How To Win a Fee Petition

James P. Schratz

Whether you're presenting a fee petition or challenging one, something remains constant: You need a complete understanding of billing methods that are thorough, accurate, and fair.

NUMEROUS STATE AND FEDERAL statutes provide that, in certain types of suits, the prevailing party's legal fees will be paid by the opposing party. See Joel P. Bennett, *Winning Attorneys' Fees,* The U.S. Government Law Journal Seminars-Press (1984) and James P. Schratz, *Recovering Legal Fees and Using Legal Fee Auditors in Fee-Shifting Cases,* 20 Trial Dipl. J. 299 (October 1997). As society continually expands the scope of protection in such areas as civil rights, the issue of responsibility for the adversary's legal fees grows in importance.

Although protecting the rights of individuals who have not enjoyed the full benefits of our society is an important and laudable goal, the specter of billing abuse in this area cannot be overlooked, since in many cases the attorneys' fees can be significantly greater than the bene-

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fits obtained by the plaintiff. In such a situation, a societal backlash against protecting these substantive rights due to attorney overbilling cannot be discounted. From another perspective, those plaintiff attorneys who fight to protect individual rights should be reasonably compensated for their efforts, and their fee requests should not be discounted if the questionable billing practices can be eliminated.

This article provides a brief listing of some of the most common and questionable billing practices based on case law, which plaintiff's attorneys should avoid and defense attorneys should look for. These are practices that can be easily avoided, thus improving the plaintiff attorney's chances of having his or her fee petition approved.

OVERBILLING IN FEE-SHIFTING CASES: IS THERE A PROBLEM? • In his book, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys,* Professor William Ross published the results of a nationwide survey of attorneys, wherein almost 40 percent of those interviewed admitted to some form of overbilling or billing abuse. When these survey results are considered in the context of requiring the "losing" party to reimburse the prevailing party's attorneys' fees, the possibility of significant billing irregularities cannot be dismissed lightly. This is not to suggest that attorneys intentionally overbill in fee-shifting cases, but rather to acknowledge that, due to a number of factors, the possibility exists.

"It's Payback Time"

While some clients may disagree, attorneys are human and human nature must be considered in fee-shifting cases, in that the adversary is being asked to pay the opponent's fees.

Assume the plaintiff's attorney has spent a long day in a rancorous deposition of the main defendant. Despite numerous unfounded objections (according to the plaintiff's attorney), the deposition is finally concluded in the early evening. Plaintiff's attorney returns to her office, where she finds that a voluminous set of discovery requests, asking for irrelevant and objectionable (according to the plaintiff's attorney) material has been served on her by the defense counsel. At the same time, the plaintiff's attorney realizes she has not filled out any time sheets on the case for the past several days. As she sits at her desk pondering the baseless deposition objections, and the oppressive and burdensome discovery requests, she begins to fill out her time sheets, knowing full well that if she wins the case, the defendant will be required to pay her fees. The possibility of "payback," for all the indignities suffered by plaintiff's attorney, real or imagined, must be considered.

Client, Client, Where Is the Client?

In many of these fee-shifting cases, there is no client review of the billing records, nor is there any internal law firm control over the accuracy and reasonableness of the entries. For example, in one case involving prisoner rights, the plaintiff prisoners never saw a bill from the attorneys representing them, nor were they responsible for paying any of the legal fees, since the attorneys were representing them pro bono. However, when plaintiffs won the lawsuit, their attorneys filed a multimillion-dollar fee petition. At the same time, the hours spent on this case by the attorneys and paralegals involved were credited toward their annual hourly goal. Since the "clients" were not responsible for paying the legal fees, the incentive for controlling the amount of time spent on this matter was reduced.

Contingency Fee Agreements

In many other instances, the plaintiff's attorney has entered into a contingency agreement with the client, so there are no invoices for the

client to review, hence, no client control of costs. Admittedly, the plaintiff's attorney has an incentive to control the amount of time and costs spent on a particular matter, but that control can be sporadic, at best. If the plaintiff is victorious, the plaintiff's attorney can recover a portion of the award, as well as requiring the defendant to pay his legal fees. Again, there is no outside client control of fees.

Lack of Control by the Defendant

It is axiomatic to state that, with rare exceptions (such as those described below), the defendant has very few options available in attempting to control the plaintiff's legal fees.

LEGAL FEE AUDITORS: NOT AS BAD AS A ROOT CANAL, NOT MUCH BETTER THAN AN IRS AUDIT • Legal fee auditors were initially retained by corporations such as insurance companies, that are confronted routinely with hundreds of millions of dollars in annual legal expenses. Unable to cope with deciphering often-unintelligible legal bills, and sometimes overwhelmed by the sheer magnitude of the litigation, these corporations retained outside experts to review the legal expenses. The experts provided guidance to the corporation as to the reasonableness and necessity of the fees. Taking notice of the numerous billing abuses that legal auditors uncover, defendants in fee-shifting cases realized that similar billing abuses may exist in the legal invoices that their victorious adversaries were now asking them to pay.

While some plaintiff's attorneys may have initially taken a small amount of pleasure in the pain the insurance industry was inflicting on defense attorneys, other plaintiff's attorneys (especially those representing plaintiffs in fee-shifting cases, such as civil rights, ADA, class actions, and the like) were prescient enough to understand that these same legal fee auditing techniques could some day be used to analyze their fee petitions. To increase their chances of having the court approve their fee petitions, these attorneys began to analyze the case law that identified questionable billing practices, and some even began submitting their fee petitions to a legal fee auditor before they were submitted to the court. If the legal fee auditor approved the petition, he or she would then be recruited to sign a declaration in support of the fee petition.

BILLING GUIDELINES: DEVELOPING CASE LAW • Over the past 10 to 15 years, there has developed a significant body of case law as to acceptable billing practices. (For a listing of the case law on this subject, see William Ross, *The Honest Hour,* and James P. Schratz, *Billing Guidelines and Fee Disputes: A Case Law Review,* 18 Trial Dipl. J. 159 (May/June 1995).) Whether preparing or opposing a fee petition, practitioners in this area should be well aware of the developing law. Based on a review of this case law, this article will highlight some of the more troubling billing practices, in addition to describing some practical suggestions in litigating fee petitions.

Contemporaneous, Accurate Time Records

Most, but not all, jurisdictions require the attorney to keep contemporaneous, accurate time records. Some plaintiff's attorneys, especially those whose practice focuses on contingency work, find such a requirement extremely tedious and oppressive. Even those attorneys who may be more accustomed to keeping time records can find this requirement burdensome, especially when preparing for, or in the midst of, trial. Despite these objections, based on personal experience and in light of the case law, it is strongly recommended that all timekeepers maintain accurate, contemporaneous time records.

Trust Me, I'm Worth $400 an Hour": Excessive Hourly Rates

Most plaintiff attorneys attempt to support their hourly rates by recruiting three or four other plaintiff attorneys to submit declarations stating that the plaintiff attorney is one of the finest attorneys in the community, that no other attorney would have taken on such a difficult case, and in light of how complex the case was, the hourly rate is extremely reasonable. Similar to Garrison Keillor's *On Lake Woebegone*, in which "all the women are strong, all the men are good-looking and all the children are above-average," the attorneys described in the fee petitions are always among the best in the community, the case is always complex, and no other attorney in the community would take the case.

Every Case Is the Toughest Case

Based on these petitions, one would think there is no such thing as a merely competent or mediocre attorney; that all attorneys have so much work they can refuse most of the cases submitted to them; and that no case is anything less than complex. This last factor in support of the fee petition is often contradicted by a statement made during the hearing on plaintiff's motion for summary judgment, in which plaintiff's attorney insists "Your Honor, this really is a very simple case." Similarly, statements by defense counsel can come back to haunt them in the fee portion of the case. According to a well-known plaintiff's attorney in San Francisco, the defense counsel seeking appellate review emphasized the significance and extreme importance of the case to the defendant's entire industry. During the fee portion of the case, the plaintiff's attorney used these statements to support his argument for a substantial fee award. James Sturdevant, speaker for The Barrister's Club of San Francisco, *Successfully Obtaining Attorney's Fees Under Fee-Shifting Statutes*, January 9, 2001.

The defense attorneys usually respond to the fee applications by submitting three or four declarations from other defense counsel, stating that plaintiff attorney's rates are excessive, to which plaintiff's attorney replies that defense attorneys (especially those who work for insurance companies) are notoriously under-compensated.

Some Real Numbers

There is little, if any, scientific evidence marshaled by either side about what the prevailing market rates actually are. Recently; however, there are two publications which supply data that neither plaintiff nor defense counsel should ignore. The National Survey Center, located in Washington, D.C., (202) 244-3937, and the consulting firm of Altman, Weil & Pensa, Two Campus Boulevard, Newtown Square, PA. 19073, (610) 359-9900, both publish annual surveys of the hourly rates charged by attorneys for the top 25 cities in the United States.

Before submitting his fee petition, the plaintiff's attorney would be wise to consult one of these publications, to assure himself that his hourly rate is within the rage of the survey findings, and refer to the findings in the petition. Similarly, the defense attorney should consult these publications to determine if the plaintiff attorney's requested hourly rate is consistent with those described in the survey.

In addition, the defense attorney should review any other fee applications by the plaintiff's attorney, to determine if the attorney has previously requested reimbursement at an hourly rate substantially less than the current request, and also to determine if any previous fee applications made by plaintiff's attorney had been disallowed, and in what amount. Such a procedure is significantly easier to do in federal court, due to electronic case filing.

PACER System

In cooperation with the United States Courts, the Federal Judicial Center designed an electronic public access system called PACER (Public Access to Court Electronic Records), which provides information on cases filed in various federal district and appellate courts throughout the country. In addition, an increasing number of state courts are also going online.

Court Records

Conversely, the plaintiff's attorney may want to review court records to determine if the defense attorney has ever sought fees in another matter, and made any statements as to hourly rates or billing practices which are inconsistent with the positions taken in the instant case.

Whose Market Rate Is It Anyway?

Over the past few years, the issue of different rates for small, mid-sized, and large law firms has begun to surface. Some defense attorneys have argued that small and mid-sized firms, with fewer non-billing support staff such as secretaries, administrative staff, and so forth, have a lower overhead than large firms who have a correspondingly greater number of non-revenue producing personnel. In addition, many solo or small law firms have lower rental costs than a large law firm with numerous floors in a major high-rise building in the heart of the downtown area.

According to some commentators, a few courts are beginning to recognize the reality of the legal marketplace in awarding prevailing rates to plaintiff's counsel. (For a general discussion of this topic, see Ken Moscaret, *Fee for All*, Los Angeles Daily Journal, Friday, September 29, 2000, page 6.) The Second Circuit Court decision in *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053 (2d Cir. 1989, *cert. denied*, 496 U.S. 905 (1990)) affirmed that the district court was not required to assign the same hourly rate to every law firm in the city, since several market rates may prevail in a large and diverse legal community, such as New York. The market rate awarded to plaintiff's counsel could be calculated by looking at small to mid-sized law firms in the city only.

In Bick v. City of New York, 1998 U.S. Dist. Lexis 5543 (S.D. N.Y. April 21, 1998), the court said the hourly rates awarded must reflect the size of the law firm involved. And in *Gomez v. Gates*, 804 F. Supp. 69 (C.D. Cal. 1992), the court stated that: "for a given type of work, lawyers in large firms charge institutional clients far more per hour than is charged by lawyers of the same skill and experience in small firms to individual clients."

Vague Entries

In one case, the attorney time records contained numerous entries for "telephone call with client - 0.50 hour." When the telephone records were subpoenaed and compared with these entries, it was discovered that the phone calls lasted, on average, less than two minutes. When cross-examined on this point, the attorneys involved claimed that this entry actually meant "go to file room, retrieve file, prepare for phone call, make phone call to client, make notes concerning phone call, return file to file room." The end result: the court substantially reduced the fees.

Red Flags

Time entries such as "research," "phone call," "trial," and "trial prep" raise red flags, and numerous courts have disallowed time associated with such vague entries. While providing a more detailed explanation of activities performed can be annoying and time consuming, especially during the heat of trial, the increased possibility of having all of the fees awarded would seem to outweigh the annoyance.

Blocked Billing: "Throw it up Against the Wall and See if it Sticks"

"Blocked billing" is the lumping together of daily time entries consisting of two or more task descriptions, or the grouping of different tasks within one block of time on a time record. Blocked billing prevents the court from accurately assessing the amount of time that was actually spent on each task, which could result in an understatement or overstatement of the amount of time the law firm spent on specific tasks.

Similar to vague entries, this billing format issue can be easily resolved by individually listing each task. Again, while it may be time-consuming to do so, it will increase the chances of having all the fees awarded.

Excessive Minimum Billing Increments: "Inflation Isn't a Bad Word"

Billing in quarter-hour segments or greater can exaggerate the amount of time that was actually spent on a task. This is especially important if a significant portion of the fees requested were incurred on tasks such as telephone calls, or intraoffice conferencing, since experience has shown that most phone calls or intraoffice conferences do not last fifteen minutes or longer. Plaintiffs' attorneys should record time in one-tenth of an hour segments, and defense attorneys should analyze the fee petition to determine how much time was recorded in quarter-hour or greater segments, and determine how much of that time was spent on phone calls and intra-office conferencing. Depending on the amount of the fee request, a decision would then need to be made whether an attempt to obtain partially redacted telephone records from plaintiff's attorney, to compare the length of the phone call to the time billed, would be cost-justified.

Allocation of Work Directed to Other Defendants

If the plaintiff sues several defendants and eventually is only successful against one of them, the plaintiff cannot recover fees for the work relative to the successful defendants. In one matter, the plaintiff sued a number of defendants but prevailed against only one defendant. By isolating the work devoted to prosecuting the case against the successful defendants, the defense attorney determined that approximately 50 percent of the fee application should be disallowed.

There is abundant case law construing this issue under a variety of fact scenarios. In the usual fact situation, fees are apportioned according to the relative time spent litigating against a particular defendant. For example, when plaintiffs successfully challenged a state and federal highway project, and 75 percent of their work was against the state defendants, 75 percent of the fee request was approved, and 25 percent of the fee request was disallowed since the federal defendants were immune from fee-shifting requests. *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1126 (9th Cir. 1981).

Allocation of Costs Associated with Other Defendants

The law is clear that it is not proper to aggregate costs against a party or parties, if the costs may be allocated amongst the various parties. *See, e.g., Fennessy v. DeLeuw-Cather Corp.* 267 Cal. Rptr. 772 (Cal. Ct. App. 1990), and *Gold West of Kentucky, Inc. v. Life Investors, Inc.* 223 Cal. Rptr. 539 (Cal. Ct. App. 1986).

Excessively Long Days

The defense attorney should total the number of hours billed by each plaintiff timekeeper each day, to assure that the timekeeper did not bill an excessive number of hours in any one day. This can happen when a timekeeper uses a mini-

mum billing increment of 0.25-hour to review or draft multiple pieces of correspondence, or to make multiple telephone calls.

Unidentified Timekeepers

Some law firms only provide the initials of the timekeepers, which prevents the other side from determining if the biller is an attorney, paralegal, or clerk. It also prevents an opposing attorney from determining if the biller is admitted to practice law, and whether his or her level of experience is commensurate with the hourly rate. Plaintiff's attorneys should provide, and defense attorneys should insist on, complete names for each timekeeper, and an indication that the timekeeper is an attorney, paralegal, or clerk.

Multiple Attendance at Depositions: "The Phantom Strikes Again"

Courts often disallow time for multiple timekeepers attending a deposition or court hearing. The time records should be reviewed and compared to deposition transcripts and court hearing transcripts, to make sure that multiple timekeepers did not bill for attendance at depositions or hearings. In one matter, the time records for a particular attorney billed for attendance at multiple depositions on a particular date, when a review of the deposition transcripts showed that no depositions occurred on that date. The attorney attempted to justify the entries by stating that "attend deposition" actually meant "prepare for deposition."

Spread Billing

This practice is most common in class actions, where the plaintiffs' attorneys have established separate billing files for each plaintiff. When a particular piece of correspondence or pleading is drafted or reviewed, the attorney bills 0.10- or 0.20-hour to each filed, based on the theory that it related to all of the individual plaintiffs.

Overstaffing

When a large number of timekeepers bill to any one case, some of the fees inevitably include time billed for attorneys educating other attorneys about the case, or billing excessive time on tasks that become routine with experience. Where there is duplication of effort, courts regularly employ an across-the-board percentage reduction.

OTHER TACTICAL CONSIDERATIONS • In challenging the reasonableness of a fee petition, should the defense use comparisons, try to obtain internal management reports, or otherwise pursue discovery? A standard lawyer's answer: "It depends."

Comparing Fees

Some defense attorneys, if their fees are lower than those requested by the plaintiff, consider introducing evidence of that fact, despite the obvious disadvantage of possibly opening up their billing practices for discovery. Unless the plaintiff attorney's fees are significantly higher, by a multiple of at least two, there is probably no benefit to comparing fees. On the other hand, if the defense attorney has staffed the case much more efficiently than the plaintiff has, this factor could be introduced. In any event, either one of these facts could be introduced by way of an expert declaration to the effect that the expert understands that the defendant's fees are a certain amount, or that the defendant staffed the case with a certain number of people.

Obtaining the Plaintiff Attorney's Internal Management Reports

In the event the defendant discovers highly questionable items in the fee petition, defense counsel should consider seeking the plaintiff's management reports, which keep track of all time billed by each timekeeper on a daily, weekly, monthly, and annual basis. For example, if

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the defense attorney discovers that the plaintiff's attorney has billed more than 24 hours in one day, he should consider seeking these records to see if the plaintiff's attorney billed more than 24 hours to all cases on other days. Since the defense attorney can expect significant opposition to such discovery, he or she should have sufficient evidence of highly questionable billing practices in order to convince the court of the necessity of obtaining these records.

Taking the Deposition of Plaintiff's Attorney

If anybody is proficient at not answering an attorney's questions, it is another attorney. Since the information is contained in the time records, with rare exceptions taking plaintiff attorney's deposition is usually not cost-justified.

Control Your Own Litigation Costs

Clients and counsel should continually be aware of even the appearance of billing abuses by their own side while litigating the underlying case. It is likely that a judge will not be persuaded by arguments that one side has overstaffed the case when the other side has approximately the same number of timekeepers. Similarly, counsel should not complain about the opposing law firm sending two or more attorneys to a deposition when it has done likewise.

Although not determinative, counsel should also be aware of the overall amount of their fees in relation to the other side's fees. For example, it may be difficult for a court to accept the defense argument that a plaintiff's fee request of $1 million is excessive when defense counsel spent twice that amount.

Closely Scrutinize Billing Throughout the Litigation

Educate the court and opposing counsel that in the event the opposition is successful, defense counsel will be closely scrutinizing the fee application. Throughout the course of the litigation it is possible for counsel to subtly, but effectively, point out to the court possible overbilling by the other side.

For example, if the plaintiff's law firm sends multiple personnel to a hearing or deposition, defense counsel, who should be there alone if possible, can point out to the court the disparity in the numbers. If plaintiff's counsel seeks to depose everybody at the defendant corporation who ever heard of the matter, defense counsel can gently indicate to the court the possible billing abuse. If the defense files numerous lengthy motions, plaintiff's counsel can also point out the possible billing abuse in this area.

Counsel should also indicate that such billing practices as blocked billing are unacceptable and can significantly interfere with the efficiency of the audit process.

CONCLUSION • Plaintiffs' attorneys in fee-shifting cases should be adequately compensated for their successful efforts, while at the same time should avoid the "red flags" of possible billing irregularities. Defense attorneys, on the other hand, must carefully review these fee petitions to assure themselves that the fees requested do not contain any of these questionable billing practices. To the degree that both groups perform their duties, their clients and society at large will be better served.

PRACTICE CHECKLIST FOR
How To Win a Fee Petition

As the volume of litigation subject to fee-shifting provisions has increased, so has the number of fee petitions. Insufficient or inadequate billing practices can hurt the plaintiff and defendant alike. For the plaintiff, there are some special things to avoid; for the defendant, some special things to look for

• A successful fee petition must rest on contemporaneous, accurate time records.

• The attorney's rates must be reasonable:

☐ Recruiting three or four other plaintiffs' attorneys to submit declarations stating that the plaintiff's attorney is one of the finest attorneys in the community is not enough;

☐ Likewise, it is not enough for the defense attorneys to respond to the fee applications by submitting three or four declarations from other defense counsel, stating that plaintiff's attorney's rates are excessive;

☐ Both the petitioner and the defense attorney should consult The National Survey Center, located in Washington, D.C., (202) 244-3937, and the consulting firm of Altman, Weil & Pensa, Two Campus Boulevard, Newtown Square, PA. 19073, (610) 359-9900. Both publish annual surveys of the hourly rates charged by attorneys for the top 25 cities in the United States, and can help to determine if the plaintiff attorney's requested hourly rate is consistent with those described in the survey;

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☐ Conversely, the plaintiff's attorney may want to review court records to determine if the defense attorney has ever sought fees in another matter, and made any statements about hourly rates or billing practices which are inconsistent with the positions taken in the instant case.

• Vague time entries such as "research," "phone call," "trial," and "trial prep" raise red flags, and numerous courts have disallowed time associated with such vague entries.

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• Billing in quarter-hour segments or greater can exaggerate the amount of time that was actually spent on a task. This is especially important if a significant portion of the fees requested were incurred on tasks such as telephone calls, or intraoffice conferencing.

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• It is not proper to aggregate costs against a party or parties, if the costs may be allocated amongst the various parties.

• The defense attorney should total the number of hours billed by each plaintiff timekeeper each day, to assure that the timekeeper did not bill an excessive number of hours in any one day.

• Plaintiff's attorneys should provide, and defense attorneys should insist on, complete names for each timekeeper, and an indication that the timekeeper is an attorney, paralegal, or clerk.

• Courts often disallow time for multiple timekeepers attending a deposition or court hearing. Review the time records and compare them to deposition transcripts and court hearing transcripts, to make sure that multiple timekeepers did not bill for attendance at depositions or hearings.

• Look out for "Spread Billing," which occurs most frequently in class actions, in which the plaintiffs' attorneys have established separate billing files for each plaintiff. When a particular piece of correspondence or pleading is drafted or reviewed, the attorney bills 0.10- or 0.20-hour to each filed, based on the theory that it related to all of the individual plaintiffs.

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