Churn That Bill, Baby! Overbilling in Law Firms

by Sharon D. Nelson, Esq. and John W. Simek

DLA Piper, the world's largest law firm, certainly cannot be happy that it has become the poster child for overbilling. Mind you, DLA Piper maintains that no overbilling took place. The problem is that most folks, including us, don't believe the firm's protestations of innocence.

But let us start at the beginning of this unhappy tale.

Adam Victor is an energy industry executive. He came to DLA Piper in April 2010 to take one of his companies, Project Orange Associates, into bankruptcy. Ultimately, DLA was disqualified as counsel due to a conflict.

According to an article which appeared in the *New York Times* on March 25, 2013, DLA filed suit against Victor in February 2012 for $678,763 in past due legal bills. In hindsight, that was probably a really bad idea. Victor counter-sued, asking for $22.5 million in punitive damages, offering evidence of deliberate overbilling in the form of damning internal e-mails from DLA attorneys produced during discovery. Attorneys for Victor said in court papers that the e-mails "shock the conscience" and alleged a "sweeping practice of over-billing."

The papers said, "As described herein, the written admissions by DLA Piper attorneys concerning churning perhaps reflect the most egregious conduct by a law firm in any fee matter. These admissions provide a window into a culture of avarice and ruthlessness that casts a pall not only on DLA Piper, but on the entire legal profession."

In earlier court papers, Victor claimed the firm acted as his company's "ghost counsel" after being ordered to withdraw and continued to bill him (NYLJ, Aug. 10 2012). DLA Piper spokesman Josh Epstein refused comment, saying that the firm doesn't comment on pending litigation.

These were some of the e-mails that came to light:

"I hear we are already 200k over our estimate — that's Team DLA Piper!" wrote Erich P. Eisenegger, a lawyer at the firm.

Another DLA Piper lawyer, Christopher Thomson, responded to the e-mail, noting that a third colleague, Vincent J. Roldan, was also recruited to work on the matter.

"Now Vince has random people working full time on random research projects in standard 'churn that bill, baby!' mode," Mr. Thomson wrote. "That bill shall know no limits."

On April 17th, *The New York Times* reported that DLA Piper had settled the ugly fee dispute. A lawyer for Mr. Victor confirmed that the parties had settled though he declined to reveal the terms of the settlement, citing confidentiality provisions in the agreement. Mr. Victor appeared to be a pretty determined guy, so our guess is that the terms of the settlement were pretty darn

sweet as DLA Piper scurried to sweep this widely-disseminated public embarrassment under the rug.

It is hard for any lawyer not to be personally offended by the DLA Piper e-mails which tarred all lawyers, most of whom try hard to stay within estimates given to clients unless the scope of work changes.

DLA Piper, with 4,200 lawyers in 30 counties, could surely have set a better example. We found laughable the internal e-mail that the firm leadership issued defending the firm's integrity and suggesting that the e-mails that surfaced were a poor attempt at humor. It was so repetitious and labored (if you say the same thing enough times, did they think it would be more credible?) that we were finally convulsed with laughter.

We were not alone. Forbes had a commentary entitled "Apology Fail in DLA Piper Legal Billing Scandal" published on March 27th. In part, the article (which had a patina of outrage throughout) said,

> "I don't know who Piper's crisis PR team is but I'd hire a new advisor. When you've been caught with your pants down in a public space, you do not rush to blame the alleged victim, you do not say the written evidence doesn't reflect the facts on the ground, you do not demonize the "former attorneys" who created the evidence, and you do not assert your firm's integrity (having recently housed the miscreants whose behavior belies that claim).
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> Nor do you protest that other people charged with reviewing your invoices are the appropriate control for your internal billing practices, accuse your own former attorneys of lying about their own behavior, nor assert your innocence before you have had the time to investigate the matter yourself (which investigation cannot possibly have taken place between the time in which these two *New York Times* articles appeared: March 25, 3:36 p.m. Suit Offers a Peek at the Practice of Inflating a Legal Bill and March 26, 5:19 p.m., DLA Piper Calls Emails Cited in Lawsuit an Offensive Attempt at Humor)."

To speak in the language of Twitter, if #fail ever applied, it was here, where DLA manages to suggest that evidence of wrongdoing isn't wrongdoing, that proof of its integrity was its understanding that the bills would be subjected to the bankruptcy court's scrutiny (and we all know how much scrutiny is commonly given), that it could conclude within 24 hours that the fees billed were commensurate with the work performed, and that the victim of what seems to be wrongdoing had the temerity to file a suit alleging overbilling after he refused to pay what he believed was an inflated bill.

What DLA did not do was what so many companies have realized is the proper approach. They could have held themselves accountable, apologized and promised to investigate and to remediate any problems.

The lawyers who wrote the offending e-mails are no longer with the firm, apparently for unrelated reasons. But what they wrote (and sorry DLA, most people believe that these e-mails

constituted bona fide greedy"chortling" over the bill's growing size) has once again made lawyers the butt of water cooler jokes. They have fueled the public perception that lawyers are sharks more interested in jacking up bills than in keeping legal costs in check.

The entire system of hourly billing encourages overbilling and more so at larger firms where there is intense pressure to ensure maximum profits and associates are expected to work brutal hours. Partners who have made it to the top of the pyramid expect huge payoffs – any client-friendly change will impact their bottom line. Overstaffing a matter is common – and let's face it, the more attorneys that are on a matter, the higher the bill. We've actually seen clients demand that five of six attorneys go home where the other side brought only one attorney to a deposition. Watch the wonderful film *The Rainmaker* – one lawyer against many for a law firm defending an insurance company - public perception about big firm padding hasn't changed a lot in 100 years.

As one article said, "Fool me for 100 years, shame on you. But fool me for another 100 years . . ."

Clients are screaming about having young associates assigned to matters because they are paying for the training lawyers didn't get in law school. They are scrutinizing the bills, demanding answers and negotiating payment as though the bill were "a starting point." On many levels, we are fundamentally hearing clients say (a la another movie – *Network*) "I'm mad as hell and I'm not going to take it anymore!" Mark Chandler, the GC of Cisco, has called law firms "the last vestige of the medieval guild system to survive in the 21st century."

William Ross, a law professor at Samford's University's Cumberland School of Law who specializes in billing ethics, says that bill churning is an insidious problem in the legal industry. In a survey of 250 lawyers done in 2007, more than half acknowledged that the prospect of billing extra time influenced their decision to undertake pointless assignments or throwing armies of bodies (featherbedding) at every problem. As he noted, " most lawyers are ethical, but the billable hour creates perverse incentives."

And one more movie reference, courtesy of *Law Technology News* – there will be a lot of Captain Renaults (*Casablanca*) coming forward to express their shock that there is intentional overbilling going on. As the *Above the Law* blog noted wryly, DLA will now have to pay the "Piper."

The public perception is that DLA bought silence, probably at an exorbitant price – though we'll likely never know for sure. What we do know is that a major firm was brought low by e-discovery. This is indeed a cautionary tale of a $2.44 billion dollar a year law firm which suffered irreparable brand damage by pursuing legal fees of less than $700,000 in a case in which it was disqualified due to conflicts. Did anyone there hear of conflict checking? Early case assessment? How about the common sense argument against suing a client at all, much less one whose bill was so far over the estimate he had been given?

This case will generate a lot of commentary for the foreseeable future. As frequent lecturers on legal ethics, we were delighted to be handed a case so fraught with ethical implications. to

discuss with audiences. The DLA Piper Debacle slide in our PowerPoint is likely to have a very long life.

And just as we had to finalize this article, DLA Piper made the headlines again, chartering Royal Caribbean's Liberty of the Seas for a $3.1 million partners' meeting, cruising from Barcelona to Nice. As Above the Law commented, that price tag doesn't include all the travel expenses or "Dear God, the booze. With 22 bars, clubs, and lounges, that bill shall know no limits." Ouch.

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