

Focus: Billing Paralegals Revisited

By Kenneth M. Walczak and Ernest Galvan, *San Francisco Daily Journal*, August 29, 2007

Attorneys frequently submit line item requests for reimbursement for the time incurred by their paralegals, law clerks and other support staff when making attorney-fees claims to courts. They should continue to do so with confidence. Courts are obligated to follow market practice, awarding to attorneys fees that mirror the amounts chargeable to private clients. Market practice firmly supports billing (on a sliding scale) for the time of many individuals who do not qualify as attorneys or even paralegals.

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A recent Focus column on paralegal billing (“Paralegal Puzzle,” 8/8/07) provides useful insight, but its authors strike one note of caution too many. Practitioners submitting bills for the work of paralegals and other legal staff should heed the column’s warnings regarding compliance with Business and Professions Code Section 6450 but disregard the unsupported prediction that courts considering fee applications will classify all hours billed by people not qualified as paralegals under Section 6450’s requirements as “general office overhead.” The relevant case law simply does not support such a warning.

A court bound to the dictates of market practice in this area likely will find that market practice is properly to the contrary. A change in this rule, including the failure to award to law firms compensation for the work of nonparalegal staff, would be both inconsistent with the current and correct state of the law and fundamentally unfair to those employees working toward satisfaction of the Section 6450 criteria. It would provide billing and task-assignment incentives that run contrary to the training and qualification purposes of Section 6450 itself.

In this area, as in all attorney-fee award law, the Supreme Court has “consistently looked to the marketplace as our guide to what is [a] ‘reasonable’ [fee].” *Missouri v. Jenkins*, 491 U.S. 274 (1989), citing *Blum v. Stenson*, 465 U.S. 886 (1984). The authors of “Paralegal Puzzle” correctly cite *Jenkins* for the proposition that “recovery of paralegal fees at market rates ha[s] long been allowed by the courts.” However, they fail to note that the principle of

market reliance that underlies the *Jenkins* ruling on paralegal time extends to recovery of reasonable (albeit lower) rates for law-firm staff not certified by Section 6450.

“The key . . . is the billing custom in the relevant market. Thus, fees for work performed by non-attorneys such as paralegals may be billed separately, at market rates, if this is the prevailing practice in a given community. . . . Indeed, even purely clerical or secretarial work is compensable if it is customary to bill such work separately, though such tasks should not be billed at the paralegal rate, regardless of who performs them.” *Trustees of Const. Industry and Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253 (9th Cir. 2006).

California cases are in agreement. In a line of decisions beginning with *Serrano v. Priest*, 20 Cal.3d 25 (1977), the state’s courts have affirmed the importance of looking to actual market practice to measure reasonable billing practices and rates. See also *Ketchum v. Moses*, 24 Cal.4th 1122 (2001); *PLCM Group Inc. v. Drexler*, 22 Cal.4th 1084 (2000). In *Salton Bay Marina Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914 (1985), the Court of Appeal stated directly that “necessary support services for attorneys, e.g., secretarial and paralegal services, are includable within an award of attorney fees.”

Secondary authorities, such as treatises and practice guides, also have interpreted the California market practice to allow separate billing for the services of law clerks and others not meeting the 6450 requirements. See Richard M. Pearl, *California Attorney Fee Awards* (2nd ed., 2006 update), Section 12.15 (“Time spent by paralegals and law clerks is compensable at market rates separately from attorneys’ services if the local practice is to bill for their services in that manner”); Paul W. Vapnek, *California Practice Guide: Professional Responsibility* (The Rutter Group 2006), Section 5:552 (“A law firm may properly bill a client for services of a law clerk or legal assistant, *provided* an itemized billing separately identifies those services.”) (emphasis in original).

The market practice is to bill clients for services performed by support staff, law clerks and those preparing to meet the 6450 requirements. Our firm does so at a rate

lower than that charged for 6450-certified paralegal work, and we believe our practice to be in line with that of most, if not all, law firms (and certainly major law firms) in the San Francisco Bay Area.

In our capacity as fees counsel for other firms, we have shown successfully the reasonableness of several practitioners' and firms' independently billed rates for law clerks, "paralegal clerks," "case clerks," litigation specialists and other noncertified staff. In March of this year, San Diego County Superior Court evaluated our own rates under both San Francisco and San Diego standards and found the support staff rates to be reasonable ("even if they are higher than the market rates for San Diego"). *Gober v. Ralphs Grocery Co.*, N72142 (Minute Order dated March 20, 2007). The court approved an award of \$160 per hour for law-student clerks and \$60 per hour for word processors. Although none of these individuals is certified by Section 6450, the court did not require that their work be considered "overhead" expenses. It reached this conclusion by applying the case law, which demands that California courts follow market practice.

Los Angeles practice does not appear to deviate substantially from that of San Diego or San Francisco. As far back as 1981, the Los Angeles County Bar Association issued a formal ethics opinion concerning the practice of "billing of secretarial services (or law clerk or paralegal services)." Formal Ethics Opinion 391. The bar association concluded that such billing may be performed "at an appropriate rate lower than the rate for legal services by an attorney" and "provided that an itemized billing separately identifies such services."

Even if the case law did not direct courts specifically to follow the market practice, courts would be unwise to refuse the recovery of fees for legal employees not (or not yet) certified by Section 6450. Declining to award market rates for paid, nonparalegal staff would contradict the logic of the cases that hold that the contributions of summer associates, and even those of unpaid law clerks, are compensable at fair market rates. "[I]t is now clear that the fact that services were volunteered is not a ground for diminishing an award of attorneys' fees. . . . [T]he amount of the award is to be made on the basis of the reasonable market value of the services rendered, and not on the salary paid." *Sundance v. Municipal Court*, 192 Cal.App.3d 268 (1987), citing *Serrano v. Unruh*, 32 Cal.3d 621 (1982). See also *Louisiana v. Mississippi*, 466 U.S. 921 (1984) (awarding requested rate for 103.7 hours of "summer law clerk" time to special master's staff); Pearl, California Attorney Fee

Awards, Section 12.32 ("Paralegal, law clerk, and law student time is compensable at prevailing market rates, even if it is volunteered.").

A judicially enforced shift of all nonparalegal staff hours to the "overhead" category also would discourage the delegation of litigation tasks to those who can perform them most efficiently, by providing a direct incentive to load tasks into the assignments given to Section 6450 paralegals. This would create the exact set of perverse incentives that the Supreme Court cautioned against in *Jenkins*: "To the extent that fee applicants under section 1988 are not permitted to bill for the work of paralegals at market rates, it would not be surprising to see a greater amount of such work performed by attorneys themselves, thus increasing the overall cost of litigation."

Such a shift also would be fundamentally unfair to those staff members who try to fulfill the 6450 requirements through a year's training under the supervision of an attorney. The cost of such training to the supervising attorney(s) would escalate dramatically if passed along to firms as nonrecoverable overhead. Supervisors, in turn, would become more reluctant to assign the types of tasks most beneficial to such training, thereby undercutting the purpose of Section 6450's process of qualification by mentorship.

The current system, which allows recovery at progressively escalating, market-based levels for the work done on fee-shifting matters by support staff, law clerks, paralegals and attorneys, provides the correct incentives to effectuate the purposes of California fees law. See, for example, *Oberfelder v. City of Petaluma*, C98-1470 (N.D. Cal., unpublished 2002) (summarizing "common practice" of billing for nonadmitted law-school graduates; commending "[c]ounsel's delegation of work to paralegals [as] a form of billing judgment"). "Paralegal Puzzle," though otherwise a useful and accurate summary of the law, does not accurately describe the current system as it relates to fees for the work of paralegals and other staff, nor does it advocate for a principle that would improve on the status quo in any significant manner.

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