the nonlawyer personnel time is to be separately itemized, the lawyer's intention to so use nonlawyer personnel and charge directly or indirectly therefor should be discussed in advance with, and approved by, the client. This would seem especially the case where substantial use is to be made of any kind of such nonlawyer services. See also EC 2-19 as to explaining to clients the reasons for particular fee arrangements proposed.

The Committee suggests that the potentiality of such dispute or lack of clear agreement and understanding referred to in the foregoing paragraph may exist in the case of work to be done by nonlawyer personnel who are employed by the lawyer and who perform services of a type known by the lay public to be regularly available through independent contractors, e.g., investigators. The Committee feels that such potentiality especially may exist where the lawyer enters into a contingent fee arrangement with the client and then separately itemizes charges to the client for the time of nonlawyer personnel who are full-time employees of the lawyer; the arrangement may be susceptible of interpretation as involving charging the client for such nonlawyer services and at the same time, in fact or effect, duplicating the charges by including the salaries of such personnel as overhead and an element of the lawyer's own fee, as proscribed hereinabove.

Again, as stated above, care should be taken to avoid the appearance of any unauthorized practice of law or of the use of such nonlawyer personnel in any way other than as set forth in Canon 3. Accordingly, even where the advance specific consent of the client as to the use of nonlawyer personnel may not seem necessary, as referred to above, the lawyer, when intending to separately itemize on his bill for the services of nonlawyer personnel, should, when arriving at the fee agreement with the client, acquaint the client with the legal limitations upon any such personnel whose services might be used and with the conditions applicable to the use of such personnel as provided in Canon 3.