

Legal Fees

Law and Management

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Dedication

This book is dedicated by John Toothman to Elizabeth McGee and William Toothman and by William Ross to Vernon and Mardelle Ross,

and dedicated as well

To those lawyers who put professional duty before financial rewards, who uphold the highest traditions of the profession even as others tarnish it with their greed, and who recognize that representing a client is an opportunity to do good, not just an opportunity to do well.

Preface

Upon arriving at the pearly gates, a lawyer checked in with Saint Peter. Glancing at his records, Saint Peter exclaimed: “You are in *remarkable* condition for a man of 107.”

Hoping for a reprieve, the lawyer corrected Saint Peter: “I’m only 58, not 107. There must be some mistake. What gave you the idea I was 107?”

Saint Peter replied: “We pulled your billing records.”

— A common joke.

“Eben Moglen, now a Columbia law professor, actually did bill 27 hours for Cravath, Swaine [in one day, by claiming he worked around the clock while traveling from the East Coast to California].”

— Mary Ann Glendon, *A NATION UNDER LAWYERS* at 30 (1994).

Even as the public complains about lawyers and their outrageous fees, a few lawyers are finding new ways to expand, or cross, the boundaries of reasonable or legitimate billing. Like the law of legal fees, the public’s perception of lawyers and their fees is shaped by the excesses of a few.

While one lawyer is trying to justify his \$500 hourly rates, or his even more embarrassing rate of \$200 per hour for a freshly minted lawyer, his partner may be billing the same client \$25 for his lunch or \$1 a page for faxes. There are law firms billing for the time of people as “lawyers” who are not licensed to practice law — that, they claim, is just a technicality. Other firms expect lawyers, either explicitly or by implication, to bill 2,000 or more hours a year, whether that time is valuable or not. Part of the problem is that lawyers have a hard time showing why their services should be

so expensive. Finding the value in legal services is often difficult, especially if the lawyer's reaction to such questions is defensive.

This book has two distinct parts. In the first part, Chapters 2 through 7, the law of legal fees is summarized and explained. This includes both fees paid by clients and fees paid by others, through fee-shifting, for example. We have not attempted to cite every existing authority. Instead, we attempt to distill and harmonize this subject. Every lawyer and client should find this part of the book useful.

The second part of the book, Chapters 8 through 14, cover the subject of legal fee management. This part of the book explains some of the tools that can be used to manage legal fees, including fee agreements and alternatives to hourly fees. This portion of the book is designed for clients, including in-house counsel, but should also be helpful for lawyers and law firms.

Although we attempt to deal with fees for all types of legal services, many of our examples and most of the cases grow out of litigation and the legal fees charged therein.

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John W. Toothman is the president of The Devil's Advocate, a legal fee management and litigation consulting firm, and LitWatch, a litigation news service. He received a B.S. and M.S. in chemical engineering from the University of Virginia, where he was a National Science Foundation Fellow. He received his law degree from Harvard Law School (with honors) and has been a trial lawyer with the U.S. Department of Justice and in private law firms. He is the co-author of *TRIAL PRACTICE CHECKLISTS* (West 2001) and the author of numerous articles about legal fees, trial practice, and litigation management. Mr. Toothman received the 1995 Ross Essay Award from the American Bar Association. Email: JToothman@DevilsAdvocate.com. Visit LitWatch.com and DevilsAdvocate.com for more information.

William G. Ross is a professor of law at the Cumberland School of Law at Samford University in Birmingham, Alabama, where he teaches ethics, civil procedure, constitutional law, and legal history. A graduate of Stanford and Harvard Law School, he practiced law in New York City for nine years before joining the Cumberland faculty in 1988. Professor Ross's writings about legal fees include numerous articles and a book, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (Carolina Academic Press, 1996). He is also the author of articles on a wide range of other legal subjects and has published two books about American constitutional history. Email: WGRoss@samford.edu.