Billing Guidelines and Fee Disputes: A Case Law Review

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Recent studies on abusive billing practices by attorneys point to the existence of a significant problem in this area. This article reviews the extensive case law establishing billing guidelines, exploring some possible theories of attorney liability and incorporating some suggested litigation tactics.

Over the past few years, the subject of abusive billing practices by attorneys has received an increasing amount of attention. Analysis of the subject has ranged from the merely anecdotal[1] to the philosophical.[2] Some commentators have focused on the various conflicts of interest inherent in hourly billing as a contributing cause of the problem,[3] while others have focused on improved law office management techniques and better communication between the attorney and client as a cure.[4] Other articles have analyzed the growing body of case law that has established certain basic requirements for ethical attorney billing,[5] while still others have indicated that a surprisingly large number of attorneys engage in overbilling.[6] One author stated that nearly all of the 20 lawyers she interviewed reported some amount of deception in billing practices.[7] Another author's study found that 38 percent of the private practitioners and 40.7 percent of the corporate attorneys believe that lawyers "occasionally" inflate their hours. Based on his study, this author concluded that there is no support for the proposition that "the vast majority of lawyers bill ethically and accurately."[8] However measured, there can be little doubt that deceptive attorney billing is a significant problem.

This article reviews the extensive case law establishing billing guidelines, exploring some possible theories of attorney liability and incorporating some suggested litigation tactics. Its explicit purpose is to demonstrate the serious potential downside to those attorneys who are engaging in or who are contemplating engaging in such practices, while providing clients with the research necessary in the event they find themselves the victims of such overbilling.

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THE CLIENT'S RIGHT TO REVIEW FILES AND AUDIT BILLS

In protecting against abusive billing, a client must be prepared to audit the legal bills. Such an audit can be completed by an outside legal auditing firm or by the client if he or she has the expertise.[9]

An essential element of a complete audit is a review of all work product of the attorney. In *Rose v. State Bar of California*, 49 Cal. 3d 646 (1989), the court held the attorney unreasonably delayed in surrendering the client's medical malpractice case file to a new attorney where the attorney did not comply with new counsel's request for the file for approximately six months. *See also Weiss v. Marcus*, 51 Cal. App. 3d 590 (1975); *Kallen v. Delug*, 157 Cal. App. 3d 940 (1984).

In *Academy of California Optometrists, Inc. v. Superior Court*, 51 Cal. App. 3d 999 (1975), an attorney discharged four years into ongoing litigation relied on the lien contained in the written fee agreement to retain files. The court held that California Rule of Professional Conduct 2-111(A)(2) "applies to discharge, as well as withdrawal, and that withholding files is inimical to the client's interest and thus a violation of the attorney's ethical obligations to the client."

In *Finch v. State Bar*, 28 Cal. 3d 659 (1981), the court found the failure to forward files and documents to substitute counsel warranted suspension of an attorney's license.

In conducting an on-site audit, the auditors interview all timekeepers who billed to the matter to assure that the invoices accurately reflect work performed and to seek answers to any questions that may arise during the review of the invoices and work product. Attorneys sometimes refuse such interviews on the grounds they are too time consuming or disruptive. Such refusals are often a tactical error, since these interviews often allow the auditors to resolve questions in favor of the attorneys.

In cases where the insurance company is responsible for the defense costs, attorneys sometimes refuse to cooperate on the grounds that such cooperation would waive the attorney-client privilege. The presentation of documentation and communications which would normally fall within the attorney-client communication privilege does not constitute a "waiver" of that privilege when the information is shared with a party's insurer who is supervising the underlying litigation and is responsible for the payment of attorney's fees, since the insurer, under those circumstances, is the joint holder of the privilege.

A defense lawyer representing an insured in such a situation routinely and necessarily represents two clients, the insurer and the insured, in what has been appropriately characterized as a "tripartite relationship." *See Purdy v. Pacific Auto Deal Insurance Co.*, 157 Cal. App. 3d 59 (1984); and *American Mutual Liability Insurance Co. v. Superior Court for Sacramento County*, 38 Cal. App. 3d 579 (1974). The "tripartite relationship" was succinctly characterized in *American Mutual Liability Insurance Co. v. Superior Court*:

> In the insured-insurer relationship, the attorney characteristically is engaged and paid by the carrier to defend the insured. The insured and the insurer have certain obligations to each other, arising from the insurance contract. Both the insured and the carrier have a common interest in defeating or settling the third party's claim.

In such a situation, the attorney has two clients whose primary overlapping and common interest is the speedy and successful resolution of the claim and litigation. Conceptually, each member of the trio—attorney, client-insured, and client-insurer—has corresponding rights and obligations founded largely in the contract, and as for the attorney, in the Rules of Professional Conduct as well. The three parties may be viewed as a loose partnership, coalition, or alliance directed toward a common goal, sharing a common purpose that lasts during the pendency of the claim or litigation against the insured. *See also Lieberman v. Employer's Insurance Co. of Wausau*, 419 A.2d 417 (N.J. 1980) (citing Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 Ins. Couns. J. 244 (1978)); *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 392 N.E.2d 1365 (Ill. App. Ct. 1979).

This tripartite relationship also exists when the insurer is responsible for payment of *Cumis*[10] attorney fees. So long as the interests of the insured and insurer coincide, they are both clients of the defense attorney, and the defense attorney's fiduciary obligation and duties run to both the insurer and the insured.[11]

THE ATTORNEY AS FIDUCIARY

The touchstone in any fee dispute is the basic principle that an attorney is bound to conduct himself or herself as fiduciary or trustee, occupying the highest position of confidence and trust. In

all relationships with the client, the attorney must exercise and maintain the utmost good faith, integrity, honesty, fairness, and undivided loyalty. *Newman v. Silver*, 553 F. Supp. 485 (S.D.N.Y. 1982), *aff'd in part and vacated in part*, 713 F.2d 14 (2d Cir. 1983).

Where the fiduciary benefits at the expense of his or her client, the transaction is presumed void.

Where a fiduciary relationship exists between parties, all transactions between them are scrutinized by the courts with extreme vigilance. Where the fiduciary benefits at the expense of his or her client, the transaction is presumed void; the burden of proof is shifted to the fiduciary, and it is incumbent upon the fiduciary to show affirmatively that no deception or fraud was practiced, no undue influences used, and that all was fair, open, voluntary, and well understood by the client. *Greene v. Greene*, 436 N.E.2d 496 (1982); *Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 385 N.E.2d 285 (1978); *Howard v. Murray*, 372 N.E.2d 568 (1977).

The fiduciary relationship between the attorney and client exists as a matter of law and requires the attorney to "exercise the utmost good faith and fairness in dealing with the client." *Coughlin v. SeRine*, 507 N.E.2d 505 (Ill. App. Ct. 1987). One of an attorney's most basic fiduciary duties is to render a full and fair disclosure to the client of all facts that materially affect the client's rights and interests. *Ball v. Posey*, 176 Cal. App. 3d 1209 (1986) (quoting *Neel v. Magana Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176 (1971).

Evidence of an attorney's violation of the Professional Rules of Conduct can be introduced to demonstrate that the attorney breached his or her fiduciary duty. *Mirabito v. Liccardo*, 4 Cal. App. 4th 41 (1992). *See also Avianca, Inc. v. Corriea*, 705 F. Supp. 666 (D.C. 1989); *Coughlin v. SeRine*, 507 N.E.2d 505 (Ill. App. Ct. 1987). It is a breach of fiduciary duty for an attorney to bill for unnecessary services and overcharge fees. *Coughlin v. SeRine*, 507 N.E.2d 505 (Ill. App. Ct. 1987). "The falsification in any manner of bills to clients is unethical and reprehensible. Billing practices, like every other aspect of client dealing, should be conducted in a scrupulously honest manner." *Florida Bar v. Herzog*, 521 So. 2d 1118 (Fla. 1988).

DUTY TO USE ETHICAL BILLING PRACTICES AND PROPER BILLING JUDGMENT

In *Hutchinson v. Wells*, 719 F. Supp. 1435 (S.D. Ind. 1989), the court excluded the hours billed for review of billing records, time records, and expenses, and for a telephone call to the client's sister. The court held the petition manifested "improper billing judgment." "Most lawyers do not bill their fee-paying clients for hours spent preparing bills." (Quoting *Shorter v. Valley Bank & Trust Co.*, 678 F. Supp. 714 (N.D. Ill. 1988)).

The court in *In re Leonard Jed Co.*, 103 B.R. 706 (Bankr. D. Md. 1989), stated, "Normally, counsel who represents a private client exercises what the courts refer to as 'billing judgment' by 'writing off' charges for certain things." The records of the firm did not "evidence the exercise of any billing judgment in that nothing appears to have been written off. In the absence of such evidence, the court will exercise its own billing judgment by writing off various efforts which ought not to have been charged to the estate as being either totally nonproductive or of negligible benefit."

ACTUAL KNOWLEDGE NOT REQUIRED FOR ATTORNEY LIABILITY

If there is evidence that an attorney knew or could have known by the exercise of reasonable diligence that fee and/or disbursement invoices to his or her client were not accurate and/or contained duplicate billings, the invoice is baseless and the issue of the attorney's bad faith is for the trier of fact. *U.S. v. Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978). Innocent partners can be held liable for the overbilling or fraudulent conduct of one of their partners. *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990); *Dresser v. Digges*, CIV No. JH-89-4885 (D. Md. Aug. 30, 1989) (189 WL 139234); *Myers v. Aragona*, 21 Md. App. 45, *cert. denied*, 272 Md. 746 (1974).

ATTORNEY'S BURDEN TO DEMONSTRATE REASONABLENESS OF FEES

In *Asbestos Claims Facility v. Berry & Berry*, 219 Cal. App. 3d 9 (1990), the court stated, "The attorneys' bare statement that 'they have reasonably

expended approximately four hundred (400) hours of their time on legal matters concerning the estate' is in no manner enlightening nor persuasive and in the case at bench insufficient as the basis for determination by the trial court of the amounts to be awarded" (quoting *Estate of Fulcher*, 234 Cal. App. 2d 710 (1965)). "If bills submitted by designated defense counsel are challenged, close scrutiny by the trial court is essential to ascertain that compensation is not being sought for work outside the scope of the appointment, or for unnecessary or duplicative activities."

Courts have expressed a distrust of billing summaries where there are allegations of inflated hours.

In support of their motion to compel payment of fees, the attorneys in *Berry & Berry* submitted a listing of their total fees and expenses and exemplars of bills sent in the past, but no copies of the bills for the months in issue. The appellate court found the showing deficient and remanded the case to the trial court for rehearing. "Respondent failed to specify what services were performed, or provide any basis upon which the trial court could have concluded either that the services rendered were within the scope of the order or that fees were reasonable." *See also In re Continental Illinois Securities Litigation*, 750 F. Supp. 868 (N.D. Ill. 1990); *Buechner v. Goodman*, 197 A. 586 (1938).

In *Kronfeld v. Transworld Airlines, Inc.*, 129 F.R.D. 598 (S.D.N.Y. 1990), the court stated:

> Entries showing time spent conferring with co-counsel should be subject to corroboration by co-counsel's own time records. . . . [I]t seems unreasonable to charge the class for numerous calls of [short] duration billed by a senior partner which were not significant enough to warrant note in [co-counsel]'s records. "The implication [of the absence of a corresponding notation in the records of counsel receiving the call] is that a particular telephone conference . . . was not so significant or of such benefit to the class that it was recorded by both counsel."

Quoting *In re WICAT Securities Litigation*, 671 F. Supp. 726 (D. Utah 1987).

In *LeRoy v. City of Houston*, 906 F.2d 1068 (5th Cir. 1990), the court stated it was a petitioner's burden to show the amount of time expended was reasonable. The court found the showing could not properly be made because the petitioner used blocked entries and vague task descriptions.

In *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291 (9th Cir. 1994), the court reduced the attorney's hours because he did not adequately document the substance of his calls and repeatedly rounded his time upward. The court of appeals, citing *Chalmers v. City of Los Angeles*, 796 F.2d 1205 (9th Cir. 1986), noted the attorney bears the burden of submitting detailed time records and upheld the district court's decision that the attorney failed to meet this burden by submitting computer-generated summaries of all hours expended on the litigation.

An attorney who cannot reasonably account for his or her time and disbursements is liable for conversion for what he or she withheld from the client during his or her stewardship. *Musico v. Champion Credit Corp.*, 764 F.2d 102 (2d Cir. 1985).

Courts have expressed a distrust of billing summaries where there are allegations of inflated hours. For example, in *Sweeney v. Athens Regional Medical Center*, 917 F.2d 1560 (11th Cir. 1990), the court ruled that the trial court erred by not requiring the attorneys to document their hours where the attorneys presented the court with a total figure without a breakdown showing how the hours were spent, and without time sheets or any evidence that they made notation of the hours spent on a daily basis. The court stated that in light of the allegations that the attorneys were inflating hours, the court should have required the attorneys to provide documentation.

See also In re Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), *aff'd in relevant part*, 751 F.2d 562 (3d Cir. 1984); *Intel Corp. v. Terabyte International*, 6 F.3d 614 (9th Cir. 1993).

COMPENSATION GOVERNED BY EXPRESS CONTRACT WITH CLIENT

Gair v. Peck, 160 N.E.2d 43 (N.Y. 1959), *remittitur amd'd*, 161 N.E.2d 736 (N.Y. 1959), *cert. denied and appeal dismissed*, 361 U.S. 374 (1960).

It is the attorney's exclusive burden to fully and fairly inform the client of all factors that bear on the determination of the attorney's fee, including hourly rates. If the only disclosed basis for an attorney's fee is "hourly rates," time is then the "sole determinate" of the fee to the exclusion of any *quantum meruit* consideration. Where the legal fee is based on time spent, an attorney is barred from demanding (or taking without permission) a

bonus from the client for an alleged "result factor," because otherwise a client could not limit the attorney's fees to the amount the client agreed. *Walker & Corsa v. Tunisian Office*, 84 Civ. 0694 (S.D.N.Y. Jan. 7, 1985), 1985 A.M.C. 936 *modified* (S.D.N.Y. Feb. 21, 1985), 1985 A.M.C. 2910 (not officially reported); *see also Petition of Rosenman, Colin, Freund, Lewis & Cohen*, 600 F. Supp. 527 (S.D.N.Y. 1984). *See also* California Business and Professions Code Section 6148.

Attorney fee agreements must be strictly construed against the attorney. *Severson & Werson v. Bolinger*, 235 Cal. App. 3d 1569 (1991).

COMPENSATION FOR COMPETENT AND PRODUCTIVE EFFORTS ONLY

Common sense dictates that the computation of the value of the attorney's services be limited to reasonably competent and productive efforts and exclude bumbling and wasteful activity from the court. *U.S.A. v. Carnevale*, 624 F. Supp. 381 (D.R.I. 1985). *See also Williamson v. John D. Quinn Construction Corp.*, 537 F. Supp. at 617 (S.D.N.Y. 1982).

In *In re Chicago Lutheran Hospital Association*, 89 B.R. 719 (Bankr. N.D. Ill. 1988), counsel who attended hearings on a "standby" basis in case his expertise was required received compensation only for time the court deemed productive. In *In re Wildman*, 72 B.R. 700 (Bankr. N.D. Ill. 1987), attorney fees were disallowed for time the attorney spent performing a trustee's duties. *See also In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830 (Bankr. C.D. Cal. 1991); *Association for Retarded Citizens of North Dakota v. Olsen*, 713 F.2d 1384 (8th Cir. 1983).

Tasks that can be readily performed by associates will not be compensated at partner rates. *Blumberg v. Jacob*, 624 F. Supp. 669 (S.D. Ohio 1985); *Blank v. Talley Industries, Inc.*, 390 F. Supp. 1 (S.D.N.Y. 1975); *Complaint of Cap'n Rick Corp.*, 525 F. Supp. 31 (S.D.N.Y. 1981), *aff'd*, 685 F.2d 423 (2d Cir. 1982).

COURTS DISALLOW "BLOCKED BILLING"

Daily time entries consisting of two or more task descriptions are known as "blocked billings." Numerous courts have disallowed blocked entries.

The bankruptcy court in *In re Leonard Jed Co.*, 103 B.R. 706 (Bankr. D. Md. 1989), disallowed fees for what it described as "lumping," which refers to the grouping of different tasks within one block of time on a time record.

> It is a practice universally disapproved by bankruptcy courts for two reasons. One, it permits an applicant to claim compensation for rather minor tasks which, if reported individually, would not be compensable. Two, it prevents the Court from determining whether individual tasks were expeditiously performed within a reasonable period of time because it is impossible to separate into components the services which have been lumped together.

See also Cristancho v. National Broadcasting Co., Inc., 117 F.R.D. 609 (N.D. Ill. 1987); *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989); *In re Donovan*, 877 F.2d 982 (D.C. Cir. 1989); *Keith v. Volpe*, 644 F. Supp. 1312 (C.D. Cal. 1986).

In *LeRoy v. City of Houston*, 906 F.2d 1068 (5th Cir. 1990), the court stated:

> Nearly all of the entries showed only one undivided total amount of time on any one date. . . . [I]t was the plaintiffs' burden to show that the amount of time expended was reasonable, and this showing could not properly be made without some breakdown as to the separate functions performed and the number of hours devoted to each.

In *In re Chicago Lutheran Hospital Association*, 89 B.R. 719 (Bankr. N.D. Ill. 1988), no compensation was awarded for multiple services "lumped" together in the fee application. The court refused to "guess or spend excessive court time to justify a fee for an applicant who [had] not itself done so."

ATTORNEY ACCOUNTABILITY FOR FEE ESTIMATE

In *In re Crown Orthodontic Dental Group*, 159 B.R. 307 (Bankr. C.D. Cal. 1993), the court stated:

> If an attorney estimates the cost of his or her services and that estimate is a critical part of the negotiations which the client relies upon in employing the attorney, unless there are some real, unexpected changes of circumstances, the attorney should be bound by that estimate.

The court in *In re Chas. A. Stevens & Co.*, 105 B.R. 866 (Bankr. N.D. Ill. 1989), stated:

> Although the court will not enslave professionals to the exact amount of their projected budgets, such forecasts must be given substantial weight when reviewing fee requests. . . . The court holds that when professionals, especially financial experts, project estimated fees or budgets to a client, they should expect to be held to the same or some reasonable variation thereof. For [the applicant] . . . to apply to this court after such enormous overruns and expect payment in full is unrealistic and unreasonable.

DETAILED INVOICE EXAMINATION BY COURT UNNECESSARY

The court in *In re Maruko, Inc.*, 160 B.R. 633 (Bankr. S.D. Cal. 1993), stated:

> In my view, the Court need not identify every insufficient or offending entry and each item disallowed with particularity. There are simply insufficient resources—even with the assistance of the Fee Examiner and the United States Trustee—for the Court to do so.

In *In re Bank of New England Corp.*, 142 B.R. 584 (D. Mass. 1992), the bankruptcy court properly reduced fees 42 percent where the court examined the entire application, determined it was deficient, and offered nine specific examples of where it was overstated. The court was not required to analyze each and every entry.

VAGUE BILLING ENTRIES

In *H.J., Inc. v. Flygt Corp.*, 925 F.2d 257 (8th Cir. 1991), the court stated that numerous entries such as "legal research" or "trial prep" or "meet with client" were inadequate. *See also Desimone v. Industrial Bio-Test Laboratories, Inc.*, 83 F.R.D. 615 (S.D.N.Y. 1979).

In *In re Continental Illinois Securities Litigation*, 572 F. Supp. 931 (N.D. Ill. 1983), the court set forth in detail appropriate billing guidelines.

As the court stated in *Cristancho v. National Broadcasting Co., Inc.*, 117 F.R.D. 609 (N.D. Ill. 1987), "[t]he specific questions researched should be described, and their relationship to the case, if not apparent, should be explained." For conferences, "[t]he date of the conference, the participants, and a description of the topic sufficient to demonstrate the usefulness of the conference should be stated." *See also American Booksellers Association, Inc. v. Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986); and *Ecos, Inc., v. Brinegar*, 671 F. Supp. 381 (M.D.N.C. 1987).

In *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989), the court reduced the fees for insufficiently documented tasks:

> Examination of the application reveals numerous instances where the billing entries were not adequately documented. This defect in adequate record keeping is most prevalent among lawyers billing at the highest rates. For example, there are multitudinous billing entries, included among other entries for a particular day, that wholly fail to state, or to make any reference to the subject discussed at a conference, meeting or telephone conference.

Time allegedly spent on broad categories such as "legal research," "interviews," "other services," or "review of files" cannot be found to have been reasonably expended without proof of what the services were. *U.S.A. v. Thompson*, 361 F. Supp. 879 (D.C. 1973), *aff'd in part and vacated in part sub nom., U.S.A. v. Boggins*, 489 F.2d 1273 (D.C. Cir. 1974).

The court in *In re Associated Grocers of Colorado, Inc.*, 137 B.R. 413 (Bankr. D. Colo. 1990), stated:

> The Court should not be required to indulge in guesswork, nor undertake extensive labor to justify a fee for an attorney who has not done so himself. We do not find it an unbearable burden to require an attorney seeking compensation to enlighten the Court as to the nature of his toil and the relation it bears to the matters at hand. Absent such a statement, compensation may not be allowed.

See also Tomazzoli v. Sheedy, 804 F.2d 93 (7th Cir. 1986); *In re Bicoastal Corp.*, 121 B.R. 653 (Bankr. M.D. Fla. 1990); and *In re Ginji Corp.*, 117 B.R. 983 (Bankr. D. Nev. 1990).

In *U.S. Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989), the court affirmed a 30 percent reduction in attorney fees awarded to the plaintiff under Section 4 of the Clayton Act. 15 U.S.C. para. 15(a) (1982). Although counsel had exercised billing judgment, the court reduced the award 10 percent for "vagueness in documentation of certain time entries" and another 20 percent because of the plaintiff's limited success.

In *In re Weidau*, 78 B.R. 904 (Bankr. S.D. Ill. 1987), the court reduced counsel's fee application by 70 percent. Many entries, particularly telephone calls, were "simply unexplained" and "most

entries gave no indication why services were rendered or how the estate benefitted." Some entries referred to individuals who did not appear in the bankruptcy petition; others indicated unreasonable amounts of time for particular tasks. *See In re Wildman*, 72 B.R. 700 (Bankr. N.D. Ill. 1987), where the court disallowed fees for telephone calls for which the attorneys provided no explanation of the subject or purpose of the call.

In *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983), hundreds of hours described in vague or meaningless terms or which were insufficiently documented were disallowed.

CHARGING MULTIPLE CLIENTS FOR WORK THAT HAS BEEN DONE ONLY ONCE

In *Lockheed Min. Sol Coalition v. Lockheed M.&S. Co.*, 406 F. Supp. 828 (N.D. Cal. 1976), the court stated, "[I]t is clearly improper to make multiple charges for work that has only been done once." *See also* Maryland State Bar Association Ethics Op. 91-1.; *Truth in Billing*, A.B.A. J., Dec. 1992.

MAINTAINING ACCURATE TIME RECORDS

In *Martino v. Denevi*, 182 Cal. App. 3d 553 (1986), the court noted that an attorney should maintain accurate records of work done and time spent in preparing for each client's case. Lawyers who fail to keep accurate records of the services they perform may lose up to 40 percent of their billable time. The court also noted that an attorney's failure to keep books of account and other records is a basis for disciplinary action.

In *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984), the court stated, "[T]he absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance."

In *In re Department of Energy Stripper Well Exemption Litigation*, 695 F. Supp. 1097 (D. Kan. 1987), the court disallowed 750 hours of unrecorded time. *See also United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Association, Local 307 v. G&M Roofing & Sheet Metal Co., Inc.*, 732 F.2d 495 (6th Cir. 1984); *In re Donovan*, 877 F.2d 982 (D.C. Cir. 1989); *New York Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983); and *In re Hudson & Manhattan RR Co.*, 339 F.2d 114 (2d Cir. 1964).

See also Fitzsimmons v. State Bar, 34 Cal. 3d 327 (1983); *Dixon v. State Bar*, 39 Cal. 3d 335 (1985); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); *Blank v. Talley Industries, Inc.*, 390 F. Supp. 1 (S.D.N.Y. 1975).

In *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982), the court stated:

> Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney. . . . It is insufficient to provide the District Court with broad summaries of work done and hours logged.

The failure to keep proper time records is a factor to be considered in accepting the reliability of estimates and reconstructions made long after the rendition of services to justify a fee. *520 East 72nd Commercial Corp. v. 520 East 72nd Owner's Corp.*, 691 F.2d 728 (2d Cir. 1989); *Blank v. Talley Industries*, 390 F. Supp. 1 (S.D.N.Y. 1975). *See also Wojtkowski v. Cade*, 725 F.2d 127 (1st Cir. 1984) ("meticulous" time records necessary); *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Inst. Juveniles v. Secretary of Public Welfare*, 568 F. Supp. 1020 (E.D. Pa. 1983).

RECORDING TIME IN EXCESSIVE MINIMAL BILLING INCREMENTS

In *Ecos, Inc. v. Brinegar*, 671 F. Supp. 381 (M.D. N.C. 1987), the court found it noteworthy that 115 of the 155 entries were for 15 minutes and all of the entries were in multiples of 15 minutes. The attorneys claimed that all items less than 7.5 minutes were not billed. The court found the practice unacceptable. "Due to the 'rounding' of figures, the court is not convinced that the time records accurately reflect the amount of time actually expended on the case."

In *Kronfeld v. Transworld Airlines, Inc.*, 129 F.R.D. 598 (S.D.N.Y. 1990), the court noted that the minimal billing increment was 0.25 hours, which was "well in excess of the actual time spent on many of [the telephone] calls." The telephone records revealed that the firm billed 0.25 hours each for a one-minute call and a five-minute call.

In *In re Tom Carter*, 55 B.R. 548 (Bankr. C.D. Cal. 1985), the court reduced fees awarded on an

interim petition by 10 percent to adjust for overcharging through the use of minimum billing increments of .25 hours and .20 hours. *See In re Wildman*, 72 B.R. 700 (Bankr. N.D. Ill. 1987) (minimum billing increments of .20 hours "unreasonable" for telephone calls lasting a few minutes); and *Tomazzoli v. Sheedy*, 804 F.2d 93 (7th Cir. 1986).

An attorney who performed services but failed to keep proper time records had his fee reduced by more than 50 percent from $30,000 to $13,000.

In *Del Noce v. Delyar Corp.*, 457 F. Supp. 1051 (S.D.N.Y. 1978), the court was critical of attorneys who failed to keep adequate, contemporaneous time records and reduced the fees of attorneys who had actually performed valuable services from more than $980,000 to $725,000.

Similarly, in *Matter of Ury*, 485 N.Y.S.2d 329 (N.Y. App. Div. 2d Dept. 1985), an attorney who performed services but failed to keep proper time records had his fee reduced by more than 50 percent from $30,000 to $13,000.

BILLING FOR EXCESSIVE INTRAOFFICE CONFERENCING

In *Henry v. First National Bank of Clarksdale*, 603 F. Supp. 658 (N.D. Miss. 1984), the court criticized time sheets because there was no indication of the dates of the conferences, number of conferences, the subject matter, or the amount of time consumed by each conference. *See also Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988).

In *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989), the court reduced the fees billed for intraoffice conferences.

> The attorneys also engaged in a plethora of conferences, most often denoted simply as "strategy" conferences, consuming the time of several attorneys who bill at very high rates. The hourly rates charged [were] of such magnitude as to indicate that the attorneys should have been able to decide on the proper strategy without the great number of strategy conferences attended by numerous firm lawyers.

As the court stated in *In re Continental Illinois Securities Litigation*, 750 F. Supp. 868 (N.D. Ill. 1990), "Generally, attorneys should work independently, without the incessant 'conferring' that so often forms a major part of the petition in all but the tiniest cases." *See also Keith v. Volpe*, 644 F. Supp. 1312 (C.D. Cal. 1986); *Daggett v. Kimmelman*, 811 F.2d 793 (3d Cir. 1987) ("not every attorney should be compensated for time spent in conference"); *Pfeifer v. Sentry Insurance, et al.*, 745 F. Supp. 1434 (E.D. Wis. 1990) (fees reduced for excessive intraoffice conferences among attorneys whose involvement was unauthorized).

BILLING FOR LAW CLERK OR PARALEGAL TIME

The American Bar Association Standing Committee on Legal Assistants defines a legal assistant or paralegal as:

> [a] person, qualified through education, training or work experience who is employed or retained by a lawyer, law office, governmental agency or other entity in a capacity or function which involves the performance under the ultimate direction and supervision of an attorney, of specifically-delegated [sic] substantive legal work, which work, for the most part, requires sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.[12]

If an attorney is seeking compensation for the services performed by a paralegal, the qualifications of the paralegal should be established to justify the charge. In *In re Grimes*, 115 B.R. 639 (Bankr. D.S.D. 1990), since there was no evidence of the qualifications of the paralegals submitted to the court, the court denied all compensation for paralegal services.

Some courts have stated that in light of the high hourly fees attorneys charge, law clerk or paralegal time is overhead that cannot be passed on to the client. Other courts have allowed attorneys to bill separately for these items but at a much reduced rate.

In *United Nuclear Corp. v. Cannon*, 564 F. Supp. 581 (D.R.I. 1983), the court noted that the law firm, not the client, should bear the expenses of a summer clerkship program, since it is designed to burnish the firm's allure and enhance its position in the recruiting wars.

In *In re Telesphere International Securities Litigation*, 753 F. Supp. 716 (N.D. Ill. 1990), the court approved $250 as the highest hourly rate for

the lawyers and treated every other expenditure, including compensation to paralegals, as overhead. *See also Keith v. Volpe*, 644 F. Supp. 1312 (C.D. Cal. 1986); and *American Booksellers Association, Inc. v. Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986).

In *Coleman v. Block*, 589 F. Supp. 1411 (D.N.D. 1984), the court stated, "Law clerk time is generally regarded as a cost which is part of law office overhead and is not recoverable."

In *In re Continental Illinois Securities Litigation*, 750 F. Supp. 868 (N.D. Ill. 1990), the court found "no definable relationship" between the cost of paralegal services and the rates charged by the firm and reduced the rates. "The problem in this case is that the profit is too high," the court stated. "It should bear an ascertainable and defensible relationship to petitioner's actual costs."

In *In re Edwin Meese III*, 907 F.2d 1192 (D.C. Cir. 1990), the court reduced the fees for paralegal services of a purely clerical nature from between $45 and $75 per hour to $10 per hour.

> The court therefore deducts those charges by both paralegals and law clerks for such tasks as "delivering" or "picking up" various documents as well as photocopying. In our view, such tasks are "purely clerical or secretarial" and thus cannot be billed at paralegal or law clerk rates.

It has also been suggested that law clerk time may be treated less favorably. *New York Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983); *Coleman v. Block*, 589 F. Supp. 1411 (D.N.D. 1984). These decisions held that clerkship programs are part of a law firm's recruiting efforts and, thus, this time should also be considered overhead.

The court held that time spent on nonlegal issues is not properly compensable at attorney's rates.

Time spent by paralegals and law clerks will be subject to the same type of scrutiny as that for attorneys. *See, e.g., Hinckley v. E. I. DuPont De Nemours & Co.*, 583 F. Supp. 11 (E.D. Pa. 1983) (finding both hourly rates and time claimed excessive); *Wabasha v. Solem*, 580 F. Supp. 448 (D.S.D. 1984).

In *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.C. 1983), the court held that time spent on nonlegal issues is not properly compensable at attorney's rates. *See also Rajender v. University of Minn.*, 546 F. Supp. 158 (D. Minn. 1982); *Bee v. Greaves*, 669 F. Supp. 372 (D. Utah 1987); *Society for Good Will to Retarded Children v. Cuomo*, 574 F. Supp. 994 (E.D.N.Y. 1983); and L.A. County Bar Association Formal Opinion No. 391 (Sept. 3, 1981).

BILLING FOR ADMINISTRATIVE OR CLERICAL WORK

Paralegal work that could have been performed by secretarial personnel will not be awarded. *Richardson v. Byrd*, 709 F.2d 1016 (5th Cir. 1983), *cert. denied sub nom. Dallas County Commissioner's Court v. Richardson*, 464 U.S. 1009 (1984).

In awarding attorney fees, courts in some cases have held that work involving investigation or compilation of data and statistics is not strictly legal work and therefore should be compensated at a lower rate. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The court in *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989), disallowed market rate billing for work done by librarians, clerical personnel, and other support staff. "Such services are generally considered within the overhead component of a lawyer's fee." *See also Feher v. Dept. of Labor and Industrial Relations*, 561 F. Supp. 757 (D. Haw. 1983). The court also found that a "reasonable attorney's fee" did not include secretarial overtime or overtime dinner expenses. "Prudent planning could have eliminated the need for secretarial overtime."

In *Keith v. Volpe*, 644 F. Supp. 1312 (C.D. Cal. 1986), the court disallowed hours claimed by attorneys, paralegals, and law clerks for items such as "pickup copies," "Xerox/distribute memo," "tag exhibits," "file review," "organize files," and "reproduce documents." The court found all "such routine work" was reflected as overhead in the hourly rates.

The U.S. Supreme Court in *Missouri v. Jenkins*, 491 U.S. 274 (1989), stated, "Of course, purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them." *See also Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988); *Spell v. McDaniel*, 852 F.2d 762 (4th Cir. 1988); *In re Bicoastal Corp.*, 121 B.R. 653 (Bankr. M.D. Fla. 1990).

In *In re Churchfield Management & Investment Corp.*, 98 B.R. 838 (Bankr. N.D. Ill. 1989), the applicant sought fees for sending newspaper articles to one of the other attorneys. "Such 'work' of clipping articles and stuffing them in envelopes for mailing should be done by secretarial staff and will not be

compensated," that court stated. *See also In re Ginji Corp.*, 117 B.R. 983 (Bankr. D. Nev. 1990).

The court in *In re Taylor*, 100 B.R. 42 (Bankr. D. Colo. 1989), noted:

> Attorneys and paralegals are to perform at their appropriate level of skill. Truly ministerial services, such as xeroxing [sic] and filing documents with the court should not be compensated at the same rate as those services which are legal. Even if an attorney or paralegal performs the ministerial services, it does not increase the value of that service.

See also Ruiz v. Estelle, 553 F. Supp. 567 (S.D. Tex. 1982); *In re Taylor*, 100 B.R. 42 (Bankr. D. Colo. 1989).

In *Cook v. Block*, 609 F. Supp. 1036 (D.C. 1985), the court refused to compensate attorneys for preparing daily time logs, drafting a change-of-address notice, filing documents, and attempting telephone contact with parties.

BILLING LONG DAYS VIEWED SKEPTICALLY

Lawyers are not superhuman. They must eat, sleep, and use the bathroom. Like other human beings, lawyers are also social creatures. They spend at least part of every day socializing with their staff and other lawyers. Since lawyers do not live at their offices, they also must spend some time traveling to and from work. Not every event in a lawyer's day is a billable one.[13]

Given the limitations imposed by nature, courts have understandably viewed high double-digit billing days with skepticism. *Metro Data Systems, Inc. v. Durango Systems, Inc.*, 597 F. Supp. 244 (D. Ariz. 1984) (a day in which one lawyer claimed to have worked 18.9 hours is "almost *ipso facto* excessive"); *Chrapliwy v. Uniroyal, Inc.*, 583 F. Supp. 40 (N.D. Ind. 1983) ("a day with 10 billable hours, while extraordinary, will occasionally occur. But 17 days where billable hours equaled or exceeded 12 hours is not justifiable. A 20 hour day is questionable"); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (it is "doubtful" that one lawyer would work 20 days during a consecutive 21-day period, never spending less than 5.5 hours on a case and spending between 11.8 and 20.75 hours on 15 of those days).

DECEPTIVE USE OF COMPUTERS

In *Florida Bar v. Herzog*, 521 So. 2d 1118 (Fla. 1988), the court found an attorney's billing practices highly objectionable where a computer system was used to manipulate the total amount of fees and costs, although the total charge remained reasonable. The computer program was capable of printing out a breakdown of hours worked per attorney, but the attorney gave the client only a one-page statement stating only the total hours worked. The court held that the billing practice was deceptive and improper.

ASSOCIATING OTHER ATTORNEYS INTO THE CASE

In *Johnson v. California Interurban Motor Transportation Association*, 24 Cal. App. 2d 322 (1938), the court held that an attorney has no authority by virtue of his or her retainer to employ counsel or assistants at the expense of the client. The charge of $100 per day agreed to by the attorney and client was held to cover anything paid by the attorney to the office assistants or others employed by the attorney to perform work of a legal nature.

RAISING RATES

A law firm that quotes a specific hourly rate for named attorneys to a client, who then agrees in writing to pay the firm's "regular hourly rates," cannot raise the hourly rates charged for the named attorneys without first notifying the client. *Severson & Werson v. Bolinger*, 235 Cal. App. 3d 1569 (1991). In *Severson*, the rates billed for the named attorneys increased several times over the course of representation; the fee agreement made no provision for rate changes, and the increases were not apparent from billing statements. A judgment in favor of the law firm for unpaid fees was reversed and remanded for a hearing on the amount of damages using the appropriate billing rates.

BILLING AT INAPPROPRIATE RATES

Lesser hourly rates are appropriate for attorneys who merely attend depositions as opposed to actively deposing witnesses or arguing motions. Tasks that can readily be performed by associates will not

be compensated for at partner rates. *Blumberg v. Jacob*, 624 F. Supp. 669 (S.D. Ohio 1985); *Blank v. Talley Industries, Inc.*, 390 F. Supp. 1 (S.D.N.Y. 1975).

In *Complaint of Cap'n Rick Corp.*, 525 F. Supp. 31 (S.D.N.Y. 1981), *aff'd*, 685 F.2d 423 (2d Cir. 1982), an associate rate of $50 per hour was applied by the court because of the attorney's lack of experience and minimal activities. In *Williamson v. John D. Quinn Construction Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1986), the compensable time was substantially reduced to reflect the attorney's inexperience and duplication of effort. In *520 East 72nd Commercial Corp. v. 520 East 72nd Owner's Corp.*, 691 F. Supp. 728 (2d Cir. 1989), an alleged fee of $375,000 was reduced to $10,000 to reflect the value of the services.

In Complaint of Cap'n Rick Corp., *an associate rate of $50 per hour was applied by the court because of the attorney's lack of experience and minimal activities.*

The court in *Whitley v. Seibel*, 676 F.2d 245 (7th Cir. 1982), *cert. denied*, 459 U.S. 942 (1981), held it is appropriate in fixing rates to distinguish between trial time and office time. In *In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984), the court affirmed reductions of partner rates to associate rates for activities that should have been performed by associates. *See also Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982); *In re Continental Illinois Securities Litigation*, 750 F. Supp. 868 (N.D. Ill. 1990).

In *In re Continental Illinois Securities Litigation*, 750 F. Supp. 868, 891 (N.D. Ill. 1990), the court set the hourly rate for paralegals at $30 an hour. In so doing, the court considered the fact that paralegals were paid between $10 to $20 an hour, noting that the Code of Professional Responsibility provides that a lawyer shall not charge or collect an illegal or excessive fee. The court also noted that such an hourly rate provided approximately a 40 percent profit margin. *See also In re Telesphere International Securities Litigation*, 753 F. Supp. 716 (N.D. Ill. 1990), where the court allowed a paralegal rate of $40 per hour.

OVERSTAFFING CASES

The court in *In re Maruko, Inc.*, 160 B.R. 633 (Bankr. S.D. Cal. 1993), stated:

> Finally having had the benefit of 13 months of billing periods before me, [the attorney's] involvement is truly "transient". While he billed in this period, there was no significant time spent in later periods on this case. The significance of this is apparent when one considers the Fee Examiner's question why one of the other lawyers already involved in this matter was not asked to conduct the research.

See also In re Stoecker, 128 B.R. 205 (Bankr. N.D. Ill. 1991).

Courts will reduce bills where unnecessary duplication is brought about by having an excessive number of attorneys involved in a case. *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294 (N.D. Ill. 1990), *aff'd in part, rev'd in part*, 945 F.2d 969 (7th Cir. 1991), *on remand*, 787 F. Supp. 772 (1992).

When a large number of employees bill on a case, some of the fees inevitably include time billed for lawyers educating other lawyers or engaging in excessive time on tasks that become routine with experience. *See Matter of Estate of Larson*, 694 P.2d 1051 (Wash. 1985). Frequent staff changes similarly inflate bills because newly assigned attorneys must spend a substantial amount of time becoming familiar with a field. *See Pierce v. F.R. Tripler & Co., Inc.*, 770 F. Supp. 118 (S.D.N.Y. 1991), which held that trial counsel had discretion to appoint a second chair, but the client was not responsible for the time required to familiarize the second chair with the case.

Where there is duplication in effort, courts regularly employ an across-the-board percentage reduction, even if all were prepared and all participated. *NorthCross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Ruiz v. Estelle*, 553 F. Supp. 567 (S.D. Tex. 1982) (authorizing an across-the-board percentage deduction); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743 (W.D. Va. 1976) (much duplication where plaintiffs were represented by no less than four attorneys, while the defendant, which was adequately represented, never had more than two attorneys present in court at any one time); *Oliver v. Kalamazoo Board of Education*, 73 F.R.D. 30 (W.D. Mich. 1976) (10 percent reduction because there were four attorneys for the plaintiffs, even though all were prepared and all participated); *In re Tom Carter*, 55 B.R. 548 (Bankr. C.D. Cal. 1985) (interim fee award reduced by 10 percent for duplicative hours); *In re Pacific Express Corp.*, 56 B.R. 859 (Bankr. E.D. Cal. 1985) (time charged by several attorneys was disallowed because a single attorney could have done the job).

In *Wabasha v. Solem*, 580 F. Supp. 448 (D.S.D. 1984), the court held that the plaintiffs had failed to meet their burden of proof that three lawyers were necessary to try the case. *See also Hinkle v. Christensen*, 548 F. Supp. 630 (D.S.D. 1982); *Skelton v. General Motors Corp.*, 661 F. Supp. 1368 (N.D. Ill. 1987), *modified on other grounds*, 860 F.2d 250 (7th Cir. 1989), *cert. denied*, 493 U.S. 810 (1989); *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983) (time billed for attendance at conferences by attorneys who were there as spectators disallowed); *see also Mares v. Credit Bureau of Raton*, 801 F.2d 1197 (10th Cir. 1986).

In the following cases, the court disallowed the time of an additional lawyer who did not participate in the proceeding: *Dunten v. Kibler*, 518 F. Supp. 1146 (N.D. Ga. 1981) (duplicate attorney at deposition asked no questions); *Henry v. First National Bank*, 603 F. Supp. 658 (N.D. Miss. 1984) (two of the three attorneys who attended a hearing did not participate); *In re WICAT Securities Litigation*, 671 F. Supp. 726 (D. Utah 1987) (court granted 100 percent of the time of the attorney who took a deposition, 50 percent of the time for lawyers who assisted, and 25 percent for all others present).

In *American Booksellers Association, Inc. v. Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986), the court found it

> inconsistent that Finley Kumble would contend on the one hand, that it is entitled to New York billing rates for its special expertise in First Amendment matters but would also maintain that it had need of assistance from additional non-local counsel. . . . [T]he engagement of another expert on this matter resulted in unnecessary duplication of effort.

In *Bruno v. Western Electric Co.*, 618 F. Supp. 398 (D. Colo. 1985), the defendant asked the court to reduce the hours billed for the attendance of two attorneys at depositions and pretrial conferences on the grounds that they reflected duplicative effort and new lawyer training that would not ordinarily be charged to the client.

> Today it has become all too common for two, or even more, attorneys to appear at a hearing, deposition, or the proceeding where one lawyer traditionally appeared. Indeed, there are hearings where firms send not one lawyer, but a "flight" of them, consisting of a senior partner, one or more juniors or associates, and several paralegals. Whether this is legal "featherbedding" or merely an effort to give young people more courtroom experience, there can be no justification for charging the excessive time to an opponent who lost the case. . . . Further, the defendant's undisputed averment that one of the plaintiff's attorneys was recently graduated from law school and admitted to the bar gives credence to the supposition that the presence of the junior attorney was "for the purpose of being trained."

In *Corcoran & Security Software v. IBM*, No. 88-2101 (4th Cir. 1990), the court found that

> the exertion of 312.6 hours of attorney and paralegal time preparing a 20 page memorandum in support of such a [motion for sanctions] was an inefficient and excessive use of manpower for which the appellant should not now be required to pay. Here, the attorneys of record for IBM are all professionals of ability; the fees they command are high. We believe that with such recognition arises a duty of reasonable efficiency in attending to legal matters. Here the time expended does not befit the resulting product, and the allowance of $30,000 for such efforts was an abuse of discretion.

See also Denton v. Boilermakers Local 29, 673 F. Supp. 37 (D. Mass. 1987).

In *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984), the court reduced the hours billed for the preparation of certain pleadings and preparation for oral argument. "[M]ost of what the defendants presented in their briefs had been argued at earlier stages in the litigation, and lead counsel is an acknowledged authority in constitutional law, not a novice." The court also found no justification for the presence of "two top echelon attorneys" at each proceeding. The records indicated that one of the attorneys was merely in attendance, not that he addressed the court.

In *Kronfeld v. Transworld Airlines, Inc.*, 129 F.R.D. 598 (S.D.N.Y. 1990), the court stated, "The presence at a deposition of two partners (whether from the same firm or different firms), without a showing that each had a distinct responsibility in the case necessitating his or her presence, is duplicative and noncompensable."

The *Kronfeld* court also stated, "Ample authority supports reduction in the lodestar figure for overstaffing as well as other forms of duplicative or inefficient work" (quoting *Seigal v. Merrick*, 619 F.2d 160 (2d Cir. 1980)). In addition, a court must analyze the tasks entrusted to various lawyers to ensure that they were performed by individuals

with appropriate skills and experience. Partners should not perform duties that could as readily be performed by associates, and associates should not do paralegal work. (Citations omitted.)

The *Kronfeld* court disallowed time billed for phone calls answered by receptionists and secretaries with whom a request for a return call was left. "Such time certainly did not benefit the class and in any event the actual time that should have been required for such calls would have been *de minimis*."

The Kronfeld *court disallowed time billed for phone calls answered by receptionists and secretaries with whom a request for a return call was left.*

In *Metro Data Systems, Inc. v. Durango Systems, Inc.*, 597 F. Supp. 244 (D. Ariz. 1984), two law firms represented the defendants. Both firms billed for conferences with each other. The court found that once the second firm was entrusted with the defense of the action, anything done by the first firm in formulating a defense strategy "was essentially duplicative." The court also questioned the time records, because the attorneys recorded different times for the same conference and one attorney billed 18.9 hours in one day.

> To have accomplished this, he would have had to have been in his office from 5:06 in the morning until mid-night, without taking any time for meals, to relieve himself or to do anything else. . . . [This] is almost *ipso facto* excessive.
>
> Terms used to describe services raise questions. There are no less than 95 time entries in which a lawyer reviewed something. In most instances, "review" appears to be merely a synonym for "read", a less impressive term. After all, anyone can read, but it takes a lawyer to review. . . . An even more amorphous term is "analysis". The Phoenix lawyers are great on analysis. There are no less than 15 time entries for analysis. Some are for "review and analysis". . . . When the Court attempts to envision a lawyer engaged in five hours of analysis, Rodin's "The Thinker" comes to mind.

In *In Re Continental Illinois Securities*, 572 F. Supp. 931 (N.D. Ill. 1983), the court stated: "Generally speaking, I will allow no fees to a lawyer for simply reading the work product of another lawyer. Every attorney cannot possibly be compensated for reading every piece of paper over the course of three years of litigation" (quoting *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983)).

In *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), the court held compensation should be denied for excess time if multiple attorneys are present at a hearing when one would suffice or if the same task is performed by more than one lawyer:

> [W]e think that the presence of more than one lawyer at depositions and hearings must be justified to the court. No fees should be awarded for hours reported by lawyers or law clerks who are present at depositions, hearings, or trial for the purpose of being trained and who do not participate in or contribute to the proceedings.

The court also stated:

> "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." (Quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980)). In determining which hours reported were reasonably expended and hence are billable to the adversary, the court should examine the total number of hours reported by each lawyer. While some private firm lawyers bill more than 2000 hours per year, studies indicate that 1400 to 1600 billable hours per associate and 1200 to 1400 per partner represents the per annum norm that can actually be billed. [Citation omitted.] These totals break down to six to seven billable hours per day for a five day week. During trials and other times of unusual stress the number of billable hours no doubt increases considerably. These studies reflect that normal workdays for lawyers include time to read general mail and advance sheets, to engage in non-billable conversations with other lawyers, and to indulge in coffee breaks and other personal activities. The court should question reported time significantly in excess of the norm.

See also Spell v. McDaniel, 852 F.2d 762 (4th Cir. 1988); *In re Leonard Jed Co.*, 103 B.R. 706 (Bankr. D. Md. 1989); *In re Ginji Corp.*, 117 B.R. 983 (Bankr. D. Nev. 1990) ("When the necessity for multiple attorneys at a hearing has not been shown, such expense is not reasonable. . . . If both attorneys attended the same meeting, the fees and expenses for one will be disallowed. However, if the attorneys attended separate discussions, then both will be allowed").

In *In re Olson*, 884 F.2d 1415 (D.C. Cir. 1989), the court disallowed the hours billed by the

prosecuting attorneys for preparing grand jury instructions: "Because United States prosecuting attorneys are thoroughly competent to instruct grand juries and rarely accept or use proffered grand jury instructions from a target of a grand jury investigation, we find these billings unnecessary and therefore unreasonable."

In *Complaint of Roberts*, 575 F. Supp. 584 (W.D. Wash. 1983), the court found that counsel's hours were "grossly overstated for an even moderately competent lawyer" and disallowed approximately 80 percent of the hours billed.

The court in Bell v. United Princeton Properties, Inc. *held that excessive time billed in light of counsel's experience is a legitimate reason for reducing a fee award.*

In *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.C. 1983), the court refused to compensate attorneys for time spent on motions for reconsideration and for efforts which, while not duplicative, were "litigious overkill." The court also held that time spent on nonlegal issues is not properly compensable at attorney's rates and disallowed time incurred because plaintiff's counsel retained separate fee counsel and hired consultants to assist in preparing the fee award petition. Expenditures for support staff overtime (including meals and transportation), unnecessary copying, and excessive computer-assisted research were eliminated. Compensable hours spent on general research and interfirm conferences were reduced.

In *Real v. The Continental Group, Inc.*, 653 F. Supp. 736 (N.D. Cal. 1987), the court reduced the lodestar by 40 percent to reflect excessive hourly rates, overstaffing, and inflated billing. The efforts of separate counsel hired to pursue the fee application were deemed duplicative and thus noncompensable. Word-processing costs were disallowed, as they fall within the overhead included in a reasonable hourly rate.

In *Daggett v. Kimmelman*, 811 F.2d 793 (3d Cir. 1987), the court found that multiple attorneys in court were unnecessary, that research and preparatory hours were duplicative, and that "not every attorney should be compensated for time spent in conference." The court also upheld the reduction in one attorney's hourly rate from $300 to $250, stating that there "comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries."

The court in *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989), held that excessive time billed in light of counsel's experience is a legitimate reason for reducing a fee award. "A fee applicant cannot demand a high hourly rate—based on his or her experience, reputation and a presumed familiarity with the applicable law—and then run up an inordinate amount of time researching that same law" (citing *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983)). In addition, the court held that an attorney's lodestar is legitimately reduced for services provided that are purely ministerial in nature.

In *In re Lederman Enterprises, Inc.*, 106 B.R. 674 (Bankr. D. Colo. 1989), the court found that although the attorneys allocated all of their time to one generic category, it was apparent that junior associates were unsupervised and inefficient; their time was reduced by 50 percent. The court reduced the award to reflect time spent pursuing matters that did not enhance the proceeding, and recalculated the number of compensable hours associated with various services. The court denied fees for a creditor's plan that was never filed, time spent on matters the creditor had no standing to assert, and hours that were "mere surplusage." The hours incurred to prepare the fee application were permitted at a reduced rate and discounted due to the attorney's failure to properly allocate time in the first instance.

In *Pfeifer v. Sentry Insurance, et al.*, 745 F. Supp. 1434 (E.D. Wis. 1990), an insurer challenged the fees charged by *Cumis* counsel as unreasonable and requested the court to determine reasonable fees. The court reduced the fees for unjustified and unauthorized research, excessive intraoffice conferences among attorneys whose involvement was unauthorized, time spent on a motion intended solely to expose the plaintiff on the public record, excessive time spent preparing for and summarizing depositions, and duplicative efforts. The court disallowed fees for conferences with the insured unrelated to preparing discovery responses, nonlegal work, and unauthorized computer-assisted research.

In *In re C & J Oil Co., Inc.*, 81 B.R. 398 (Bankr. W.D. Va. 1987), research time charged without an explanation of the novelty or difficulty of the questions was disallowed as excessive, and time spent preparing the fee application was compensated at 75 percent of the hourly rate requested in the fee application.

In *In Re Fine Paper Antitrust Litigation*, 98 F.R.D. 48 (E.D. Pa. 1983), the fee petitions of 41 private

law firms representing plaintiffs in a class-certified antitrust suit were adjusted to reflect excessive, duplicative efforts that did not benefit the class. In general, the court disallowed time billed to the class for reading and reviewing documents for which the attorneys were not responsible, time billed for attendance at conferences by attorneys who were there as spectators, hundreds of hours described in vague or meaningless terms or insufficiently documented, and the time spent preparing fee petitions.

See also In re Estate of George S. Halas, Jr., 159 Ill. App. 3d 818 (1987) (substantial reduction of fees for such practices as assigning 77 people to work on the estate; using inexperienced associates for matters within the general knowledge of experienced practitioners; and sending two, three, or four attorneys to routine court appearances); *In re Chicago Lutheran Hospital Association*, 89 B.R. 719 (Bankr. N.D. Ill. 1988) (no compensation for nonparticipating counsel present at meetings, conferences, and hearings).

In *LeRoy v. City of Houston*, 906 F.2d 1068 (5th Cir. 1990), the appellate court found the hours awarded were "grossly excessive." The attorneys who handled the appeal had represented the plaintiffs at trial, so they "by no means had to start from scratch." The court looked at the hours billed for the various projects, the complexity and the redundancy of the arguments, and the hourly rates of the attorneys as reflective of their competence. "There is no mathematical formula to precisely calibrate the number of hours reasonably necessary for appellate representation." The court determined a reasonable fee amount based on its "common sense, informed by years of experience with briefing and arguments in this Court, and what the record reflects concerning the prior work plaintiffs had done on the case."

The court also stated, "Hours that result from the case being 'overstaffed' are not hours 'reasonably expended' and are to be excluded from this calculation."

BILLING FOR EXCESSIVE REVIEW OF DOCUMENTS

In *In re WICAT Securities Litigation*, 671 F. Supp. 726 (D. Utah 1987), the court noted the word *review* in time entries was "a signal for the padding of hours." *See In re Chicago Lutheran Hospital Association*, 89 B.R. 719 (Bankr. N.D. Ill. 1988) (no compensation for time spent reviewing another lawyer's work product).

In *Wright v. U-Let Us Skycap Services, Inc.*, 648 F. Supp. 1216 (D. Colo. 1986), the court refused to award any fees for time spent proofreading internal memoranda.

BILLING FOR PUBLIC RELATIONS WORK

In *United States v. Yonkers Board of Education*, 118 F.R.D. 326 (S.D.N.Y. 1987), counsel could not recover for time spent on press communications. *See also Utah International, Inc. v. Department of Interior*, 643 F. Supp. 810 (D. Utah 1986); *Society for Good Will to Retarded Children v. Cuomo*, 574 F. Supp. 994 (E.D.N.Y. 1983); *Wuori v. Concannon*, 551 F. Supp. 185 (D. Me. 1982).

In *Robinson v. Ariyoshi*, 703 F. Supp. 1412 (D. Haw. 1989), the court denied an award of fees for press conferences and contacts with the media because such work did not assist the litigation process and publicity would not have helped inform members and possible members of the class of the litigation.

BILLING FOR NONREIMBURSABLE EXPENSES

In *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.C. 1983), the court eliminated fees for expenditures for support staff overtime including meals and transportation, unnecessary copying, and excessive computer-assisted research.

In *Cantrell v. Vickers*, 524 F. Supp. 312 (N.D. Miss. 1981), the court disallowed research and travel time by a law student whose presence at a hearing was not reasonably necessary for adequate representation of the client, as well as long-distance telephone charges indirectly related to the action.

The court in *Real v. The Continental Group*, Inc., 653 F. Supp. 736 (N.D. Cal. 1987), disallowed word-processing costs because they fall within the overhead included in a reasonable hourly rate.

In *Pfeifer v. Sentry Insurance, et. al.*, 745 F. Supp. 1434 (E.D. Wis. 1990), fees were disallowed for unauthorized computer-assisted research.

In *In re Leonard Jed Co.*, 103 B.R. 706 (Bankr. D. Md. 1989), the court stated:

> In determining whether a particular expense is chargeable to the debtor's estate, the court must distinguish between "overhead" expenses, which are not reimbursable, and "out-of-pocket"

> expenses, which are. Overhead expenses are those day-to-day operating costs which are incurred regardless of whom the law firm represents. . . . Out-of-pocket expenses are those expenses which can clearly be traced to a particular client.

The firm argued that it was its practice to bill for meals and secretarial overtime and also that the debtor's counsel apparently followed a similar practice.

> The Court's response is that merely because these practices are routine does not convert overhead expenses to out-of-pocket expenses. . . . Reimbursement for meals and secretarial overtime will be disallowed where the applicant has shown no compelling need to provide them in the first place. The Court will allow reimbursement for photocopying and computer research attributable to work done for this particular client, but not for postage, telephone or messenger services which are costs of doing business.

The court in *In re Global International Airways Corp.*, 38 B.R. 440 (Bankr. W.D. Mo. 1984), disallowed postage charges, saying they were part of the attorney rate and that extraordinary charges must be itemized. It also disallowed the charge for secretarial service on the ground that it was part of the attorney rate. *See In re Tom Carter*, 55 B.R. 548 (Bankr. C.D. Cal. 1985) (expenses for business lunches, parking, overtime, secretarial, and travel expenses disallowed).

In *In re Bicoastal Corp.*, 121 B.R. 653 (Bankr. M.D. Fla. 1990), the court considered charges for computers, lodging, postage, and travel. The court considered whether computer research charges were compensable or whether they are considered to be general overhead expenses and therefore not properly charged to the fee-paying party:

> While the views on this proposition are not uniform, this court is of the opinion that Lexis charges are part of the general overhead and are not compensable. . . . In the opinion of this Court, to accept the proposition that Lexis charges or any other computer research charges are compensable, one should also then conclude that the cost of acquisition of the lawyer's library and the cost of maintaining the library, even possibly, the depreciation of the law books would also be compensable. No one has ever urged such a proposition yet, but, of course, if one should, it would be clearly rejected as being without any justification.

Concerning lodging, the *Bicoastal* court stated, "Reimbursement for hotel expenses was allowed only to the extent that they appeared to be reasonable; extravagant hotel expenses were not allowed." Concerning postage, it noted, "Postage expenses are overhead expenses built into the hourly rate charged by [the firm]. Absent a showing that postage expenses are extraordinary, these expenses are non-compensable. . . . Expenses associated with express mail and messenger delivery services are considered to be overhead and therefore were not awarded." Finally, travel expenses associated with local travel and meal expenses were not awarded. *See also In re Ginji Corp.*, 117 B.R. 983 (Bankr. D. Nev. 1990).

The court in In re Global International Airways Corp. *disallowed postage charges, saying they were part of the attorney rate and that extraordinary charges must be itemized.*

In *In re Convent Guardian Corp.*, 103 B.R. 937 (Bankr. N.D. Ill. 1989), the court disallowed the following expenses: secretarial overtime, postage, messenger service, express mail, and local meals and parking. The court also denied a request for reimbursement for art supplies, because "art supplies, absent extraordinary circumstances, are overhead, and [the firm] failed to set forth any extraordinary circumstances."

The *Convent Guardian* court denied reimbursement of local meal expenses because it was unable to determine who was present at the meals, on what the parties were working while the alleged business meals were occurring, where the meetings occurred, or why it was necessary to conduct the meetings over breakfast, lunch or dinner.

On the issues of postage and express mail, the court denied reimbursement for Federal Express charges because "the entries fail to state what was delivered, when it was delivered, to whom it was delivered, and why the United States Postal Service was not used."

For messenger service, the firm used in-house messengers who were taxied to the courthouse to file documents. If the messenger was sent to file more than one document, the taxi fare was apportioned among the various cases. The court denied some of the requests for taxicab fare reimbursement because it was unable to determine "who the messenger was, what was delivered or filed and, in some instances, whether the firm allocated the fare

among several cases." The court denied other messenger charges because it could not determine "what was delivered, where it was delivered or why it was delivered instead of mailed."

Regarding travel expenses, the court denied taxicab fare because it was unable to determine "either who incurred the expenses, why the expenses were incurred, or what the party was working on, and thus the Court [was] unable to determine why the estate should pay for cabs to and from the train, to the attorneys' homes and to private clubs and ultimately whether the expense was necessary and reasonable."

Regarding local parking expenses, the court stated, "[A]bsent extraordinary circumstances, local parking expenses are noncompensable because they are not reasonably necessary to the proper representation of the client." The court denied local parking expenses because they lacked "any explanation of extraordinary circumstances and because they either fail to state why the expense was incurred or where it was incurred."

Some courts have disallowed charges for computer-assisted research such as LEXIS, either on the theory that they are included in the hourly rate or are overhead. *See In re Command Services Corp.*, 85 B.R. 230 (Bankr. N.D.N.Y. 1988), citing *In re Cuisine Magazine, Inc.*, 61 B.R. 210 (Bankr. S.D.N.Y. 1986); *Matter of Pothoven*, 84 B.R. 579 (Bankr. S.D. Iowa 1988); *In re Michigan General Corp.*, 102 B.R. 554 (Bankr. N.D. Tex. 1988). *See also In re Churchfield Management & Investment Corp.*, 98 B.R. 838 (Bankr. N.D. Ill. 1989); *Metro Data Systems, Inc. v. Durango Systems, Inc.*, 597 F. Supp. 244 (D. Ariz. 1989).

In *Grendel's Den, Inc., v. Larkin*, 749 F.2d 945 (1st Cir. 1984), the court found the total figure for the attorney's hotel expenses unreasonable on its face. He had rented a three-room suite for himself, his wife, his children, and his assistant and had stayed an additional night. The attorney had reduced the charge, but the court reduced it even further because it found "no explanation of how he determined what proportion of the bill should be charged to him as opposed to his family. Nor do we see any effort to minimize costs in his taking a three-bedroom suite at an expensive hotel." The court also found no justification for staying a second night, after oral arguments were completed.

In *Entertainment Concepts III, Inc. v. Maciejewski*, 514 F. Supp. 1378 (N.D. Ill. 1981), the court determined the attorney's half-day and full-day entries included commuting time between the attorney's home in Michigan and the courthouse in Chicago. The court determined travel should not be compensated at the same hourly rate as office and court time and allowed $40 per hour for travel time. *See Catchings v. City of Crystal Springs, Mississippi*, 626 F. Supp 987 (S.D. Miss. 1986), and *Coleman v. Block*, 589 F. Supp. 1411 (D. N.D. 1984), where the courts compensated for travel time at one-half the rate for legal work, and *In re C&J Oil Co., Inc.*, 81 B.R. 398 (Bankr. W.D. Va. 1987), where travel time by attorneys, law clerks, and secretaries was compensated at 75 percent of the hourly rate requested in the fee application.

In *In re Pacific Express Corp.*, 56 B.R. 859 (Bankr. E.D. Cal. 1985), travel time and various expenses incurred because counsel came from out of state were disallowed. The court arrived at the compensable amount by estimating the number of hours competent local counsel would have spent on the matter, multiplied by a reasonable local hourly rate, plus those expenses local counsel would have incurred.

Some courts have disallowed charges for computer-assisted research such as LEXIS, either on the theory that they are included in the hourly rate or are overhead.

In *American Booksellers Association, Inc. v. Hudnut*, 650 F. Supp. 324 (S.D. Ind. 1986), the court took judicial notice that expenses for word processing and for tasks such as "docketing and diarying" are considered part of a law firm's overhead.

DISGORGEMENT OF FEES AS CONSEQUENCE OF OVERBILLING

The courts have long held that an attorney's violation of ethical standards and fiduciary duties to his or her client and/or the court mandate forfeiture of the attorney's fee. In the words of one court:

> Forfeiture (of attorney's fee) is similarly mandated if an attorney violates ethical standards, his fiduciary duties to his client or his duty as an officer of the court. (Case cites omitted.) To permit a fee to stand in the face of violation of ethical standards of fiduciary duties only serves to place this court in the untenable position of approving such conduct to the disservice of the public and the bar.

In re Damon, 40 B.R. 367 (S.D.N.Y. 1984). *See also Baker v. Humphrey*, 101 U.S. 494 (1880); *In re Arlan's*

Department Stores, Inc., 615 F.2d 925 (2d Cir. 1979); *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917 (2d Cir. 1950) (opinion by L. Hand, J.), *cert. denied*, 340 U.S. 813 (1950).

In *Eriks v. Denver*, 824 P.2d 1207 (Wash. 1992), the court held the attorney had violated the rules of professional conduct and breached his fiduciary duty to his clients. In light of this violation, the court found disgorgement of fees was a reasonable way to discipline specific breaches of professional responsibility and to deter future misconduct of a similar type. *See also Ross v. Scannell*, 647 P.2d 1004 (Wash. 1982); *In Re Eastern Sugar Antitrust Litigation*, 697 F.2d 524 (3d Cir. 1982).

In *Goldstein v. Lees*, 46 Cal. App. 3d 614 (1975), the court relied upon the California Supreme Court decision in *Clark v. Millsap*, 197 Cal. 765 (1926), which states, "A court may refuse to allow an attorney any sum as an attorney's fee if his relations with his client are tainted with fraud."

Gilchrist *held that total fee forfeiture results where actual fraud or bad faith is shown.*

See Jeffry v. Pounds, 67 Cal. App. 3d 6 (1977); *Thompson v. Price*, 251 Cal. App. 2d 182 (1967); *Asbestos Claims Facility v. Berry & Berry*, 219 Cal. App. 3d 9 (1990). In *Jeffry* and *Goldstein*, fees were denied to attorneys who acted against their clients' interests and the duties set forth in Business and Professions Code Section 6068.

Other jurisdictions follow the rule that a breach of fiduciary duty or violation of professional ethics by an attorney requires disgorgement of legal fees. *See Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889 (Minn. Ct. App. 1989), and *In Re Eastern Sugar Antitrust Litigation*, 697 F.2d 524 (3d Cir. 1982). The Third Circuit explained that there are two purposes served by disgorgement: to discipline specific breaches of professional responsibility and to deter future misconduct. These punitive aims were emphasized in *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986), where the court stated that forfeiture damages are both "reparational and admonitory."

Gilchrist held that total fee forfeiture results where actual fraud or bad faith is shown. However, even where there is no actual fraud or bad faith and where there is no harm to the client, the fee should be partially forfeited. Where there is constructive fraud (the breach of an ethical duty, unaccompanied by intentional wrongdoing or actual fraud), the court will consider the factors used for awarding punitive damages[14] to determine what portion of the fee should be forfeited.

The fundamental rule of forfeiture is well established and has been consistently applied. *See Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744 (D.C. 1981), *vacated on other grounds*, 680 F.2d 768 (D.C. Cir. 1982); *In Re Lee's Estate*, 9 N.W.2d 245 (Minn. 1943); *Laughlin v. Boatmen's National Bank of St. Louis*, 163 S.W.2d 761 (Mo. 1942); *Frank v. Bloom*, 634 F.2d 1245 (10th Cir. 1980); *Crawford v. Logan*, 656 S.W.2d 360 (Tenn. 1983) (violation of disciplinary rule, if established, will result in fee forfeiture); *Coleman v. Moody*, 372 S.W.2d 306 (Tenn. Ct. App. 1963) (attorney guilty of malfeasance or breach of faith against client "will forfeit, and may not recover, compensation from his client for such pretended personal services"); *Ross v. Scannell*, 647 P.2d 1004 (Wash. 1982) (professional misconduct grounds for denying fees to attorney); *In re Thomasson's Estate*, 196 S.W.2d 155 (Mo. 1946) (lawyer who does not at all times represent his or her client with undivided fidelity is not entitled to compensation for his or her services); *Matter of Estate of Gould*, 547 S.W.2d 863 (Mo. Ct. App. 1977) (fee disgorgement appropriate where attorney is guilty of misconduct, "particularly with respect to fees which he paid himself"); *American-Canadian Oil & Drilling Corp. v. Aldridge & Stroud, Inc.*, 373 S.W.2d 148 (Ark. 1963) (attorney representing conflicting interests barred from receiving any fee); *Leoris v. Dicks*, 501 N.E.2d 901 (Ill. App. Ct. 1986) (conduct that clearly violates established canons of ethics warrants forfeiture of attorney fees); *Brill v. Friends World College*, 520 N.Y.S.2d 160 (N.Y. App. Div. 1987) (attorney who commits misconduct in violation of disciplinary rules as "a matter of law" is "not entitled to a legal fee for any services rendered").

ATTORNEY LIABILITY FOR PUNITIVE DAMAGES

When an attorney breaches the fiduciary obligations owed to a client, punitive damages may be awarded based on a finding of fraud, constructive fraud, or oppression. *Day v. Rosenthal*, 170 Cal. App. 3d 1125 (1985). Punitive damages have been awarded in cases where an attorney submitted false bills to a client. *Finch v. Hughes Aircraft Co.*, 469 A.2d 867 (Md. App. 1984).

In *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744 (D.C. 1981), *vacated on other*

grounds, 680 F.2d 768 (D.C. Cir. 1982), the court awarded punitive damages in an amount equal to the attorney fees already paid by the client. *See also Stinson v. Feminist Women's Health Center*, 416 So. 2d 1183 (Fla. Dist. Ct. App. 1982).

ATTORNEY LIABILITY FOR FRAUDULENT BILLING PRACTICES

In *Finch v. Hughes Aircraft Co.*, 469 A.2d 867 (Md. App. 1984), the court held that each element of fraud was proved where there was evidence that the attorney submitted bills for services that overstated the amounts due, the attorney knew that the bills were false, the attorney's purpose was to defraud the client, and the client acted in justifiable reliance upon the misrepresentations.

ATTORNEYS WHO OVERBILL MAY NOT RECEIVE FEES BASED ON QUANTUM MERUIT

An attorney who breaches the fiduciary duties owed to a client has forfeited the right to compensation and cannot recover on the basis of *quantum meruit*. "An attorney displaying conduct sufficient to void an agreement in law should not be allowed to profit from his blatantly unprofessional conduct in equity." *Lance Holding Co. v. Ashe*, 533 So. 2d 929 (Fla. Dist. Ct. App. 1988) (quoting *Jackson v. Griffith*, 421 So. 2d 677 (Fla. Dist. Ct. App. 1982)).

In *In Re Lee's Estate*, 9 N.W.2d 245 (Minn. 1943), an attorney was serving as trustee for a group of beneficiaries. The attorney entered into a contract with the beneficiaries to examine the records of the trust in exchange for one-third of the amount due to the beneficiaries under the trust. The court found that the attorney was trying to obtain additional compensation to do what was already required of him as trustee. Holding that the attorney was unfaithful in his duties, the court denied compensation on a *quantum meruit* basis. Similarly, an attorney who took unauthorized legal actions, thereby breaching the attorney-client contract, was unable to recover any fees in *quantum meruit* for services performed. *Kelly v. Murphy*, 630 S.W.2d 759 (Tex. Ct. App. 1982). *See also Jeffrey v. Pounds*, 67 Cal. App. 3d 6 (1977); *Goldstein v. Lees*, 46 Cal. App. 3d 614 (1975); *Developments-Conflicts of Interests*, 94 Harv. L. Rev. 1493, 1495 nn.125–29.

ATTORNEY LIABILITY FOR CLIENT'S ATTORNEY FEES

Where there is a fiduciary relationship, the defrauded party is entitled to all attorney fees incurred as a result of the fraud. *Walters v. Marler*, 83 Cal. App. 3d 1 (1978).

ATTORNEY LIABILITY FOR VIOLATING STATE CONSUMER PROTECTION LAWS

All of the states and the District of Columbia have laws that prohibit sellers from engaging in unfair and deceptive acts and practices.[15] Some of the laws specifically exempt lawyers. During the last decade, however, several courts have held that lawyers may be sued for violating the consumer laws.[16]

In *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 461 A.2d 938 (Conn. 1983), the court held that attorney services were covered under a consumer statute because of its regulation of "the conduct of any trade or commerce." In *Malench v. Township of Hamilton*, No. L-76814-86 (N.J. Super. Ct. 1988), the court found the president-elect of the New Jersey State Bar Association liable under the state consumer fraud law for concealing from a client that the lawyer had failed to file within the statute of limitations on a federal civil rights case. Other cases have held that consumer laws cover the entrepreneurial aspects of law practice, such as bringing in clients and determining how to bill the client, but do not address issues of professional conduct, such as competence.

In *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984), the court held that the term *trade or commerce* only includes the entrepreneurial or commercial aspects of the professional practice of law, not the substantive quality of services provided. A claim directed to the competence of a strategy employed by attorneys constitutes an allegation of negligence or malpractice and is not actionable under the state's Consumer Protection Act, the court stated.

In *Haberman v. Public Power Supply System*, 744 P.2d 1032 (Wash. 1987), the court followed *Short* but specifically noted that the claims in *Haberman* did not challenge the attorney's fee rates, billings, or client relationships.

In *Lucas v. Nesbitt*, 653 S.W.2d 883 (Tex. Ct. App. 1983), *writ ref'd. n.r.e.*, the court held that the Texas Deceptive Trade Practices Act applies to the services of an attorney. In *Wright v. Lewis*, 777

S.W.2d 520 (Tex. Ct. App. 1989), the court noted that the Texas act applies to situations in which an attorney has failed to disclose material information concerning services that were known at the time of the transaction and which were a proximate cause of actual damages.

The consumer laws prevent merchants and sellers of services from cheating their customers. If lawyers lie to their clients about the amount of time they spend doing the work, or about whether the work they suggest is necessary, why should they be treated differently from an auto repair shop that inflates its bill for labor or makes unnecessary repairs?

The consumer laws are an unusually powerful tool for deterring undesirable conduct, because they prohibit a wide range of conduct and often permit awards of treble damages and attorney fees.[17] Though this area of law has enormous potential to increase the honesty of lawyers, courts have only recently begun to apply consumer law to lawyer misconduct. If they continue to do so, these laws may offer clients remedies that are more effective than disciplinary proceedings and simpler than legal malpractice cases.

In *Eriks v. Denver*, 824 P.2d 1207 (Wash. 1992), the court noted that an attorney, in failing to disclose a conflict of interest, was in violation of the Consumer Protection Act if the purpose in doing so was to obtain clients or increase profits.

STATE-BAR-ORDERED RESTITUTION OF FEES

In *Bernstein v. State Bar of California*, 50 Cal. 3d 221 (1990), the state bar ordered restitution of fees for which no work was performed.

The client who is required to retain another attorney to obtain his or her files may be able to recover those fees as part of the restitution award. *Sorensen v. State Bar of California*, 52 Cal. 3d 1036 (1991). As the *Sorensen* court stated:

> Private persons have incurred specific out-of-pocket losses directly resulting from attorney misconduct. Restitution of these amounts emphasizes the professional responsibility of lawyers to account for their misconduct, and thereby serves to both protect the public and instill public confidence in the law.

ENDNOTES

[1] *Skaddenomics*, The American Lawyer, Sept. 1991.

[2] Book, *Can Lawyers Be Trusted*, 138 U. Pa. L. Rev. 913 (1990).

[3] *See, e.g.*, Reed, *How Did We Get to Where We Are—And What Are We Going to Do About It, in* Beyond the Billable Hour: An Anthology of Alternative Billing Methods (R. Read ed., 1989).

[4] Greenfield, *What Law School Never Taught You*, California Lawyer 53 (1992)

[5] Ross, *The Ethics of Hourly Billing by Attorneys*, 44 Rutgers L. Rev. 1 (1991); Pitulla, *Truth in Billing*, A.B.A. J., Dec. 1992, at 120; Schratz, *Resolving the Cumis Quandary: Guidelines for Reasonable Fees*, Ins. Litig. Rep., June 1992.

[6] Ross, *supra* note 5, at 3.

[7] Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659, 705 (1990).

[8] Ross, *supra* note 5, at 5.

[9] *See* Schratz, *Do the Right Thing*, Legal Audit Rev., 1994.

[10] In *San Diego Federal Credit Union v. Cumis Ins. Society Inc.*, 162 Cal. App. 3d 358 (1984), the court held that under certain situations the insured has the right to retain independent counsel at the carrier's expense. Such counsel has become known as *Cumis* counsel.

[11] The obligations of defense counsel to the insurer were further codified in 1987 when the California Legislature enacted Civil Code § 2860(d). That section provides that it is the duty and obligation for *Cumis* counsel to disclose such information to the insurer: "(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes and timely to inform and consult with the insurer in all matters relating to the action."

[12] American Bar Association Standing Committee on Legal Assistants, Position Paper on the Question of Legal Assistant Licensure or Certification 4 (Dec. 10, 1985).

[13] It has been estimated that a lawyer must generally spend three hours in the office in order to legitimately bill for two hours. *See* Ross, *supra* note 5.

[14] The factors considered by *Gilchrist* include the seriousness of the wrong, the defendant's profitability, the duration of the misconduct and any concealment of it, the defendant's awareness of the wrong, the defendant's attitude and conduct upon discovering the misconduct, defendant's financial condition, and the effect of any other punishment to which the defendant might be subject. 387 N.W.2d at 417.

[15] *See* Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659, 698–99 n.7 (1990).

[16] *New Threat to Attorneys?*, A.B.A. J., Dec. 1988, at 17 (noting various cases in which courts have held lawyers liable for violation of consumer fraud statutes and discussing a recent New Jersey case).

[17] *See, e.g.*, D.C. Code Ann. § 28-3905(k)(1) (1981) (providing for "any consumer who suffers damage" an action to recover treble damages, attorney fees, and any other relief the court deems proper to remedy violations of the D.C. unfair trade practices statute).

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