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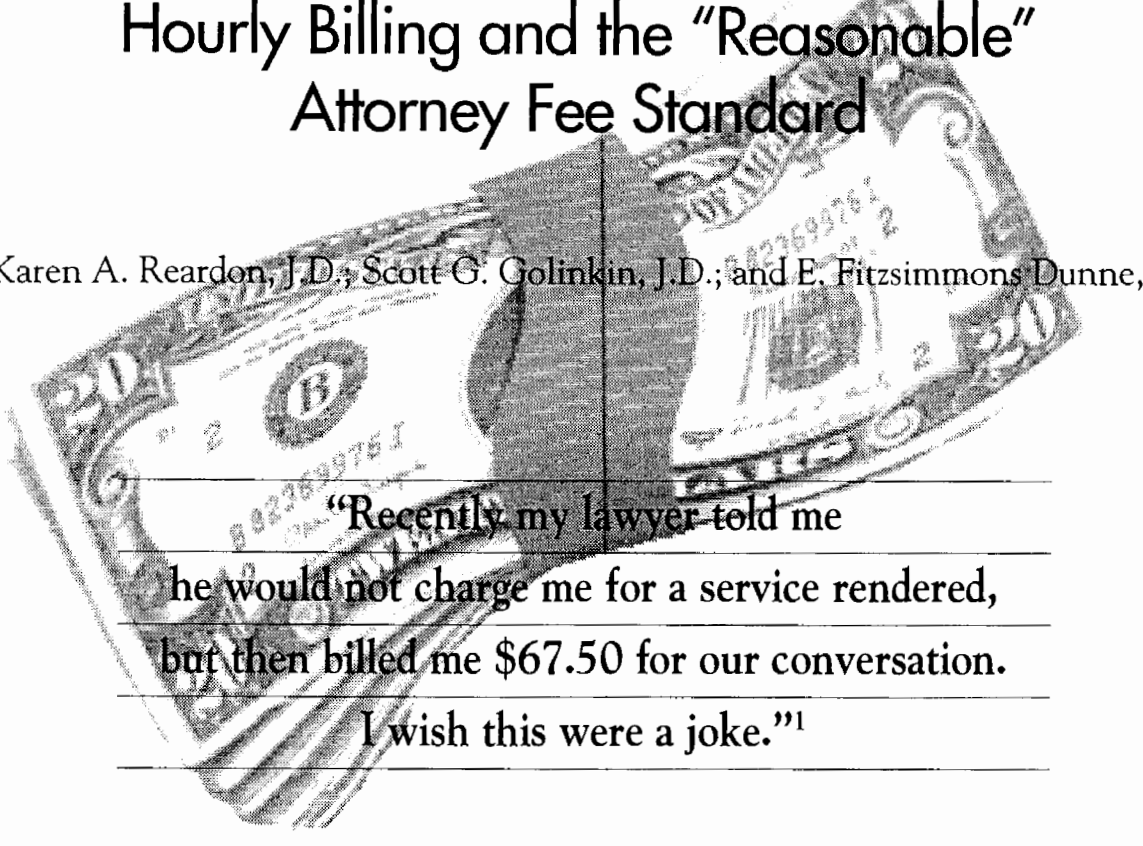
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Chances Are You Paid Too Much:
Hourly Billing and the "Reasonable"
Attorney Fee Standard

by Karen A. Reardon, J.D.; Scott G. Golinkin, J.D.; and
E. Fitzsimmons Dunne, J.D.

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"Recently my lawyer told me
he would not charge me for a service rendered,
but then billed me \$67.50 for our conversation.
I wish this were a joke."¹

Abstract

There are many losses, such as hurricanes, earthquakes, and other natural disasters, that insurers cannot control. However, insurers can exercise a great deal of control over one of their costliest expenditures—legal costs—and should be knowledgeable about existing methods to effectively control these costs.

This article sets forth the current problems associated with billing by legal service providers. In addition, it provides standards that insurers should keep in mind when reviewing legal bills, and considers the advantages and disadvantages to alternative methods to traditional hourly billing. Finally, the article reviews the types and consequences of remedies which are available when fee disputes arise between an insurer and the attorney it has retained.

This quote exemplifies the fact that now, more than ever, attorneys' fees are being questioned. Gone are the days when companies paid lawyers by dutifully handing over a check in response to a one-line bill stating simply "for services rendered" followed by a dollar amount (sometimes of six or seven figures). Companies now are examining attorneys' fees, scrutinizing their billing and staffing practices, and demanding that they adhere to the requirement that attorneys' fees be "reasonable."²

The "reasonable" fee standard is especially important to the insurance industry because insurance companies are perhaps the predominant consumers of legal services. Virtually every suit that is filed in the United States implicates an insurer in some way. Thus, insurers not only have a concern in how legal service providers bill, they have an obligation both to their shareholders and their policyholders to be effective consumers of legal services.

Most obviously, by being effective legal services consumers, insurers can reduce burdensome legal costs which directly affect

their profit margins and the earnings enjoyed by their shareholders. If insurers are effective consumers of legal services, their customers also will benefit; lower premiums benefit everyone. And by demanding that legal fees and billing practices be reasonable, insurers benefit their insureds by enabling the insureds to pay the same reasonable rate for defense of the uncovered counts of a complaint (which is the responsibility of the insured) that the insurer has negotiated for defense of the covered counts. Furthermore, strict scrutiny of an attorney's bill by the insurer means that neither it nor its insured will pay for unnecessary or excessive services identified by the insurer. Also, by learning from the conduct of their insurer, insureds will be more knowledgeable consumers of legal services in situations which do not involve insurance. In summary, if insurers are effective users of legal services, this could have a "trickle down" effect on the occasional user of legal services, who would benefit because insurers are in a position to "police" legal service providers, keeping costs low and billing practices in check.

This article provides a background to the

controversy surrounding hourly billing, provides guidelines to assist legal service consumers in combating the problem of unreasonable billing practices, and sets out some alternatives to the hourly billing method and the potential problems with those alternatives.

The Cost of Legal Services

A recent study has found that costs associated with the U.S. tort system have grown nearly four times faster than the U.S. economy.³ In 1991, the U.S. tort system cost \$132.2 billion dollars—385 times its cost in 1933. Considering that the gross national product has only increased a hundred-fold since 1933, such growth is spectacular. Of the total tort costs (which include insured and self-insured claims payments, administrative costs, and attorneys' fees), consumers pay \$63 billion, of which 95 percent (\$60 billion) is insured, and businesses pay \$69 billion, of which 68 percent (\$47 billion) is insured. Costs are estimated to skyrocket as we approach the year 2000 with U.S. tort costs projected to reach \$300 billion. That amount would be 3.5 percent of the U.S. gross domestic product (GDP), remarkable growth since in 1991 tort costs were 2.3 percent of GDP. In contrast, tort costs were 0.4 percent of GDP in Denmark, 0.7 percent in Japan, and 0.9 percent in Canada and France.⁴

Of the estimated \$132.2 billion spent in 1991 on the U.S. tort system, 33 percent (\$43.6 billion) was about equally divided between defense costs and general legal expenses.⁵ In terms of defense costs absorbed by insurers, increases in those costs have surpassed liability losses. In 1991, defense costs increased 12.7 percent while losses only increased by 10.4 percent.⁶

Therefore, as costs of operating the tort system and accompanying legal services continue to rise, consumers of legal services have been forced to scrutinize fee bills and require that fees charged for such services be "reasonable." By doing so, companies can reduce some of the financial burden they now shoulder for legal services. For insurers who pay for legal services, that translates into lower premiums for customers and larger profit margins for shareholders.

Ethics and Billing

To ensure that lawyers maintain reasonable billing practices, it is useful for insurers to start with the ethical standards which govern attorneys. In fact, the "reasonableness"

standard is codified in the American Bar Association's Model Code of Professional Conduct (Model Code), which sets out factors in determining the reasonableness of a fee. Those factors include:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.⁷

Ethical issues, such as whether a client should be billed for mistakes, whether a client should pay for the education of young associates, and whether a client should be billed in full for work that was done for another client and recycled,⁸ present problems because these decisions are left up to each lawyer's personal judgment. Thus, attorneys are put in the position of choosing between their clients' interests and their own financial gain. Courts, however, have started addressing these issues. In particular, courts have found that excessive billing of fees and charging of costs as though they were fees are unethical practices.⁹

Usually, ethical issues like these do not get into the courts because they are handled quietly by the firm and client involved, or referred to a state bar association for a disciplinary hearing, if brought to the attention of any outside entity at all. Only when an attorney appeals the ruling of the disciplinary committee will a court hear the issue. Fortunately, clients now are contesting bills and courts have started to establish guidelines for what are and are not reasonable attorneys' fees.¹⁰

The Reasonable Fee Standard

Consumers of legal services—particularly insurers—should bear in mind several important concepts when reviewing attorney fee bills to determine what is reasonable. First, be

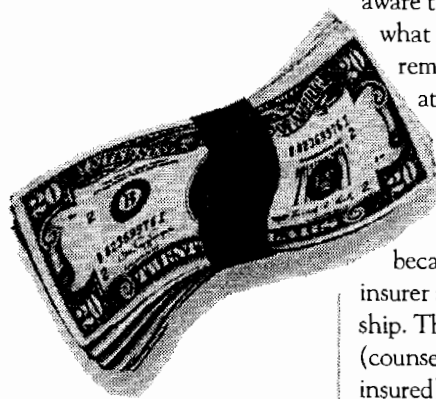
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aware there is legal precedent that establishes what is and what is not "reasonable." Second, remember that, if brought to trial it is the attorney's burden to demonstrate the reasonableness of his or her fees.¹¹

Finally, remember that insurers have a right to review files and documents related to the defense of the insured because the attorney represents both the insurer and the insured in a three-way partnership. This right exists even when *Cumis* counsel (counsel paid for by an insurer to defend the insured) is involved; the insured's and insurer's interests still coincide so that counsel has fiduciary duties running to the insured and the insurer. (Only information concerning a coverage dispute will fall outside of this right and not be available to the insurer.)¹²

Knowing this is useful to keep the following guidelines in mind when reviewing legal service bills.

Rates and Disbursements Charged Should Be Agreed On in Advance

One of the most effective means of ensuring that attorney fee bills are reasonable is to establish in advance which rates and charges are acceptable and which are unacceptable. This can be done by asking the lawyers for their schedule of rates and charges, negotiating acceptable rates, and incorporating the agreement in an engagement letter which specifies the rates for each lawyer and other legal professionals, and the costs charged for various services and disbursements (such as photocopying, etc.). By negotiating staffing, rates, and schedules of charges before the lawyers are hired, clients can spot potential problem areas and prevent many disputes which otherwise would arise after the fees have been incurred and the bills submitted.

Remarkably, this device is often overlooked by clients. Yet its usefulness cannot be over-emphasized. The authors' own experience provides a useful illustration. One firm selected by an insured as defense counsel proposed to add a 10 percent "administrative surcharge" to all bills to cover such expenses as photocopying, postage, long-distance calls, and "similar expenses." Obviously, what the lawyers proposed bore no relation to the actual cost of providing those items, and would have resulted in excessive charges. Just as obviously, the insurer did not agree to that proposal. Having inquired before approving the firm, the insurer was able to reject unreasonable fees and charges before costs were incurred.¹³

Attorneys Are Required to Use Proper "Billing Judgment"

"Billing judgment" is essentially a term used by courts in the place of the word "ethical." It simply means that attorneys should write off charges that should not be billed to their clients.¹⁴ If a court finds that attorneys have engaged in improper billing judgment, the court will exercise its own billing judgment and write off those items it finds unnecessary for the legal service provided.

Charges that have been found to reflect improper billing judgment vary greatly. One court held that it was improper to charge a client for the time it took to review the client's bill. Other courts have found (and rightly so) that improper billing judgment was exercised when an office victory party was billed to the client or when the client was charged for an attorney's shoe shine and haircut prior to the first day of trial.¹⁵ Even the U.S. Supreme Court has observed that attorneys are obligated to exclude from their bills excessive, redundant, and unnecessary hours.¹⁶

To Be Reasonable, Billing Entries Must Be Specific

In *Scott Fetzer Co. v. Weeks*, the court enunciated the requirement that entries must have adequate specificity by finding that an attorney "must provide reasonable documentation of the work performed, [though] it need not be exhaustive or in minute detail, it must [convey] the hours worked, what type of work, and the category of the attorney who performed it (i.e. senior partner, associate, etc.)."¹⁷ Courts find it difficult to determine what is reasonable when a task is billed with a boilerplate description. Descriptions of tasks limited to "review documents," "conference," "legal research," or "monitor case," without more detail, are examples of "boilerplate" billing entries which must be avoided.

The court in *In Re Leonard Jed* found descriptions such as "Tel w/other T— Leonard Sachs," "Order/Judgment Order Appr. Fees," and "Research" to be so insufficient that it struck out entries of that sort from the bill.¹⁸ In another case, a court refused to find \$919.78 of time on LEXIS reasonable because the bill failed to describe what was being researched and how it was related to the client's case.¹⁹

The court in *Kaiser v. MPEC American*

"By negotiating staffing, rates, and schedules of charges before the lawyers are hired, clients can spot potential problem areas."

Properties, Inc., when faced with insufficient billing descriptions, found the bills to be non-compensable, stating that "without detailed information concerning the nature of and the actual time expended on each of the legal tasks performed, the identity of who performed them, how they related to the litigation and whether they were necessarily required, it [is] impossible to render a finding that they [are] reasonable and, therefore, compensable."²⁰

Time Records Must Be Accurate

Courts will not accept as reasonable bills reflecting unsubstantiated time. As one court stated, "[t]he absence of detailed contemporaneous time records, will call for a substantial reduction in any award or, in egregious cases, disallowance."²¹ Courts are being more explicit in applying standards. For example, Illinois's highest court has set forth the following principles its courts should apply to assess the sufficiency and detail of fee bills:

- whether detailed time records were kept;
- whether time billed benefited the client;
- who billed the time;
- whether time billed was reasonably related to the matter being litigated.²²

Moreover, in recording their time, attorneys cannot use a "heavy pen," a practice addressed in *ECOS, Inc. v. Brinegar*. The court found the fact that all of the attorney's time entries were for "3 hours or 4 hours" and never for "3.4 hours or 4.8" hours showed an unreasonable rounding-up of time.²³ This practice also was found unreasonable in another case where the attorney's time entries were in 15-minute allotments, never less.²⁴

Inter-Office Conferencing Should Be Limited

Conferencing is an important tool of lawyers and, when used properly, results in tremendous value to the client. Conferencing enables a junior level associate to work efficiently under the direction of a supervisor who can identify the legal research needed on a case or narrow the investigation needed, but need not actually perform the research or conduct the investigation at the supervisor's significantly higher rate.²⁵ However, conferencing can be subject to abuse. Consequently, a number of courts have taken issue with excessive inter-office conferencing. In the words of Judge Grady in *In Re Continental Illinois Securities Litigation*, "attorneys should work independently, without the incessant

'conferring' that so often forms a major part of the [bill] in all but the tiniest cases."²⁶

Examination of bills reflecting excessive inter-office conferencing usually leads courts to reduce attorneys' fees correspondingly. As one court cogently observed, having numerous interoffice conferences when the rates charged by the attorneys are very high "indicates that the attorneys should have been able to decide on the proper strategy without the great number of conferences attended by numerous firm lawyers."²⁷

Overhead Costs Should Not Be Billed

Almost uniformly, courts have ruled that overhead costs are not billable. The court in *In Re Leonard Jed* made the distinction between what are overhead costs (non-billable) and what are out-of-pocket costs (billable). The court stated that "[o]verhead costs 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."²⁸

Generally, overhead costs include such items as heating and air conditioning, word processing fees, and secretarial fees. Some courts have held photocopying fees to be overhead and not reimbursable, but this is not the norm because photocopying fees usually are related to the service provided. However, if attorneys fail to show that photocopying is necessary, courts are not shy about reducing photocopying charges.²⁹ Other courts have found some travel-related charges to be overhead and unreasonable. That often happens where the expenses are not adequately detailed or shown to relate to the case.³⁰ Travel expenses also are disallowed when they simply are unnecessary, such as where a court found that an attorney's travel time to a meeting was unreasonable based upon the fact that there were other attorneys present who were able to handle the matter and, hence, the attorney's presence was for the law firm's benefit, not the client's.³¹

Billing of Duplicative and Excessive Work Is Unreasonable

If more than one attorney bills for the same service, courts find this to be duplicative and, as such, unreasonable. One court has commented disapprovingly on the now common practice of staffing a case with more than one lawyer:

[Two attorneys] chose to handle this case in tandem when one able and experienced attorney would have been adequate to the

"In recording their time, attorneys cannot use a 'heavy pen.'"





task, particularly if supported by a less expensive attorney to assist with legal research. This approach involved certain inefficient divisions of labor. It also involved some unnecessary duplication of effort. Counsel have not reduced their fee request to reflect this redundancy. Rather, they seek compensation for every hour spent by each. The court doubts they would exercise their usual billing judgement to charge a typical client for all of their time spent on the case. In any event, it is unreasonable for them to seek compensation for the necessary duplication of effort.¹²

Typically, excessive work is characterized by an attorney billing for tasks that, based on his or her experience, should have been handled in half the time. For instance, in *LeRoy v. City of Houston*, where the attorneys represented the plaintiffs at trial, the large amount of hours they billed on the appeal were deemed to be grossly excessive because "by no means did they have to start from scratch."¹³

The unreasonable billing practices discussed above are not limited to attorneys paid by insurers, of course. Notably, the major complaints that corporations have concerning their outside counsel fall into categories that courts have found to be unreasonable billing practices:

1. Over-staffing of projects by outside law firms, including having two or more lawyers at meetings.
2. Billing of training time for new associates.
3. Pressuring attorneys to bill and generate excessive fees.
4. Charging of overhead costs.¹⁴

But by observing the above guidelines, insurers, like other corporations, can make great progress in dealing with some of the most common complaints.

Working with Outside Counsel

To effectively contain costs, in-house counsel and claims managers alike must keep the court-delineated "reasonable" attorney fee standards in mind. However, to implement these reasonable standards one first has to make an informed decision when choosing an attorney or law firm.

When hiring counsel, make sure that he or she can effectively and efficiently handle your legal needs. At the outset of the relationship, address the expectations of counsel's role in the matter for which he or she has been retained. A two-way flow of information at

this initial stage is extremely important because it will help minimize disputes as the matter progresses. This flow of information should include an analysis, or blueprint, of how counsel plans to attack the matter and what the approximate costs will be. Asking for a plan of attack has two virtues. First, counsel is forced to think about the matter at an early stage, which will promote cost efficiency. Second, the plan provides the client with an idea of what the attendant costs and problems will be in resolving the matter.¹⁵ Of course, there will be variations, but it is a good idea to set some initial parameters that will aid counsel in choosing what work is necessary and what work is frivolous. The blueprint also should stipulate the number of lawyers who will be working on the matter, their names, and their hourly rates.¹⁶

Another issue that should be addressed at the outset of a relationship with counsel on a specific matter is the settlement value of the case. Attempt to get a solid estimate of what counsel views the matter is worth. Do not let an attorney force litigation that could and should have been avoided in order to generate an "adequate" fee.

One approach that has been implemented by the Sentry Insurance Company has been to set forth comprehensive written guidelines for defense counsel. Sentry's guidelines are:

1. Preliminary workup should be restricted to a review of the Summons and Complaint, Appearance, investigative material, Answer, Demands for Answers to Interrogatories, requests for admission, refiling of Cross-Complaints, if applicable. *No further workup is to be done without express authorization from the company.*
2. Attorneys should not engage in investigation or lengthy and repeated interviews with witnesses or insureds if those procedures can be properly performed by independent adjusters or investigators. If extenuating circumstances cause a deviation from this instruction, *authorization* must be obtained from the company.
3. Legal research requirements should be promptly reported to the company. You are requested to provide a summary of the reasons necessitating research requiring more than two hours and not undertake same without *authorization* from the company.
4. Six month interim billing is encouraged; however, other arrangements will be entertained. In no case will billing be con-

"When hiring counsel, make sure that he or she can effectively and efficiently handle your legal needs."

sidered on less than a quarterly basis. *Time sheets and details of the services performed are required.*

5. If depositions are authorized, we request a "brief" narrative report covering the highlights of the testimony as they refer to the liability and damages. If the testimony simply confirms our prior knowledge of the claim, it is not necessary to highlight that testimony. In no case do we require copies of depositions unless specifically requested.
6. The company must be promptly advised of court appearances, settlement conferences, pre-trial depositions, and trial. It is required that counsel report twice daily when on trial. If reporting should have to take place after company local hours, arrangements may be made to report to the handling examiner at home.
7. The company requests that attorney reports be concise and *brief*.
8. Reports are to be forwarded directly to the examiner in charge of the file, addressing your correspondence to their individual attention. Single copies of your reports are all that is needed.³⁷

Guidelines such as Sentry's make clear at the outset of the relationship those work, staffing, and billing practices the insurer approves and disapproves. However, guidelines should be flexible in order to foster a good ongoing relationship with counsel and to allow them to meet their professional responsibilities. Guidelines which are too stringent can strain the relationship between attorney and client when it should be amicable, stymie innovation by the attorney, and actually increase costs. Remember, too, that such guidelines do not necessarily keep defense counsel's billable hours down because of the extensive information the attorney is required to keep and the level of communication expected by the company, unless that information is used to evaluate the case and the ongoing relationship with counsel.

As prudent consumers of legal services, clients should require counsel to generate detailed billing statements with accurate time keeping. Those statements should identify the attorney billing the time, allowing clients to spot duplicative or wasted effort. The statements should also include the subject matter and the task engaged in and how that relates to the matter assigned. Those billing techniques allow clients to keep tabs on what counsel is doing and why. Also, it provides the documentation needed to show counsel which expenses are unreasonable.

Finally, clients should know the billing format

used by the firm. In the last five years, firms have been experimenting with other methods of billing to supplant traditional hourly billing as described below. If the firm you use has not changed its billing method, it might be receptive to try one of these alternative methods of billing.

Alternatives to Hourly Billing

Non-traditional billing arrangements (alternative billing) recently have become a hot topic in the legal world. Advocates of alternative billing feel that hourly billing is inefficient and should be replaced. The various alternative billing arrangements are flat fees, blended rates, and modified contingency fees (for defense lawyers). There are benefits and drawbacks to each method.

Though the alternative billing movement is gaining momentum, law firms are resistant to change. According to a recent study, only one out of five law firms regard alternative billing methods as essential to their survival and future prosperity. Forty-three percent of the firms surveyed responded that they are developing new billing and pricing methods and 23 percent said they do not see a need to develop alternative billing arrangements. In terms of practice areas, billing alternatives are employed most often in litigation. In the survey, 47 percent of firms have employed alternative billing methods in litigation, 29 percent have employed them in corporate transactions, and 26 percent have used them in real estate transactions.³⁸ However, several different approaches have been developed and implemented by some firms.

Most firms will negotiate volume discounts or hourly rate discounts. With volume discounts, a company will agree to refer all of a specific kind of work to a law firm in exchange for discounted fees. Other firms will reduce the rates of the attorneys working on the matter for the client. These types of arrangements are becoming the norm rather than the exception.³⁹

Instead of negotiating for volume or hourly rate discounts, a client can hold a "beauty contest," in which it invites a number of law firms to bid on handling the matter. Each bid usually includes an analysis of how the firm plans to attack the matter, staffing plans, and fees.⁴⁰ One drawback to constantly requesting bids, however, is that the practice does not promote long-term relationships or provide any assurance that the service outlined will be of the quality desired.

When a firm takes on a matter on a flat fee billing arrangement, the firm will handle the



"Guidelines which are too stringent can strain the relationship between attorney and client."

“Task billing is essentially a pay as you go method in which clients pay for each stage in the resolution of the matter.”

matter for a pre-established price, no matter how many hours are required to complete the project. This is sometimes referred to as “value billing.” The term value billing is used when discussing the flat fee method because the flat fee quoted to the client is generated by a formula.⁴⁰ The formula takes into account the “reasonable relationship between the costs of the service to the client and the potential value of that service to the client, while acknowledging the impact of the marketplace upon that attorney’s right to command a greater fee than his or her competition.”⁴¹ These considerations, albeit cryptic in application, are used to determine the fee that the firm will charge.

Firms that employ a blended rate (or fixed fee) method charge the client an hourly rate somewhere between that usually billed by a senior partner and younger associates. The benefit lies in the fact that one obtains the service and expertise of the senior partners at the cost of an associate.

There are deficiencies in both the value billing and blended rate methods. First, value billing carries the risk that outside counsel will either reap a windfall or receive inadequate compensation. This problem should be addressed at the outset of the relationship, when negotiating the fee. Intuitively, it would seem that if the firm is experienced in handling the matter, it is in a sound position to determine what the costs would be to resolve it. Yet, the firm’s experience and expertise cuts both ways. Ideally, one would hope that the firm negotiates a fee that takes into account research, briefs, and memos already done on the matter. This would correlate into a lesser flat fee. Conversely, though, a firm that has all the preliminary research on file could take advantage of the client by quoting a higher price for the service with the knowledge that much of the work is already completed.

On the other hand, purchasers of legal services in the current market have more leverage and are in a better negotiating position when determining the flat fee. In that event, a firm could be retained for the matter without full knowledge of all that it entails. The unknown nature of many legal problems could create a situation where the firm would receive inadequate compensation for the services rendered.

Second, the value billing and blended rate methods may generate a conflict between the law firm and the client, who have divergent economic interests. The client may want the benefit of the most experienced and efficient

partners, but the firm may want to put them on other clients’ work or simply use lower-paid associates on the matter.⁴³ To prevent this from happening, a client may require the firm to provide specifics on staffing at the outset or require that a certain portion of the time be that of the supervising attorney. Under the blended fee approach, this would be easy to determine because time sheets are still generated by the attorneys. But in the value billing situation, where time sheets are not used, the client would not know how many hours each attorney was contributing. Is the client going to request that attorneys working on its file “bill,” i.e., generate time sheets or records of time spent? That is one of the very things the alternate billing movement is intended to do away with.

Furthermore, quality may suffer due to the parties’ divergent economic interests. Firms may have more of an interest in “cutting corners” to save costs, as by not updating research or limiting discovery. Quality also may suffer because such methods can affect the timeliness of service. If there is a choice of whether to bill \$300 per hour to one client or to work on a file that is under a value billing or a blended fee, the “billable” file may get more attention and the matter be resolved sooner.

Modified contingency fees (or “defense contingency fees”) are another approach. Under this method firms still record time, but a portion of the law firm’s fee is conditioned upon its success in obtaining a favorable result in the matter. The advantage to this alternative is that compensation depends on the result the firm obtains, not on how much time is spent on the matter. Modified contingency fees, however, require the firm to assume the risk that compensation for the legal service is not guaranteed.⁴⁴

Law firms also may be amenable to employing task billing. Task billing is essentially a pay as you go method in which clients pay for each stage in the resolution of the matter.⁴⁵ Many proponents of task-based billing claim that it allows corporate counsel to gain data on what a reasonable price is for a certain task performed by a legal service provider. This data provides a knowledge base to corporate counsel which allows them to negotiate better fixed fee arrangements. Yet, this necessarily leads to additional monetary expense as the client must set up some sort of data collection system and provide the personnel to analyze the data and manage it on an ongoing basis.⁴⁶



Fee Disputes

If a dispute over fees does arise, clients should, first and foremost, talk to their lawyer. In most, if not all, cases, lawyers will be amenable to discussing their fee and billing practices. An open and frank discussion concerning problems and questions a client has about the bill usually will resolve these problems. Remember, all parties involved want to keep the mutually beneficial relationship alive and well.

Sometimes, though, discussions are unsuccessful and a conflict continues to exist. In that event, clients and lawyers must look elsewhere to resolve their dispute. Generally, they look to alternative dispute resolution—mediation or arbitration—or, as a last resort, to litigation.

Mediation is often well-suited to solving fee disputes. A form of assisted negotiation, mediation is a process in which a neutral facilitator works with the parties, separately or together, to help the parties themselves reach an agreement. Mediation offers important benefits to both the client and the lawyer and generally saves time and money compared to litigation. Mediation is private, protecting the lawyer in particular from the embarrassment of a public dispute; that protection can serve as an inducement to settlement. Furthermore, mediation helps the parties to preserve an ongoing business relationship. In mediation, with the assistance of an effective neutral facilitator, the parties tend to work together to resolve the dispute, rather than in opposition. As a result, attorney and client retain a higher degree of trust in each other, coupled with a greater understanding of their respective concerns, thus allowing them to continue to work together while taking steps to avoid future disputes.

Like mediation, arbitration also involves a neutral third party. However, in arbitration the third party hears the disputing parties present their evidence and arguments and reaches a conclusion about the merits of the dispute. Arbitration thus offers many of the benefits of mediation, such as cost and time savings and privacy, with the addition of yielding a neutral's opinion about the controversy. That opinion can be advisory, helping persuade the parties to agree on a solution, or binding, producing a decision each party must accept. Either way, a privately issued neutral evaluation of even a strongly disputed matter can resolve a nettlesome conflict without the harshness of public litigation.

Both mediation and arbitration offer an additional, important advantage: their use and

structure can be anticipated and controlled. As with other aspects of the attorney-client relationship (such as staffing guidelines, billing frequency, etc.), the nature and form of the fee dispute resolution process can be agreed upon in advance. Thus, the parties can decide whether to use mediation or arbitration (or both), whether arbitration will be binding or advisory, who will serve as the neutral, and so forth. Particularly where the client (such as an insurer) retains numerous firms or attorneys or regularly retains the same firm or attorney with a form engagement letter, inclusion of a well-constructed fee dispute mechanism can bring consistency to resolution of fee disputes regardless of the attorneys' location or practice.

Some state bars—Illinois is one example—offer a form of mediation or arbitration for attorney-client fee disputes. However, the efficacy of those programs is questionable where the client is a larger business entity, such as an insurance company. The state programs seem to be geared to disputes involving individual clients rather than business entities, and often utilize as neutrals persons who lack mediation skills training.

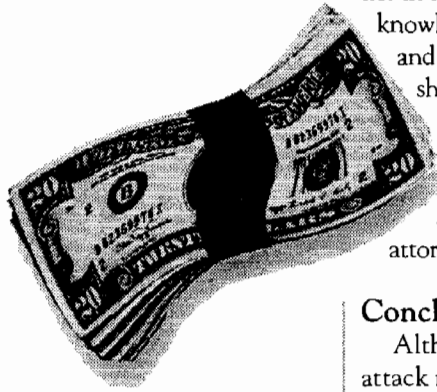
Finally, litigation of fee disputes, often in the form of a declaratory judgment action, is an option. Seeking a judicial determination of the reasonableness of fees is not without its merits. Litigation can expose and sanction truly egregious behavior. And, the very act of instituting litigation can send a strong signal to the legal community that unreasonable billing practices will not be tolerated—at least by that client. Litigation also affords appealability of adverse decisions.

The drawbacks of litigation, however, generally make it useful only as a last resort. Litigation, of course, is time-consuming and expensive. Billing disputes are highly fact-intensive, so a litigated resolution is of little precedential value. In other words, neither the client nor the attorneys may get much for their time and money. Litigation also tends to produce sharp adversarial positions and unwanted publicity (at least within the legal community), creating ill-will rather than cooperation. Whether client or attorney, becoming known as a “hardball” player on fees can result in less trust in working relationships and perhaps impact the quality of work performed. For the litigious client, it also can reduce the pool of able counsel willing to perform services; for the litigious law firm, it can reduce the number of clients.

Where possible, then, non-litigation dispute

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resolution methods are preferred. The key to effective mediation or arbitration of fee disputes lies in the use of a trained neutral facilitator knowledgeable about the work attorneys do and their billing practices. Ideally, the parties should seek a neutral third party who has been professionally trained as a facilitator, is experienced as a litigator (both for plaintiffs and defendants), and understands the desires and practices of both attorneys and clients.

Conclusion

Although hourly billing has come under attack recently, it is, for the time being, the predominate method used by legal service

providers to charge their clients. Therefore, consumers of legal services should attempt to limit the abuses hourly billing fosters by relying on the reasonable attorney fee requirement and by careful monitoring of their providers. Consumers also should consider advance agreements to smoothly resolve disputes that do arise. Case law and the legal services marketplace have started the process of establishing guidelines for determining the reasonableness of attorneys' fees. It is now the job of the consumer to refine and enforce those guidelines in effective and efficient ways and, when disputes arise, to seek a forum for resolution which is consistent with its business objectives.

Endnotes

1. Harvey Saferstein, Letter to the Editor, *L.A. Times*, July 18, 1993, at 3.
2. Blair S. Walker, "Legal Bills Undergo Greater Scrutiny," *USA Today*, June 24, 1992, at 4B. Once auditor uncovered an alliance of 20 attorneys who, over an eight-year period, defrauded a dozen insurers of at least \$200 million in defense costs. Richard B. Schmitt, "An Insurer's Sleuth Sniffs Out Lawyers Inflating Their Bills," *The Wall Street Journal*, July 21, 1992, at A1. See also Marcia Chambers, "Untangling an Unholy Alliance," *National Law Journal*, April 30, 1990, at 13-14.
3. Sara J. Harty, "Tort Costs Grow Faster than the Economy," *Business Insurance*, October 19, 1992, at 1. [Citing Tillinghast, "Tort Costs: An International Perspective 15" (1989).]
4. *Ibid.*
5. *Ibid.* One should note, however, that these figures have been criticized and should not be read as absolutes. Another study, which did not include the costs of operating the insurance system, found that the U.S. tort system costs between \$29 and \$35 billion. See J. Kakalik & N. Pace, "Costs and Compensation Paid in Tort Litigation vi-vii" Rand Corporation Study (1983).
6. Eileen P. Gunn, "Cost of Defense Rising Faster than Liability Losses," *Business Insurance*, January 4, 1993, at 3 (citing Insurance Services Office Inc., "Legal Defense: A Large and Still Growing Insurance Cost"). The Insurance Services Office study cited by Gunn broke down defense costs in 1991 by lines of coverage:
 - \$4.2 billion for general liability;
 - \$2.3 billion for workers compensation and multiperil;
 - \$1.2 billion for commercial automotive;
 - \$1.1 billion for medical malpractice and product liability.
7. ABA Model Code of Professional Conduct Rule 1.5(a) (Smith-Hurd 1993). The Model Code, however, is only a model. Although adopted by many states, other states have ethical rules which differ from the Model Code in various respects.
8. Stephanie B. Goldberg, "The Ethics of Billing: A Roundtable," *A.B.A. Journal*, March 1991, at 56-60. These issues were posed to Professor Geoffrey C. Hazard of Yale Law School, alternative billing specialist Richard C. Reed, and trial lawyer Robert P. Cummins. Remarkably, all three said that Model Code Rule 1.5 would prohibit billing in these situations, but can be rationalized by the attorney to circumvent the purview of Rule 1.5.
9. See Joanne Pitulla, "Truth in Billing: Attorneys Are Paying the Price for Inflating Fee Statements," *A.B.A. Journal*, December 1992, at 120.
10. Courts in virtually all states have ruled upon the reasonableness of attorney fees.
11. *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646, 664 (7th Cir. 1985). See also *Atlantic Permanent Federal Savings and Loan Association v. American Cas. Co.*, 839 F.2d 212, 219 (4th Cir. 1988); *LeRoy v. City of Houston*, 906 F.2d 1068 (5th Cir. 1990). It also should be noted that alleged acts of professional negligence in an attorney's handling of a matter, though not sufficient to establish a cause of action for legal malpractice, do affect the reasonable value of legal services and should be used in determining what fees are reasonable. See *In Re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 157 B.R. 1 (S.D.N.Y. 1993); *Gusman v. Unisys Corp.*, 986 F.2d 1146 (7th Cir. 1993).
12. See *Rogers v. Bobson, Mass, Ryan, Brummund & Bellum*, 392 N.E.2d 1365 (1979); *Purdy v. Pacific Auto Deal Insurance Co.*, 203 Cal. Rptr. 524 (1984); *Lieberman v. Employer's Ins. Co. of Wausau*, 419 A.2d 417 (N.J. 1980).
13. Although cost cutting is a worthwhile goal, it is equally important to look at the relationship between the rates charged, the value added, and the results obtained to determine at what rate effective and economical services are provided. Just as it is foolish to retain an attorney at rates of \$400 per hour or more without question, the same can be said of the decision to hire a lawyer at \$100 per hour or less without inquiring into his or her experience, the substantive staffing of the matter, and the firm's prior billing practices.

"Consumers also should consider advance agreements to smoothly resolve disputes that do arise."

14. See *In Re Marriage of Angiulli*, 480 N.E.2d 513 (Ill. App. 1985); *In Re Leonard Jed Company*, 103 B.R. 706 (Bkrcty. D.Md. 1989).
15. See *Hutchinson v. Wells*, 719 F. Supp. 1435 (S.D. Ind. 1989) (review of client's bill); Blair S. Walker, "Legal Bills Undergo Greater Scrutiny," *USA Today*, June 24, 1992, at 4B.
16. *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40 (1983).
17. *Scott Fetzer v. Weeks*, 859 P.2d 1210, 1217 (Wash. 1993).
18. *In Re Leonard Jed Co.*, 103 B.R. 706, 713 (D. Md. 1989).
19. *Browning v. Peyton*, 123 F.R.D. 75 (S.D.N.Y. 1988).
20. 518 N.E.2d at 429. The bill provided to the court consisted of 13.5 hours with no description, seven hours of "file review," 27.25 hours of "pleadings," 15.75 hours of "document review," 17.5 hours of "status," 5.25 hours for "telephone calls," and 35 hours for "court appearances." *Ibid.* at 428-29.
21. *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984).
22. *Fiorito v. Jones*, 377 N.E.2d 1019 (Ill. 1978).
23. *ECOS, Inc. v. Brinegar*, 671 F. Supp. 381, 395 (M.D. N.C. 1987).
24. *Tomazzoli v. Sheedy*, 804 F.2d 93, 97 (7th Cir. 1986).
25. Risking offense, the authors would go so far as to say that recent graduates of law school, trained in both traditional and computerized legal research techniques, often are better and more efficient researchers than senior attorneys.
26. 572 F. Supp. 931, 933 (N.D. Ill. 1983). See also, *In Re Olson*, 884 F.2d 1415 (D.C. Cir. 1989); *Keith v. Volpe*, 644 F. Supp. 1312 (C.D. Cal. 1986).
27. *In Re Olson*, 884 F.2d at 1429. See also *Keith v. Volpe*, 644 F. Supp. at 1325 (court deleted form attorney fee request 103.2 hours of conferencing); *Laffey v. Northwest Airlines Inc.*, 572 F. Supp. 354 (D.D.C. 1983) partially rev'd on other grounds, 746 F.2d 4 (D.C. Cir. 1984).
28. *Leonard Jed*, 103 B.R. at 711.
29. See, e.g. *Metro Data Systems Inc. v. Durango Systems*, 597 F. Supp. 244 (D. Ariz. 1984) (where the court found Federal Express charges and photocopying charges totaling \$1,370.60 unnecessary); *In Re Bicoastal*, 103 B.R. at 502 (court found copying charges in the amount of \$3,881.20 and fax/Federal Express charges in the amount of \$6,686.55 unreasonable); *Browning*, 123 F.R.D. at 80 (finding \$426.95 of copying charges unreasonable as it "translates into 2,134 copies at \$.20 a page").
30. See *In Re Convent Guardian Corp.*, 103 B.R. 973 (Bkrcty. N.D. Ill. 1989), where the court refused to allow taxicab fare because it was unable to determine who incurred the expense, why the fare was needed, and what matter the attorneys who charged taxicab fares were working on. Other courts have cut attorneys' billing for travel time in half. See *Catching v. City of Crystal Springs*, 626 F. Supp. 987 (S.D. Miss. 1986); *In Re Automobile Warranty Corp.*, 138 B.R. 72 (D. Col. 1991).
31. *U.S. v. Allen*, 578 F. Supp. 468, 487 n.7 (W.D. Wis. 1983).
32. *Denton v. Boilermakers Local 29*, 673 F. Supp. 37, 56 (D. Mass. 1987).
33. *LeRoy v. City of Houston*, 906 F.2d at 1081.
34. Shelby Rodgers, *Alternative Billing Techniques*, 521 PLI Comm. 117, Nov. 30, 1989.
35. See Dan L. Goldwasser, "Insurer, Attorney Relations Can Be Improved," *Business Insurance*, December 10, 1992, at 8.
36. One also should inquire about the relative experience of each attorney assigned to the matter. Expertise is a double-edged sword: it can save money through efficient use of time, but, remember, with expertise comes higher billing rates.
37. See *Pfeiffer v. Sentry Ins.*, 745 F. Supp. 1434, 1443 (N.D. Ill. 1990).
38. See Gary B. Crouse, "Despite Widespread Criticism of Hourly Billing Methods [sic] Just One Law Firm in Five Considers Alternative Billing Critical to Their Success and Survival," *Of Counsel*, June 7, 1993, at 18. One hundred and twenty-nine law firms were surveyed by the consulting firm of Altman, Weil, Pensa of Newtown Square, Pennsylvania to achieve the study's results.
39. Ellen J. Pollack, "In a Bid to Trim Costs, Many Companies Are Forcing Law Firms to Reduce Fees," *The Wall Street Journal*, Dec. 12, 1991, at B1.
40. *Ibid.* See also Jeff Benjamin, "View the Bill from a Proper Perspective; Quality Must Be the Focus," *N.Y. Law Journal*, July 26, 1993, at S1. Qualities that must be considered when reviewing bids are responsiveness, the ability to work with in-house counsel and claims managers and abide by their requirements, integrity, flexibility, and sensitivity to cost. Ellen Joan Pollack, "More Clients Ask Firms to Bid for Work," *The Wall Street Journal*, January 6, 1994, at B3.
41. See Anne B. Fisher, "How to Cut Your Legal Costs," *Fortune*, April 23, 1990, at 185; William Grady, "A Fresh Approach to Legal Fees," *Chicago Tribune*, October 20, 1993, at S3 p. 4.
42. Chris G. McDonough, "Legal Fees: Value Billing and the Reasonable Requirement," *N.Y. Law Journal*, May 11, 1993, at 1.
43. See the Benjamin article referenced at note 40.
44. Darlene Ricker, "The Vanishing Hourly Fee," *A.B.A. Journal*, March 1994, at 66.
45. See the Fisher article referenced at note 41. For example, in the context of litigation the client would pay for each stage of the lawsuit (the initial research, discovery, pretrial, and the trial itself). This approach has been employed by Texas Commerce Bancshares Corporation.
46. Vera Titunik, "Task Mastery," *Corporate Counsel Magazine*, Spring 1994, at 60.

