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Actual and Necessary: A Guide to Keeping Time So You Get Paid

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Billing time is one of the most dreaded aspects of private practice in any field of law, but not because it is hard or overly time-consuming. The extra step of recording discrete, detailed time entries is much more than an annoyance. For bankruptcy practitioners employed under §§ 327, 1103 and 105[1] of the Bankruptcy Code and certain creditors' counsel,[2] it is a step that cannot be done in a sloppy, haphazard way — at least, if the attorney wants to be paid.

In nonbankruptcy areas of practice, an attorney may have to explain generic, unclear and blocked billing to a client. However, a bankruptcy practitioner's bills are subject not only to this review, but also to that of multiple other parties, including the U.S. Trustee's Office, debtors, committees, interestholders and, most importantly, the court, before the practitioner will be awarded compensation under §§ 330 and/or 331. Developing proper billing habits from the start will pay for itself — literally.

Although most new attorneys who enter an established bankruptcy practice will have standard forms for fee applications, taking the time to understand the law informing a court's analysis is the first step in understanding how to effectively and properly keep time for easy approval. The first part of this article discusses the Code sections and cases that likely apply to every fee application. The second part discusses the common pitfalls that can result in a court reducing a fee request, and easy and practical tips to avoid them. By making proper billing a habit rather than a dreaded task, the foundation will be laid to get paid in full.

The Laws of Getting Paid[3]

Section 330 of the Bankruptcy Code

Under § 330, after notice and a hearing an attorney may be awarded (1) "reasonable compensation for actual, necessary services rendered" and (2) "reimbursement for actual, necessary expenses."[4] On the court's own motion or that of any party-in-interest, a court can, however, reduce the compensation requested.[5] In making the determination of whether and how much to reduce a request, the court is directed to

> consider the nature, the extent, and the value of such services, taking into account all relevant factors, including —
>
> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated the skill and experience in the bankruptcy field; and
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably

1 Although § 105 is not directly addressed in § 330, courts have ordered that the compensation of attorneys retained outside of §§ 327 and 1103, for example, to represent a future claimants' representative are subject to the provisions of § 330. *See, e.g., In re Imerys Talc Am. Inc.*, 2020 Bankr. LEXIS 3282, *9 (Bankr. D. Del. Nov. 20, 2020).

2 For example, an oversecured creditor is entitled to reasonable attorneys' fees under § 502(b), and landlords can often include attorneys' fees in a claim under § 502(b)(6).

3 The law discussed herein applies to both interim compensation under § 331 and final compensation under § 330, as all interim compensation will be subject to § 330 at the conclusion of the engagement.

4 11 U.S.C. § 330(a)(1).

5 11 U.S.C. § 330(a)(2).

skilled practitioners in cases other than cases under this title.[6]

In addition, the court "*shall not* allow compensation for — (i) unnecessary duplication of services; or (ii) services that were not (I) reasonably likely to benefit the debtor's estate, or (II) necessary to the administration of the case."[7]

The Lodestar Method

The lodestar method is a court's starting point for determining whether fees billed were reasonable. The "lodestar" equals a *reasonable amount of time for the matter* multiplied by a *reasonable hourly rate*.[8] Reasonable time is the time that the court believes a billing attorney should have spent on the matter. Then, a "reasonable hourly rate" is calculated with reference to a billing attorney's experience and skill, as well as prevailing rates in the community for similar services provided by reasonably comparable attorneys. The sum (*i.e.*, the lodestar) may then be adjusted to account for the specific demands of the case, often with reference to some or all of the 12 *Johnson* factors.

The *Johnson* Factors

The *Johnson* factors are derived from the Fifth Circuit's decision in *Johnson v. Georgia Highway Express Inc.*,[9] and consist of the following: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fee awards in similar cases.

However, courts have not taken a uniform approach to the *Johnson* factors. Some courts view the factors as already subsumed into the lodestar method,[10] while others apply the lodestar method and then look to the *Johnson* factors to decide whether the lodestar amount should be modified.[11] Still other courts consider the *Johnson* factors in conjunction with calculation of the lodestar.[12] Although these distinctions may matter in some cases, the one- and two-step processes will often generate essentially similar results, especially given that enhancement of the lodestar is a rare occurrence.[13]

Biggest Pitfalls and Strategies to Avoid Them

Even with an understanding of the law, unless time records are maintained in anticipation of bankruptcy court review, a practitioner will often fall into some of the pitfalls discussed below. In many cases, a simple fix can nip errors in the bud. This avoids the headache of reviewing and editing voluminous invoices at the end of a fee-application period or the end of a case, and, most importantly, permitting the court to allow fees in full and without objection.

Not Enough Detail/Excessive Billing

Vague time entries are virtually always a problem. A general, shorthand description might be easy to understand for the time-keeper doing the work and making a contemporaneous record (it goes without saying to always keep contemporaneous time). However, the court and other parties who analyze vague, generic time entries do not have the benefit of the billing attorney's on-the-spot thoughts.

Time entries should be drafted with an eye toward explaining and justifying why the work was "reasonable and necessary," and how it benefited the estate or a constituent. Entries such as "reviewed emails" are certainly insufficient, but even additional details, such as "conference with X concerning research and strategy" or "conference with X concerning pending matter related to debtor" might not provide enough detail for a court to determine whether the time was justified.[14] Vague entries can cause the court to spend time attempting to decipher the context, conduct an evidentiary hearing,[15] or simply deny the compensation.

While courts frequently complain that counsel have engaged in excessive billing, the heart of the issue is frequently that the court does not understand how the amount of time billed was "reasonable and necessary." In other words, the billing entry was not specific or detailed enough to explain to the court that the full amount of time delegated to a task benefited the estate or was necessary to the administration of the case. This issue is often remedied if detailed descriptions are crafted with an eye toward the benefit to the case as previously explained.

Vague and ambiguous entries are a common and costly mistake. No attorney, particularly a new associate, wants their entries to be the reason that the firm's fee application is reduced or its approval delayed. Taking the time to carefully prepare time entries is essential, not optional.

Tip: Have an attorney or professional assistant who is not working on the case review the time entries. If that person cannot understand the value of the time billed or the task that was completed, more detail should be included until it becomes clear. If it becomes necessary to bill significant time to certain tasks, make sure the explanation is particularly thorough to explain the circumstances.

Block-Billing

Similar to time entries that are insufficiently detailed, time entries that are block-billed — multiple tasks combined in a one-time entry — do not establish for the reviewer (1) how much time was spent on a particular task, or (2) whether the time spent on each task was reasonable. For example, if an attorney records 3.0 hours total for "review of a motion for approval of DIP financing; telephone call with

6 11 U.S.C. § 330(a)(3).
7 11 U.S.C. § 330(a)(4)(A) (emphasis added). Section 330(a)(4)(B) excludes from this provision an individual chapter 12 or 13 case, in which the court can permit compensation "based on *a consideration* of the benefit and necessity of such services to the debtor" (emphasis added).
8 *See In re Yermakov*, 718 F.2d 1465, 1471 (9th Cir. 1983).
9 *Johnson v. Georgia Highway Express Inc.*, 448 F.2d 714, 717-19 (5th Cir. 1974).
10 *See In re Boddy*, 950 F.2d 334, 338 (6th Cir. 1991).
11 *See In re Hall*, 518 B.R. 202, 211 (Bankr. N.D.N.Y. 2014).
12 *See, e.g., In re Vernon-Williams*, 377 B.R. 156, 184 (Bankr. E.D. Va. 2007).
13 *See In re Kieffer*, 306 B.R. 197, 205 n.11 (Bankr. N.D. Ohio 2004) ("The distinctions between the components of the two approaches are so small that they are indistinguishable when stirred into the fee stew.").
14 *See In re Digerati Techs. Inc.*, 537 B.R. 317, 332, 370-78 (S.D. Tex. 2015).
15 Time spent defending a fee application is not compensable for an estate professional under § 330. *Baker Botts LLP v. ASARCO LLC*, 576 U.S. 121, 127-35 (2015).

debtor's counsel concerning alternative financing sought; and email to client regarding financing options for debtor's continued operation under chapter 11 and recommendation not to object to the filed DIP financing motion," the court has no idea whether the review of the motion took 0.6 hours (presumably reasonable) or 2.7 hours (perhaps unreasonable absent additional undescribed factors). According to the U.S. Trustee's guidelines, while block-billing is generally not allowed, a single daily entry that combines *de minimus* tasks can be combined, provided that the entry does not exceed 0.5 hours.[16]

A consequence of block-billing is that the court may conclude that it lacks the information to trim excessive time from a particular task among those blocked, and may choose to reduce the total time billed by a discretionary percentage.[17] The goal is to establish that your work was reasonable and necessary. Do not give a court an "excuse" to question the reasonableness of your time by block-billing.

Tip: Break up time entries so that each task corresponds to the amount of time spent on that task — even if the amount of time is modest. Making use of time-tracking software or timers and developing good habits can be quite helpful in mastering detailed task-billing.

Not Delegating to Proper Staff/Duplicative Billing

Whether certain tasks are properly completed by senior-level attorneys, lower-level attorneys or support staff is largely out of the control of an associate. Nevertheless, there will be times when tasks that would be more suitable for a junior-level attorney must be completed by a senior attorney, or where an attorney may need to complete a task that would ordinarily be delegated to a staff person. Similarly, there are times when multiple attorneys must participate in the same hearing or conference, which reviewing courts often view skeptically.

In such situations, courts are more inclined to allow the "double billing" if the exigent circumstances are explained in the entry and such staffing situations are kept to a minimum.[18] When matters are not explained or apparent from the time description, the court is left to question how the time and/or rates are reasonable and necessary.

Tip: While a junior associate might not have much control over the delegation of tasks, associates typically draft the fee applications, so they should keep this issue in mind when reviewing bills and flag any issues with a supervising attorney prior to filing. A good-faith reduction for certain tasks might go a long way with the court and other parties-in-interest. At a minimum, make sure your own time is not subject to objection or reduction. If you find yourself billing time to routine tasks, be sure the circumstances are fully explained in the entry.

Conclusion

Given the consequences of failing to record time properly, it is well worth the time to develop the habit of recording specific time entries that are separated by each task performed and that indicate that how the time spent was both reasonable and necessary. With such a "reasonable and necessary" standard as a guide, a professional can ensure that the court and other interested parties understand the value being added to the case and that the fees requested are fully warranted. abi

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16 *See* 78 C.F.R. 116 (2013); 61 C.F.R. 97 (1996).

17 *See In re 29 Brooklyn Ave. LLC*, 548 B.R. 642, 653 (Bankr. E.D.N.Y. 2016) (reducing block-billed time by 50 percent); *In re Ritchey*, 512 B.R. 847, 871-72 (Bankr. S.D. Tex. 2014) (reducing block-billed fees by 75 percent); *In re Gurley Hous. Assocs. LP*, No. 20-10712, 2021 Bankr. LEXIS 49, at *16 (Bankr. N.D.N.Y. Jan. 12, 2021) (reducing fees by 5 percent on account of block-billed time).

18 *See In re New Boston Coke Corp.*, 299 B.R. 432, 445 (Bankr. E.D. Mich. 2003) ("[I]n situations where more than one attorney attends a hearing or conference, there must be a showing that each attorney contributed to the hearing or conference.") (citing *In re Microwave Prods. of Am.*, 102 B.R. 661, 665 (1989)).