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# Ethics: Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals

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# Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals



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*Dilbert's* take:


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# How do we convey to new lawyers how to bill? (And some pointers for more seasoned professionals….)

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## The dynamic for estate-paid professionals:

1. Application / court approval.
2. Interim fee apps (sometimes, monthlies) / final fee apps.
3. Objections? Fee examiners?
4. Court review and approval.

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## The rest of the known universe:

1. Client hires the lawyer.
2. Lawyer does the work.
3. Lawyer sends client the bill for the work (possibly including some N/C entries).
4. Client reviews the bill / asks Qs / sometimes pushes back.
5. Lawyer adjusts the bill.
6. Client pays the bill.

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## The "bankruptcy fees disconnect":

- Other than the court and UST (and maybe a fee examiner or fee committee), no one else seems to care.
  - The fees will be paid from either a secured creditor's carveout or from the pool of unsecured funds. *See, e.g., In re* Frontier Comm. Corp., 2020 WL 6390675, *4 (Bankr. S.D.N.Y. 2020) (shameless reference to the court having cited one of my articles).
  - "There but for the grace of God…."

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# Who's minding the store?

- The nerds who comb through the bills (the chambers / the fee examiners).
- And all of the nerds remember what impressions they formed about the professionals' behavior and motivations.
- Often, the people *not* minding the store are the clients who have asked the court for permission to have their professionals' retention applications approved.
  - Non-"chapter 22" or "chapter 33" debtors (the inexperienced client).
  - The unsecured creditors (or the secured creditor whose carveout is paying for the professionals).

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# One of my favorite quotes:*

"Debtors may not care who gets what money remains (if the attorney gets more, other creditors get less), and, when clients do not haggle over price, some attorneys will be tempted to divert the funds to themselves by charging excessive fees."

> —Bethea v. Robert J. Adams & Assoc., 352 F.3d 1125, 1127 (7th Cir. 2003) (ch. 7 case) (cited in SE Property Holdings, LLC v. Stewart (*In re* Stewart), 970 F.3d 1255, 1259 (10th Cir. 2020)).

* Not my favorite quote of all time, though, but I can't find the citation for the opinion – I think, perhaps, from the Calif. Supreme Court – that said, "The only problem with this argument is that it is wrong."

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# What do we tend to see?

- No budget, or mere lip service to a budget that is overbroad and under-specific.
- "All hands on deck" overstaffing / overworking.
- Misallocation of professional to task.
- Occasionally hefty (or surreal) expenses.
  - $140 shirt.
  - Liquor and movies from hotel minibar.
  - Luxe hotels and luxe meals (often with liquor).*

* Occasionally, we also see overly high hourly rates (*see, e.g.,* Market Center East Retail Property, Inc. v. Lurie (*In re* Market Center East Retail Property, Inc., 730 F.3d 1239, 1250-52 (10th Cir. 2013) (reversing a hybrid fee award that would have provided the equivalent of an $8,500+/hour rate for about 40 hours of work) or rate increases that occur within a few weeks of the order authorizing employment.

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# Then you get headlines like these from the *New York Times*:

**Who Knew Bankruptcy Paid So Well?**

Photo Illustration by The New York Times

By Nelson D. Schwartz and Julie Creswell

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Which leads to stories like this in the *Wall Street Journal*:

## Bankruptcy Costs Attacked

Attorney Guidelines to Be Overhauled, With Hotel, Other Expenses Scrutinized



From the same article:

| Expenses questioned by judge or U.S. Trustee | Cost | Outcome |
|---|---|---|
| Roundtrip business class flight between London and New York by law firm Proskauer Rose. | $8,675.78 | Proskauer cut $5,965.78 from request to match estimated cost of coach flight. |
| Photocopying and stationery charges from law firm Slaughter and May. | $55,144.28 | Slaughter and May voluntarily reduced $73,000 for that and other expenses. |
| Blackstone Group client dinner with 17 attendees that exceeded the $20-per-person limit by $3,605.60. | $4,000 | The firm withdrew the request. |
| Two three-night stays at the Waldorf-Astoria from restructuring firm Development Specialists. | $3,451.41 | The firm said nearby hotels were full, but agreed to take $1,000 off the bill. |
| Car-service trips from consulting firm Goldin Associates. | $937.87 | Goldin proposed to reduce travel expenses by $305.99. |
| Minibar charges at the London NYC Hotel from consultant San Marino Business Partners. | $54.42 | Charges ultimately approved. |

Source: Court filings and transcripts; the firms — The Wall Street Journal

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# And, ultimately, to this (at least in big Ch 11s):

**DEPARTMENT OF JUSTICE**

**Appendix B Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases**

**AGENCY:** Executive Office for United States Trustees, Justice.
**ACTION:** Notice of internal procedural guidelines.

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# The psychological cost of not combing through fee applications before filing them:

- First impressions matter.
  - Good billing hygiene? Halo effect.
  - Bad billing hygiene? The professional is, perhaps:
    - Sloppy.
    - Greedy.
    - Inept.
- And I'll comb through every single line item of folks who have formed a bad impression.

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## It's not just debtors' counsel that need to pay attention:

- E.g., UCC counsel.
- Other types of professionals who are getting paid from estate funds.

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## Categories of billing mistakes:

1. Goldilocks errors.
2. Pervasive sloppiness.
3. Reckless overworking.
4. The indulgence of quirky preferences (the professional's or the client's).

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# Goldilocks errors:

Correspond with multiple parties re restructuring strategy and tactics 8.2 hours

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# Goldilocks errors:*

| TITLE | DATE | TIME | RATE | AMOUNT | ORIGINAL TIME ENTRY | WHAT THE CLIENT PAID FOR... |
|---|---|---|---|---|---|---|
| Partner | 3/18/2014 | 2.8 | 500 | $1,400.00 | More work on the employee benefits aspects of the proposed acquisition, with special emphasis on those issues arising from the involvement of the ABC Employee Stock Ownership Plan, including: work on e-mail message to Rhonda Jones concerning conference call with Nathan Kersey and Nick Krantz on 3/17/14, with special emphasis on the special right that ABC has granted the ESOP for a special "restorative payment" for certain participants," receipt and review of e-mail message from Nathan Kersey regarding the Agreement Relating to Covenants After the Merger, Amendment Number 1 to the ESOP and the Disclosure Schedule Insert for Section 5.01(r) of the Stock Purchase Agreement; receipt and review of e-mail message from Annie Cruise at Barber and Hay along with an updated version of the draft Merger Agreement; prepare for and participate in conference call with legal counsel for ABC and the ESOP Trustee and discussion of possible technical problems with the proposed special "Restorative Payment" to the ESOP and alternative language for the proposed description of the proposed special "Restorative Payment" in the Merger Agreement; receipt and review of responsive follow up telephone conference with Nathan Kersey and Nick Krantz regarding same; receipt and review of three additional e-mail messages from Nathan Kersey regarding proposed changes to the Post-Closing Agreement regarding the ESOP, the Merger Agreement and the disclosure concerning the proposed "restorative payment" in the ESOP; additional telephone conferences with Rhonda Jones regarding all of the above. | 5 emails, 1 client call, 1 recap call and 1 call with opposing counsel |

* Graphic courtesy of Legal Decoder, Inc. and the garrulous lawyer who authored the non-anonymized, original version.

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# Pervasive sloppiness:

- "Attention to file" and other vague entries.
- Massive block-billing.
- Round-hour phenomenon:

| | |
|---|---|
| Research caselaw on X | 3.5 |
| Draft memo on X | 4.5 |
| Telephone call with client on Y | 1.0 |
| Meet with [colleagues] about X | 1.0 |
| Attending hearing on Z | 4.0 |
| Travel to hearing on Z | .5 |
| Travel back to office after hearing on Z | .5 |

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# Reckless overworking:

- The 32-hour, 8-page stay relief motion.
- The "who's left standing" search for available (and often high-billing) professionals.
- How law schools contribute to this phenomenon.
- How the professional's fiduciary status contributes (best illustrated by this image from this article):

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## The indulgence of quirky preferences (the professional's or the client's):

- Clients are supposed to dictate the objectives; we choose the means (after appropriate consultation).
- When clients control the means, fees spiral out of control.
- How can one convey, in statements to courts (or fee examiners), that opposing party/counsel was obstinate and substantially increased the costs and fees for filing and responding to motions, etc.?
  - To a fee examiner.
  - To a court.

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## Lest you think that I don't care about consumer-side fees:

- Beware the inappropriate limitation of services covered by a flat fee.
  - *See, e.g., In re* Roberts, Case No. 17-11846-gs, United States Bankruptcy Court for the District of Nevada, Docket No. 152:

> In this regard, all of the fees [the law firm has] billed under "Chapter 13 Services" appear to be basic services covered by the flat fee as stated in the Disclosure and Amended Disclosure. Therefore, the court shall disallow the billings set forth in the Chapter 13 Services category in excess of the disclosed fee of $6,796.00.

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## The client *can* do more, if it chooses:

- Think hard about which professionals to hire.
- Create the ground rules for billing.
- Pay attention to staffing and workflow issues.
- Monitor the budget.
- Set the ground rules about which expenses are reasonable and which ones aren't.

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## The client *can* do more, if it chooses:

- Consider suggesting that counsel use artificial intelligence for those tasks that don't need a human touch (not just in discovery, but also, perhaps, in automating some of the easier drafting tasks).
- And use legal analytics to create a dashboard that helps you see where you're efficient and where you need to buff up your efficiencies.

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# Why do we care about how and what we bill?

- Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses….") and
- 11 U.S.C. § 330(a)(1) ("After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award … [to, among others] a professional person employed under section 327 or 1103—(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.")

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# Billing can also tell us about potential malpractice risk.

- In a recent article published at 6 U. PA. J. L. & PUB. AFF. 267 (2020), Joe Tiano and I interviewed a cross-section of legal professional liability (LPL) insurers to get a better feel for how insurers viewed different types of risk.
- We're drilling down on:
  - Staffing efficiency (who's doing what and for how long);
  - Billing hygiene (eliminating vague or block-billed entries; eliminating rounded hour entries);
  - Workflow efficiency (efficiency of performing a particular task);
  - Matter management (how to choose who's doing what for which matters);
  - Institutional governance (how does a firm manage ethics compliance and workflow); and
  - Fiduciary risk (not dropping the ball on duties owed to the client).

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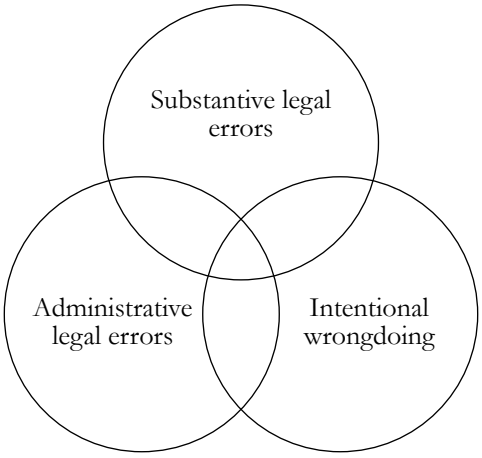
# Three types of errors:

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# Substantive legal errors:

- Giving incorrect legal advice;
- Doing exceptionally sloppy work (like missing a statute of limitations or other important deadline), and
- Engaging in other actions that fall below the standard of care.

- Substantive legal errors are reflected in bills when people redo work that was done poorly or do work that wouldn't have been necessary if things had been done correctly the first time.

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# Administrative legal errors:

- Not because they're less important than substantive legal errors but because they're *process* errors.

- Failing to identify and resolve conflicts of interest;
- Faulty withdrawal from representation;
- Failure to transfer client files, and
- Improper commingling of funds.

- Again, in bills, I look for that undercurrent of work that deals with fixing mistakes that a good process should have prevented ahead of time.

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# Intentional wrongdoing:

- Billing fraud;
- Misappropriation of client funds;
- Frivolous litigation; and
- Outright dishonesty.

- Often, time entries won't reveal these directly, but sometimes they can give cues (e.g., delayed billing; rounded-hour billing).

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## Managers and supervisors have a duty to make sure that the organization is behaving ethically.

- Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer (the main rule).
- Rule 5.2: Responsibilities of a Subordinate Lawyer (what happens when a subordinate lawyer thinks that she should be doing things differently from an ethics point of view).
- Rule 5.3: Responsibilities Regarding Nonlawyer Assistance (even though they're not bound by the ethics rules, we still are).

- LPL insurers actually would prefer to help you set up systems to avoid problems – and they have some great advice to give.

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## Never forget that it's not just what you say but how you say it (even with fee applications).

- And it's also what you do (who's doing it, whether "it" is the right thing to be doing, and whether "it" is being done efficiently)
- Questions/comments?

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To be published (after editing) as Nancy B. Rapoport, *Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals,* 15 BROOK. J. OF CORP., FIN. & COM. L. ___ (forthcoming 2021).

# Telling the Story on Your Timesheets:
# A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals[1]

Nancy B. Rapoport

There's a Dilbert comic strip that has resonated with me over the years: in that strip, the pointy-haired boss told Dilbert to charge 100% of his time to project codes, and Dilbert responded by pointing out that charging 100% of his time that way would lead to overbilling the firm's clients. What's the punchline of the strip, a copy of which hangs in my home office? Dilbert asks, "Did you learn that in 'flaw' school?"[2] That's actually a darn good question.

Most of the time, a law student can make it all the way through law school without understanding how to bill time; moreover, it's likely that no law student truly understands how the accurate recording of time eventually translates into an associate's paycheck. Maybe the student learns about billing time as a summer associate, but even then, it's quite possible that no one is teaching the summer associate exactly what should get billed, what shouldn't, and—for the time that should get billed—how to describe the time in order to justify the fee.[3] Let's assume that a newly minted law graduate gets to her first private-law job, which requires her to keep track of her time in tenths of an hour.[4] Who trains her on when to start the clock, when to stop it, and how to explain to the client what she's accomplished? Moreover, who pulls back the client-curtain for her to show her how clients react to the bills that they get?[5]

When clients are paying the legal bills out of their own operating accounts, those clients often have rules about what they will and won't accept in terms of legal work: for example, the client won't pay for summer associates (or for first- or second-year lawyers' work); it won't pay for tasks that are more appropriately attributable to overhead, such as data entry and filing;[6] it won't pay for professionals of the same firm to meet on a regular basis to discuss how to allocate the workflow; it won't pay for block-billed time, or vague entries, or hours that always manage to end in .0 or .5; it won't pay for inefficient work or for work that isn't reasonably likely to benefit the client.[7] These rules aren't just whimsical client preferences or tacit idiosyncrasies; they're typically memorialized in outside counsel billing guidelines.[8] But in bankruptcy, the bankruptcy estate is

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[1] This essay will be published in the Spring 2021 issue of the BROOKLYN JOURNAL OF CORPORATE, FINANCIAL & COMMERCIAL LAW.

[2] Want to see the strip for yourself? Click here: https://dilbert.com/strip/2016-01-12.

[3] There's a whole other can of worms to open when law firms are asking clients to pay for summer associate time.

[4] For that matter, what about the recent grad who hangs out her own shingle? Who teaches her about how to bill?

[5] *Cf.* this famous painting (https://www.edvardmunch.org/the-scream.jsp).

[6] I've been an administrative assistant myself, and the work is often difficult, requiring judgment and skill, but it's still overhead.

[7] *See, e.g.,* Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, Georgia State Symposium on Legal Analytics, 35 GA. ST. U. L. REV. 1269, 1273-74 & n. 15 (2019) ("See Matthew Guarnaccia, Clients Leaving Firms with the Bill for Research, LAW360 (Mar. 20, 2017, 4:44 PM), https://www.law360.com/articles/903628/clients-leaving-firms-with-the-bill-for-research [https://perma.cc/4228-NVFZ]; Sara Randazzo, *Corporate Clients Push Back After Law Firms Hike Starting Salaries*, WALL ST. J. (updated June 15, 2016, 7:05 PM), https://www.wsj.com/articles/companies-push-back-at-law-firms-starting-salary-hikes-1466029554 [https://perma.cc/3VKF-LFTU].").

[8] Until recently, these outside counsel billing guidelines often have remained in the metaphorical "bottom drawer" of the desk, rarely dusted off and enforced. In discussions with my in-house counsel friends, I've learned that cost constraints on legal departments caused by COVID-19's economic turmoil have, quite understandably, prompted a greater enforcement of outside counsel's billing guidelines.

footing the bill for those professionals whose employment must first pass muster with the bankruptcy court and whose fee applications the court must approve. I've[9] gone on *ad nauseum* about the disconnect between the professionals performing the work and the review of the bills by the clients, none of whom is paying directly for that work.[10] That disconnect means that—except in exceptionally acrimonious cases—the only people reading the fee applications and forming opinions on the reasonableness of the fees and expenses are, first and foremost, the bankruptcy judge (who must determine reasonableness per section 330 when ruling on fee applications), someone in the Office of the United States Trustee, and, sometimes, a fee examiner, if the court appoints one.

We fee examiners are a nerdy lot.[11] We enjoy sifting through timesheets, arranging them and then rearranging them to try to make sense of the basic question undergirding section 330: were the right professionals doing the right things for the right amount of time? While we're answering that question, we're also forming our own opinions of the professionals' judgment reflected in those timesheets: was the professional treating the engagement in the same way that she would if she were submitting the bills to the general counsel of a company that wasn't involved in a bankruptcy case, or was the professional spending time recklessly, because there was no one to provide a check on the line-by-line choices that the professional was making?

It's probably no secret that the impressions that fee examiners form about specific professionals in one case will carry over to future cases with the same professionals. If, in one case, I see a professional use three associates simply to "take notes" in all-hands meetings, you can bet that I'll look for that wasteful behavior in future cases. Or, to use some other drawn-from-my-real-fee-reviews examples, if I see a professional charge a $140 shirt (!) to the estate, or charge liquor (including mini-bar booze) or fancy dinners (e.g., Del Frisco's, especially when the dinner's sole purpose is to celebrate a victory) or swanky hotels (such as the Four Seasons or the Ritz-Carlton) to the estate, will I have someone comb through every single expense and time entry looking for similar judgment missteps in future cases?[12] Will I look even harder for overstaffing, over-researching, or the misallocation of task to a professional's skill level? You're darn right I will. Alternatively, if I see a professional cap the cost of his own meals at the government's *per diem* rate,

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[9] Often, with co-authors, thank goodness.

[10] *See, e.g.,* Nancy B. Rapoport, *Want to Take Control of Professional Fees in Large Chapter 11 Bankruptcy Cases? Talking With Your Client's General Counsel is a Good First Step,* Harvard Law School Bankruptcy Roundtable, July 28, 2020, available at http://blogs.harvard.edu/bankruptcyroundtable/2020/07/28/want-to-take-control-of-professional-fees-in-large-chapter-11-bankruptcy-cases-talking-with-your-clients-general-counsel-is-a-good-first-step/; Nancy B. Rapoport, *Using General Counsel to Set the Tone for Work in Large Chapter 11 Cases,* 88 FORDHAM L. REV. 1727 (2020); Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases,* 28 AM. BANKR. INST. L. REV. 39 (2020); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Leveraging Legal Analytics and Spend Data as a Law Firm Self-Governance Tool,* XIII J. BUS., ENTREPRENEURSHIP & L. 71 (2019); Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, Georgia State Symposium on Legal Analytics, 35 GA. ST. U. L. REV. 1269 (2019); Randy D. Gordon & Nancy B. Rapoport, *Virtuous Billing,* 15 NEV. L.J. 698 (2015); Nancy B. Rapoport, *"Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms,* 4 ST. MARY'S J. L. ETHICS & MALP. 42 (2014); Nancy B. Rapoport, *The Client Who Did Too Much,* 47 AKRON L. REV. 121 (2014); Lois R. Lupica & Nancy B. Rapoport, *Best Practices for Working with Fee Examiners,* 32 AM. BANKR. INST. J. 20 (June 2013; Nancy B. Rapoport, *The Case for Value Billing in Chapter 11,* 7 J. BUS. L. & TECH. LAW 117 (2012); Nancy B. Rapoport*, Rethinking Fees in Chapter 11 Bankruptcy Cases,* 5 J. BUS. & TECH. LAW 263 (2010); Nancy B. Rapoport, *Avoiding Judicial Wrath: The Ten Commandments for Bankruptcy Practitioners,* 5 J. BANKR. L. & PRAC. 615 (September/October 1996).

[11] For my friends Brady Williamson and Bob Keach: I mean that in the nicest possible way.

[12] Want more examples? *See* Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases,* 28 AM. BANKR. INST. L. REV. 39, 70-71 (2020) (Joe Tiano and I list some whoppers of entries that triggered a deeper dive into the fee application).

will I form an opinion that the professional is also likely to make judicious use of his time when determining what actions he'll take on behalf of his client? Yep. And I'd be willing to bet you that the judges are forming their own opinions, too. Those time entries and expense files are telling us a lot about the ways in which the professionals see themselves and their roles in various cases. They tell us if the professional believes that leaving any stone unturned makes him a bad lawyer (or a lawyer who could get sued for breach of fiduciary duty), rather than a lawyer who uses a more finely honed cost-benefit analysis. Those time entries are telling us if a lawyer feels entitled ("I worked eighteen hours a day for the past three days, so the client *should* buy me a brandy"). And those time entries are telling us if there are lawyers at competing law firms who are engaging in a Hatfield-and-McCoy war because they just don't trust (or like) each other.[13] In other words, not only are time entries telling us what the professionals did, but they're telling us about the professionals' psyches, too.

A lot of what fee examiners do wouldn't be necessary if clients knew what to look for, and where to look, in fee applications—and if the details in the appendices of the fee applications themselves were presented in a searchable format. If clients set out the parameters of the engagement in more detail than "please just get me through this bet-the-company event," then some of the stories that fee examiners tell would disappear. I've set out a number of suggestions in a piece that came out earlier this year.[14] Among those suggestions are the following:

- Think hard about which professionals to hire.[15]
- Create the ground rules for billing.[16]
- Pay attention to staffing and workflow issues.[17]
- Monitor the budget.[18]
- Set the ground rules about which expenses are reasonable and which ones aren't.[19]
- Consider suggesting that counsel use artificial intelligence for those tasks that don't need a human touch (not just in discovery, but also, perhaps, in automating some of the easier drafting tasks).[20]
- And use legal analytics to create a dashboard that helps you see where you're efficient and where you need to buff up your efficiencies.[21]

That's good advice for clients—and for "clients," think "the debtor's general counsel" and "the members of the creditors' committee." But it's also helpful for the professionals themselves, because it's never pleasant when a court reduces a fee application due to a failure to demonstrate

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[13] For that last example, see, e.g., Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases,* 28 AM. BANKR. INST. L. REV. 39, 47 n.33 (2020)
[14] Nancy B. Rapoport, *Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases,* 28 AM. BANKR. INST. L. REV. 39 (2020).
[15] *Id.* at 72.
[16] I*d.* at 77.
[17] *Id.* at 78.
[18] *Id.* at 81. And asking for a budget, even a bare-bones one, is important as well. It boggles my mind that a firm that touts its extensive expertise is flat-out stymied when a client wants to know the likely range of any impending professional fees.
[19] *Id.* at 83.
[20] *Id.* at 88.
[21] *Id.* at 85.

reasonableness. The professional can't go back in time and use the disallowed time on another, more remunerative task. Once billed time is spent, it's gone forever.

Some of the most telling mistakes on a fee application fall into these four categories: (1) Goldilocks errors, (2) pervasive sloppiness, (3) reckless overworking, and (4) the indulgence of quirky preferences (the professional's or the client's).

*Goldilocks: not enough, too much, or just right.*

Remember, fee applications are publicly filed documents, so the time descriptions represent the choices that the professionals made, both in terms of what they did and how they chose to describe what they did. Sometimes, professionals obfuscate in order to mask their strategy in a case ("correspond with multiple parties re restructuring strategy and tactics"). Such a description obviously doesn't reveal too much in terms of strategy—which is probably good for ongoing litigation—but it's significantly less useful to the court, which has to review that description for reasonableness.[22] Think of that kind of a description as the bankruptcy version of Goldilocks's[23] "this bed is too hard." It's all edges and no middle, so the client can't possibly pinpoint just what its professional did during the time described by that entry.

There's also the over-description phenomenon, which Legal Decoder has described in one of its webinars:[24]

[22] And it's not necessary to hide the ball after all of the strategic activities in question have been completed.
[23] If you've never heard of *Goldilocks and the Three Bears,* check out this version: https://americanliterature.com/childrens-stories/goldilocks-and-the-three-bears. There are also an astonishing number of Muppet/Goldilocks videos (thank you, Joe Tiano), including this one: https://www.youtube.com/watch?v=Vi4BCtoKVkE.
[24] Graphic courtesy of Legal Decoder, Inc. and the garrulous lawyer who authored the non-anonymized, original version.

| TITLE | DATE | TIME | RATE | AMOUNT | ORIGINAL TIME ENTRY | WHAT THE CLIENT PAID FOR... |
|---|---|---|---|---|---|---|
| Partner | 3/18/2014 | 2.8 | 500 | $1,400.00 | More work on the employee benefits aspects of the proposed acquisition, with special emphasis on those issues arising from the involvement of the ABC Employee Stock Ownership Plan, including: work on e-mail message to Rhonda Jones concerning conference call with Nathan Kersey and Nick Krantz on 3/17/14, with special emphasis on the special right that ABC has granted the ESOP for a special "restorative payment" for certain participants," receipt and review of e-mail message from Nathan Kersey regarding the Agreement Relating to Covenants After the Merger, Amendment Number 1 to the ESOP and the disclosure Schedule Insert for Section 5.01(r) of the Stock Purchase Agreement; receipt and review of e-mail message from Annie Cruise at Barber and Hay along with an updated version of the draft Merger Agreement; prepare for and participate in conference call with legal counsel for ABC and the ESOP Trustee and discussion of possible technical problems with the proposed special "Restorative Payment" to the ESOP and alternative language for the proposed description of the proposed special "Restorative Payment" in the Merger Agreement; receipt and review of responsive follow up telephone conference with Nathan Kersey and Nick Krantz regarding same; receipt and review of three additional e-mail messages from Nathan Kersey regarding proposed changes to the Post-Closing Agreement regarding the ESOP, the Merger Agreement and the disclosure concerning the proposed "restorative payment" in the ESOP; additional telephone conferences with Rhonda Jones regarding all of the above. | 5 emails, 1 client call, 1 recap call and 1 call with opposing counsel |

To carry on with the Goldilocks theme, that description is too soft. It's easy to get lost in the fluffy word morass. Other than computers—which never get bored or zone out—anyone reading more than a few time entries like this would have a MEGO response (my eyes glaze over). So what would constitute a "just right" description? Here are two suggestions, both from a publication of the Florida Bar:[25]

> 1. Include Subject Matter. Always include the content of your phone call, conference, letter, legal research, etc. Don't stop at "Telephone conference with Bob Smith;" continue to write "regarding. . ." and include the subject of the conversation. Carry this over to letters, meetings, and so on.
>
> 2. Use Verbs to Convey Action. The services you provide are the actions you perform on your clients' cases. Let them know what you are doing by using action-oriented words like prepare, develop, create, edit, organize, negotiate, summarize, and analyze.

What you want to be able to describe in a time entry is *what* you did, with *whom,* and the context (the *why* of the work). I'm not asking you to break down "prepare for hearing": we've all prepared for those, and we know what generally goes into that prep time. But if you have a time entry that just reads "respond to email," I can't tell to whom you're responding or the general subject. There's a world of difference between "respond to email from X about rescheduling Y's deposition" and "[I

[25] Jeanine M. Rogers, *Accounta-Billing: Level the Playing Field With Great Billing Descriptions,* 10/15/2001 FLA. B. NEWS 21.

did stuff but you're going to have to guess what it was]." Don't leave me hanging, George Carlin-style, with the legal equivalent of "here's a partial score: Notre Dame, 6."[26]

It's not just time entries that need to pass the Goldilocks test. When professionals overstaff matters, that's also a Goldilocks failure. Sometimes, only one person needs to be at a hearing or meeting; sometimes, two or three people need to attend; sometimes, ten people do. But when meeting after meeting or hearing after hearing shows the same people each time, with few of them having specific reasons to attend, overstaffing—as judged by timesheets and the answers to follow-up questions—tells me that the professional isn't taking the time to think about who needs to be where.[27]

*Attention to detail matters—a lot.*

Think back to those people who don't tuck in their shirts when they're at the podium in court, or the ones who perpetually have food stains on their jackets. It's probably not fair to judge them,[28] but our natural instinct when we see sloppiness in professionals is to wonder where else in that professional's life the sloppiness manifests itself. So when fee applications contain vague entries like "attention to file,"[29] or have numerous block-billing entries, or list entries that virtually always

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[26] King Kaufman, Partial Score, George Carlin, 71, salon.com (June 23, 2008), available at https://www.salon.com/2008/06/23/carlin_3/ ("[Carlin would] do characters in the '60s and '70s, when he was a frequent guest on network variety and talk shows. Al Sleet, the Hippie-Dippie Weatherman, was the most memorable, but he also did a sportscaster who'd say, 'Here's a partial score: Notre Dame 6.'").

[27] Maybe the professional isn't thinking about the staffing issues because he or she is too busy to slow down and think strategically during certain stages of a case. But try using that excuse when you're metaphorically pushing your bill across the table to the general counsel whose company actually *is* paying the fees out of its operating account:

> The bankruptcy court has oversight of the payment of professional fees, but the review of those fees can be incredibly time-consuming and is highly detail-driven. Those professionals who submit their bills for court review represent real clients, but those real clients aren't writing the ultimate checks. In most non-bankruptcy settings, there's a metaphorical moment when the professional pushes a bill across the table to the client and waits for the client to react. If the client questions a bill, the professional may well end up lowering it.
>
> When it comes to estate-paid Chapter 11 fees, the professionals are pushing their bills across the table, but on the other side of the table, the client charged with evaluating the reasonableness of the bill may have no meaningful way to put the bill into context. Moreover, because no single client is charged with footing the professionals' entire bill, it's possible that none of the clients really cares how much these professionals are charging. In essence, the client sitting at the table is a stand-in for entities with little voice (and little individual stake) in determining how the professional makes his billable decisions. And sitting at another table, far away, is the bankruptcy court.

Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases,* 5 J. BUS. & TECH. LAW 263, 265 (2010) (footnotes omitted).

[28] That, of course, has never stopped me.

[29] *See, e.g.,* Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, Georgia State Symposium on Legal Analytics, 35 GA. ST. U. L. REV. 1269, (2019) ("Far too often, invoices for legal services rendered contain line-item entries that run the gamut from being vague and cryptic (e.g., 'review file,' 'attention to tax issue,' 'consider negotiation strategy,' and the like) to being so over-descriptive that the line-item entry doesn't provide easily discernable value. Good billing hygiene means recording clear, concise, informative narrative entries linked to the time to complete an individual task. Neither law firms nor clients benefit from bad billing hygiene."); *see id.* n. 68 ("As one of us has said before (and as we both have thought, repeatedly), 'attention to file' has never told a single client what the biller actually did.") (citing Nancy B. Rapoport, *"Nudging" Better Lawyer*

end in .0 or .5, Joe Tiano and I call that "bad billing hygiene." Let's take the statistically improbable recording of time entries that end in .5 or .0:

| | |
|---|---|
| Research caselaw on X | 3.5 |
| Draft memo on X | 4.5 |
| Telephone call with client on Y | 1.0 |
| Meet with [colleagues] about X | 1.0 |
| Attending hearing on Z | 4.0 |
| Travel to hearing on Z | .5 |
| Travel back to office after hearing on Z | .5 |

Sure, those time entries are all theoretically possible, but it's awfully convenient that they round to the hour or half-hour so neatly. Once we exit the world of the "likely," in which some tasks really do take a full hour or a full half-hour, and we cross over into the world of the statistically unlikely time entries, the first thought that I have was how contemporaneously the professional recorded her time. When rushing to complete timesheets at the end of the day or week, or (ahem…) month, the arithmetic is surely easier when computing zeros and fives. The second thought calculates the odds that the professional was constantly rounding her time entries *down* to save the client some money. The final thought that I have is that, if the professional isn't meticulous here, where else is the professional not being meticulous?

Like bad hygiene in real life, bad billing hygiene tells you that (1) the person with the bad hygiene isn't aware of it, or (2) the person is aware of it but has no idea how to fix it, or (3) the person doesn't care about fixing it. It's impossible not to form a bad impression stemming from bad billing hygiene if, once the problems are called to the professional's attention, nothing changes.

*It's not about you. Really, it isn't.*

Professionals sometimes tell me that the reason that they gave an assignment to a partner instead of an associate was that "the only people in this branch office happen to be partners" or "no one else was around, and I needed it done immediately." I completely understand that, sometimes, the right person for the task isn't anywhere to be found.[30] What I don't understand is why the professional didn't take the step of adjusting the fee to a reasonable amount before filing the fee application.[31] Not to sound like a broken record, but I'm pretty sure that a general counsel whose company is footing the tab would ask for discounts in that situation.[32] Other indicators that the professional isn't putting the client's interests first include expensing meals at high-priced restaurants, flying first-class, and sleeping at extra-pricey hotels. Nothing captures a reporter's

*Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 ST. MARY'S J. LEG. MAL. & ETHICS 42, 86 (2014)).

[30] I do remember a partner at my old law firm calling around on a Sunday to find an associate to staff a matter that was urgent. I don't remember which associate got called last, but I do remember hearing the partner's side of the phone conversation, where he asked, "well, is it *elective* surgery?"

[31] In fact, sometimes it's exactly the opposite: the professional might start with an inflated hourly rate, knowing full well that she or her firm will have to offer a "discount."

[32] Or in the situation in which "this partner just really likes doing legal research."

attention better than the occasional story about lawyers billing for underwear[33] and shoes[34] or for putting "churn that bill" in an email.[35] Once we cross over the line into billing for overhead,[36] we've lost sight of our fiduciary duty to our clients.[37]

*When a client wants the lawyer to let the client run the show.*

I've seen two instances in which the client basically bossed the lawyer around, resulting in amped-up fees. In one case, the client would read the lawyer's draft and rewrite it, leaving the lawyer stuck with the unenviable task of reviewing the client's rewrites, fixing the problems, and sending the new draft back to the client, only to have the process repeat itself.[38] In the other case,

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[33] *See, e.g.* Dionne Searcey, *From Behind Bars, Joe Nacchio Sues His Lawyer for Malpractice,* WALL ST. J. (March 23, 2011), available at https://www.wsj.com/articles/BL-LB-39662 ("Some of their costs, Nacchio's filing said, included attorney underwear, staff breakfasts and hotel-room movies during the six-week trial in Denver. ").

[34] *See, e.g.,* Amy Stevens, *Ten Ways (Some) Lawyers (Sometimes_ Fudge Bills,* APnews.com (Jan. 13, 1995), available at https://apnews.com/dd2c954e21c64c5bbd01efa85b422405 ("Mr. Marquess of Legalgard says a few months ago he questioned a Houston lawyer's $165 charge for 'ground transportation.' It turned out to be a pair of shoes.")

[35] *See, e.g.,* Martha Neil, *'Churn that bill, baby!' email surfaces in fee dispute with DLA Piper,* ABA J. (Mar. 25, 2013), available at https://www.abajournal.com/news/article/sued_by_dla_piper_for_675k_ex-client_discovers_lighthearted_churn_that_bill.

[36] *See, e.g.,* Amy Stevens, *supra* n. 34 (discussing adding a pro-rata charge for "HVAC" to a client's bill).

[37] One of my own pet peeves as a fee examiner involves a certain type of rare response to my questions about time entries. 99.9% of the time, the professionals understand that I'm just doing my job—helping a court to determine reasonableness—and that job requires me to do a deep dive into not just what each professional did but also how he or she described each task. I know that asking professionals to go back and re-explain (and re-justify) their time is unpleasant. The professionals know that I know that it's unpleasant. Most professionals take a deep breath, possibly also silently cursing me for a bit, and then respond with tact and with additional supporting data. Occasionally, though, a relatively junior person (it always seems to be a junior person) will provide snarky responses, along the lines of "don't you understand how BigLaw works?" Well, yes; yes, I do. (I'm from BigLaw, too.) That's why I get appointed as a fee examiner. In these rare cases, the pattern is (1) insufficient description in time entry + (2) snarky response. Just as the $140 shirt expense item, *see* n. 12, *supra,* caused me to crawl through that particular professional's fee application with a fine-toothed comb, snarky responses to a fee examiner's questions will lead to the conclusion that the professional has an entitled attitude that might signal that the person is neither especially careful nor especially efficient in his work.

[38]

> Occasionally, I've discovered internal actions (actions only between the client and her lawyer) that have also seemed odd. These internal actions might never trigger reactions from the opposing party, because they might never see the light of day; nonetheless, those actions generated unnecessary legal work. The best examples come from my review of bills that reflected a significant amount of activity by the client in editing the lawyer's work product. Those edits, in turn, required a lot of client-lawyer discussions and re-edits, and the legal fees increased exponentially. The entries looked something like this:
>
> Day 1 Send draft to client 0.1
> Day 2 Telephone conference with client re draft 1.0
> Day 3 Review and revise client's revised draft 2.0
> Day 4 Discuss revised draft with client; resend draft 0.5
> Day 5 Telephone conference with client re draft 1.5
>
> You get the point. The client was rewriting the lawyer's draft--and not because the draft was wrong as to any of the facts. The client was rewriting the draft because she didn't like some of the words that the lawyer used in the draft. The lawyer spent unnecessary time dealing with a client who wanted to play both roles (client and lawyer). In part, the client might just have been persnickety. In part, though, the client knew that the legal bills were going to come out of someone else's pocket. My guess is that the diffusion of responsibility for those legal fees contributed to the client's willingness to do a line-by-line edit of her lawyer's work.

the client wanted two partners at a single firm to replicate each other's work, even though the law firm knew that the estate was being asked to pay for that duplication of effort. In the world outside bankruptcy, clients can tell their lawyers to do unnecessary work and, subject to the ethics rule regarding the reasonableness of fees (and the client's knowing acceptance that extra work means higher bills), there's no problem with the client who wants to tell the lawyer both what to do and how to do it. That's not the case with estate-paid professionals, though. That same pesky disconnect between who's doing the work and who's ultimately stuck with the bill means that the professionals need to push back on client demands for which the client isn't paying.

*What should we do?*

We can talk until we're blue in the face about "exercising billing judgment," and Joe Tiano and I have a few articles planning to describe what the data show us about lawyers and their billing. But, as far as I can tell, we haven't talked much about what time entries tell us about the lawyers themselves. I doubt that most lawyers ever really think about what it says about *them* when they overwork a case or bill champagne to their clients. Maybe that's the way in to get lawyers to think about true billing judgment. After all, if we could see ourselves as others see us,[39] perhaps we'd want to change.[40]

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> There has to be a way of drawing a line between normal client-lawyer interactions and those that unnecessarily drive up the fees in a case. When the client is paying those fees herself, of course, it is her choice as to how much extra work she wants to ask her lawyer to do. But in situations in which someone other than the lawyer is paying the client's fees, the question of when a client should "help" the lawyer do the lawyer's job--or urge the lawyer to do more on a case than the lawyer thinks is reasonable--should not be based solely on the client's own preferences.

Nancy B. Rapoport, *The Client Who Did Too Much,* 47 AKRON L. REV. 121, 125-26 (2014) (footnotes omitted).

[39] As the poet Robert Burns observed in the last stanza of *To a Louse,*

> O wad some Power the giftie gie us
> To see oursels as ithers see us!
> It was frae mony a blunder free us,
> An' foolish notion:
> What airs in dress an' gait was lea'e us,
> An' ev'n devotion!

Robert Burns, *To a Louse: On Seeing One on a Lady's Bonnet, At Church* (1786), http://www.robertburns.org/works/97.shtml.

[40] Maybe not, though. It's a bit like the old joke about how many psychologists it takes to change a light bulb: one, but the light bulb has to want to change. *See, e.g.,* https://www.reddit.com/r/Jokes/comments/7d3hmv/how_may_psychologists_does_it_take_to_change_a/.

# Faculty

**Prof. Nancy B. Rapoport** is the Garman Turner Gordon Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas, and an Affiliate Professor of Business Law and Ethics in the Lee Business School at UNLV. Her specialties are bankruptcy ethics, ethics in governance, law firm behavior, and the depiction of lawyers in popular culture. Previously, she clerked for Hon. Joseph T. Sneed III on the U.S. Court of Appeals for the Ninth Circuit following law school, then practiced primarily bankruptcy law with Morrison & Foerster in San Francisco from 1986-91. Prof. Rapoport started her academic career at The Ohio State University College of Law in 1991, and she moved from assistant professor to associate professor with tenure in 1995 to associate dean for Student Affairs (1996) and professor (1998), just as she left Ohio State to become dean and professor of law at the University of Nebraska College of Law from 1998-2000. She then served as dean and professor of law at the University of Houston Law Center from July 2000-May 2006 and as professor of law from June 2006-June 2007, when she left to join the faculty at Boyd. She served as interim dean of Boyd from 2012-13, as senior advisor to the president of UNLV from 2014-15, as acting executive vice president and provost from 2015-16, as acting senior vice president for Finance and Business (for July and August 2017), and as special counsel to the president from May 2016-June 2018. Prof. Rapoport is admitted to the bars of the states of California, Ohio, Nebraska, Texas and Nevada and of the U.S. Supreme Court. In 2001, she was elected to membership in the American Law Institute, and in 2002, she received a Distinguished Alumna Award from Rice University. In 2017, she was inducted into Phi Kappa Phi (Chapter 100). She is a Fellow of the American Bar Foundation and of the American College of Bankruptcy. In 2009, the Association of Media and Entertainment Counsel presented her with the Public Service Counsel Award at the 4th Annual Counsel of the Year Awards. In 2017, she received the Commercial Law League of America's Lawrence P. King Award for Excellence in Bankruptcy, and in 2018, she was one of the recipients of the NAACP Legacy Builder Awards (Las Vegas Branch #1111). She has served as the fee examiner or as chair of the fee review committee in such large bankruptcy cases as Zetta Jet, Toys 'R Us, Caesars, Station Casinos, Pilgrim's Pride and Mirant. Prof. Rapoport appeared in the Academy Award®-nominated movie *Enron: The Smartest Guys in the Room* (Magnolia Pictures 2005) as herself. She received her B.A. *summa cum laude* from Rice University in 1982 and her J.D. from Stanford Law School in 1985.