

ENSURING PARALEGAL FEE RECOVERY THROUGH PROPER BILLING STANDARDS

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The continued lament of paralegals all over the country is that they are not secretaries or clerical staff. They are paraprofessionals with specific education, training and continuing education requirements. They have specific skills honed by training and experience that provide a separate and specific benefit to attorneys and clients. I put aside, for the moment, the conundrum this creates for attorneys and supervisors on “Administrative Professionals Day.” I will instead focus on the best avenue to ensure maximum recovery of the paralegal fees recorded and billed to the case or project.

The insurance industry recognized the value of the reduced paralegal rate decades ago. Insurance companies have incorporated into their defense counsel guidelines, distinctions between tasks they will compensate a law firm for at paralegal rates and those they will compensate at attorney rates. These guidelines also define clerical tasks that are not compensable because they are appropriately considered a part of the attorney’s overhead and included in the attorney’s hourly rate. The bottom line is courts and clients are watching fee invoices carefully, making paralegal fees an easy target for challenge and reduction.

The U.S. Supreme Court Weighs In

The ongoing debate over recovery of hourly fees billed by paralegals seems resolved by U.S. Supreme Court opinions in *Missouri v. Jenkins* 491 U.S. 274, 109 S.Ct.2463 (1989) and most recently by *Richlin Security Service Co. v. Chertoff, Secretary of Homeland Security* 218 S.Ct.2007 (2008). Yet, I have seen fee petitions as recently as this year argue both for and against the separate hourly billing of paralegal fees. The job of attorneys, paralegals and ultimately fee auditing experts is to provide the client with the most effective and economical legal services available. Properly assigned, paralegals are a valuable component of this formula.

The *Jenkins* Court reviewed a prevailing plaintiff’s right to recover attorneys’ fees under a Federal Civil Rights Statute (48 U.S.C. § 1988). The defendant State of Missouri challenged the recovery of separately billed paralegal fees. The Court found the right to recover a “reasonable attorney’s fee” must refer to a reasonable fee for the attorney’s work product. It refused to limit the term only to those fee entries personally performed by licensed members of the bar. (*Jenkins*, 491 U.S. 274, 285). The definition of “reasonable fee” for attorney work product has historically been driven by the marketplace. The Court, thus, concludes the appropriate compensation to the prevailing party

includes work separately billed by paralegals if that is the standard in the marketplace where the action is litigated. The Court recognized the shift to separate billing for paralegal time in the legal community and the statutory purpose in providing the same level of compensation otherwise available in the marketplace. Preventing the prevailing party from billing separately for paralegal time, while allowing defense counsel in the same action to obtain market rate for paralegal work thwarts that statutory purpose. (*Id.*, at 286-287.)

The *Jenkins* Court also recognized the benefit to civil rights litigants of the use of paralegals and law clerks to perform legal tasks under attorney supervision at lower billing rates. (*Id.*, supra at 288.) The Court warned against the potential that these tasks will be performed by attorneys rather than paraprofessionals if separate billing is disallowed, drastically increasing litigation fees.

The rationale of the *Jenkins* Court was reaffirmed and solidified most recently in the *Richlin Security Service Co. v. Chertoff* case ("*Richlin*"). Unlike *Jenkins*, *Richlin* addressed fee recovery under the Equal Access to Justice Act (5 U.S.C. § 504 and 28 U.S.C. § 2412 (d)(1)(A) ("EAJA"). Defendant argued that the application of the different recovery statute distinguished the earlier *Jenkins* decision and required a calculation of the paralegal fees based on actual cost to plaintiffs' counsel rather than fees billed to Plaintiff.

Richlin found that a straightforward reading of the statute allows the recovery of paralegal fees at market rate. (*Richlin*, supra 218 S.Ct at 2012.) The Court agreed with *Jenkins* that the definition of "attorneys' fees" as used in the statute cannot have been limited only to work performed by members of the bar. The Court also rejected the argument that the term could have different meanings for different statutes, finding it "self-evident" that Congress meant to embrace the recovery of paralegal fees when it enacted the attorney fee recovery statutes. (*Id.*, at 2014.) The overriding rule is that fees should be recoverable in accordance with the customary practice in the relevant marketplace. (*Id.*, at 2017.) If separately billed paralegal fees are customary in the marketplace, they are recoverable by the prevailing plaintiff under the fee shifting statute.

What is Paralegal Work?

Once paralegal fees are separately billable and recoverable, they are subject to the same standards and scrutiny as attorneys' fees. The paraprofessional designation of paralegal is subject to regulation in many jurisdictions, though not yet to the extent attorneys are governed and regulated.

The National Federation of Paralegal Associations ("NFPA") defines a paralegal as someone who has qualified for that title "through education, training or work experience, to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer." NFPA requires that these paralegals be either be employed by or retained by a

lawyer, law firm, governmental agency or other entity or “authorized by administrative, statutory or court authority to perform this work.” (See, NFPA Informal Ethics Opinion 95-4, n. 1.) NFPA has taken the position that it is not ethical for paralegals to bill clerical tasks which are non-professional.

California appears to have adopted the NFPA definition and requires minimum education, certification and continuing education requirements for paralegals. California Business and Professions Code Section 6450 defines a Paralegal as a person who:

- Is qualified by education (Certificate or Bachelors Degree) or, training, or work experience (High School diploma plus three years working under supervision of attorney);
- Either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity; and
- Performs substantial legal work under the direction and supervision of an active member of the State Bar of California.
- Tasks performed by a paralegal include, but are not limited to, case planning; development and management; legal research; interviewing clients; fact gathering and retrieving information, drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is permitted by statute, court rule, or administrative rule or regulation.

Paralegals cannot provide legal advice, represent a client in court, select, explain, draft, or recommend the use of any legal document to or for any person other than the attorney who directs and supervises the paralegal. Paralegals also cannot engage in conduct that constitutes the unlawful practice of law.

The NFPA definition is also restated by several courts in decisions reviewing fee petitions regarding the recovery of paralegal fees. Federal Courts addressing the issue have reasoned that paralegal fees billed for work that would have otherwise been performed by the attorney and not the legal secretary, are recoverable under a myriad of Federal Statutes. Courts caution that the refusal to allow recovery of separately billed paralegal work, in accordance with market trends, risks increased attorney rates and over inflation or disproportionate allocation of legal fees. This work would be performed by attorneys or subsumed into an increased attorney hourly rate if not separately billable by the paralegal at a lower rate. (See, *Miller v. Alamo* 983 F2d 865, 862; and *In re Busy Beaver Building Centers, Inc.* 19 F3d. 833, 856-866.)

State Courts have applied this logic to develop standards for paralegal fee recovery. Washington Appellate authority examines the following six criteria when determining paralegal recovery:

- Services performed are of a legal nature;
- The services are supervised by an attorney;
- Paralegal qualifications are appropriately substantiated in the fee petition;
- The tasks performed are appropriately described to allow review for legal as opposed to clerical work;
- The time stated to complete the described tasks is reasonable; and
- The rate charged for the time billed is reasonable under local community standards for the same level personnel.

[See, *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 844-845 (1995).]

Courts are clear that purely clerical tasks should not be billed at paralegal rates regardless of the qualifications of the biller. Work done by librarians, clerical personnel and other support staff is “generally considered within the overhead component of a lawyer’s fees.” *Id.*; *In re Olsen*, 884 F.2d 1415, 1426-27 (D.C. Cir. 1989); *In re North*, 313 U.S.App.D.C.188, 195 (D.C. Cir. 1995). “[W]ork of a predominantly secretarial nature is thus properly included in the office overhead rather than as a separate charge. See *Ramos v. Lamm*, 713 F.2d 546, 558-59 (10th Cir.1983).” (*Spell v. McDaniel*, 852 F.2d 762, 771 (C.A.4 1988).) In *Keith v. Volpe*, 644 F.Supp. 1317, 1323 (C.D. Cal. 1986), the court disallowed hours claimed for such items as “pick-up copies,” “Xerox/distribute memo,” “tag exhibits,” “file review,” “organize files,” and “reproduce documents.” The court found that all “such routine work” was reflected as overhead in the hourly rates. (*Id.*)

Though there are several definitions and examples of what paralegal work is and is not, the actual recovery of paralegal fees has been appropriately and sometimes inappropriately challenged on several fee petitions. Total recovery can be increased by a few simple adjustments in approach to billing by paralegals for the work they perform.

Recovery of Paralegal Fees

There are practical challenges in the recovery of paralegal fees regardless of legal authority allowing recovery. Paralegals are assigned repetitive or tedious tasks that are crucial to the progress of a case but do not require the constant judgment of an experienced attorney. In the litigation context these assignments

can include document management, expert management, or gathering discovery information, to name a few. And in the transactional context they can include obtaining and researching public records as well as tracking changes. The key to recovery of paralegal fees is clear communication with the client and eventually the reviewer of the invoice; be that reviewer the court or a fee auditing expert.

Ideally, the particularities of each case should be addressed and discussed with the client. But the attorney in direct communication with the client is not always fully aware of the time requirements of the paralegal's job. The paralegal's time will be recorded and sent to a client on the billing invoice. To facilitate clarity, the paralegal should communicate with the attorney the scope and breadth of the assignment given the paralegal in order to answer the potential questions from the client or, better yet, so the attorney can discuss these issues with the client at the beginning of the matter and include a description of the work in the retention agreement. It is difficult for the client or auditor to deduct or reduce time billed for projects reasonably explained to the client at the beginning of the case and included in the retention agreement.

Excellent examples of this concept are specific retention agreements drafted between large insurers and the defense counsel they retain to defend their insureds in mass toxic tort litigation. The insured is exposed to several lawsuits in several jurisdictions that often rely upon the same core set of facts, documents and experts. These assignments benefit from a database, a core group of personnel and a paralegal, or two, to keep the documents and the experts organized. The creation and maintenance of a database or organization of documents is usually considered a purely clerical function. The repeated telephone calls to experts regarding depositions or reports are likewise usually considered purely clerical. In my expert practice, I have been asked to review the fee invoices of several of these types of firms and have seen appropriate paralegal billing for what are otherwise non-billable clerical tasks such as maintenance of these databases or coordination of experts because they were addressed at the outset of the assignment and provided for in the retention agreement. The client is made fully aware of the value of centralized maintenance of this information by paralegals with legal training and judgment.

Another, perhaps even the most important, key component of communication necessary to the recovery of paralegal fees lies in the billing description. The paralegal must appropriately and completely describe what work is being performed and the benefit of the work to the case. If the paralegal includes what was done and *why* in a short billing description, with a separate time allocation, the chances of the billing entry passing a fee audit or judicial review dramatically increases.

The mass toxic tort context again provides an excellent example. The client is likely to produce an enormous quantity of documents that require review and analysis for content and privilege, and indexing for use in the multitude of

cases. The plaintiffs will also have to provide an untold quantity of documents from medical records to employment records to earnings records all of which need to be reviewed and analyzed for various uses. The routine vague billing entries for these tasks leave the fee invoices full of duplicative looking entries and do not provide the client or reviewer of any idea what work was actually completed. (i.e., "Review client documents. 6.5 hours." A few dozen of these entries causes concern and often results in a percentage reduction or complete deduction for vague and incomplete billing entries.)

This problem is easily fixed by noting the volume of documents reviewed, by page, volume or box numbers and the reason for the review. Are the documents being prepared for the attorney to take the deposition of the expert cardiologist, or the treating pulmonologist? If the billing entries state that the paralegal is copying medical records for an attorney without further explanation, the entry is identified as clerical and deducted from the total recovery. If the billing entry explains that the correct medical records had to be selected and then prepared for the attorney to take the deposition of the most important expert witness for the opposing side, the entry is identified as appropriate deposition preparation and is not deducted by the auditor. I have challenged vague billing entries such as these in my expert practice and been successful in persuading reviewing courts to reduce the total awarded on fee petitions for such incomplete or clerical billing. (Instead try, "Review 2 of 10 banker's boxes of client documents just received for appropriate indexing, for privilege and for production in several cases. 7.8 hours.")

The likelihood of recovering paralegal fees is also increased if the paralegal exercises good judgment in billing. Paralegals and attorneys alike are often required to perform clerical tasks in order to get work done in a timely manner, or spend more time on a project than is reasonably billable. This is what the courts refer to when the opinions state that these tasks are considered part of the attorney's overhead expenses and are subsumed in the attorney's hourly rate. These clerical tasks or excessive time allotments present red flags for courts and auditors and can cause increased scrutiny as well as increased reductions. The paralegal can reduce these risks by looking over the billing and exercising good billing judgment in the description, the task and the time allotment.

Overview

Courts have addressed and accepted the market trend that paralegal fees are appropriately billed and recovered under various prevailing party attorney fee recovery statutes. Large and small clients have identified the value of paralegal services in keeping their legal services economical.

The state of the economy and overreaching by many Plaintiffs' firms has increased the demand for fee auditing and review by the courts. I have given presentations to several large insurer and corporate clients extolling the value and virtues of the attorney fee audit. Recently, the California State Bar Litigation Section periodical included an article identifying an entire cottage expert industry relating to audits of fee petitions after Anti-SLAPP Motions to Strike have been decided. The success or failure of recovery of fees, especially paralegal fees, in these audits is largely dependant on appropriate communication through the actual billing description, and the use of good billing judgment.