

# PRESENTING AN ATTORNEY'S FEE APPLICATION IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF MAINE

*By Sean T. Carnathan, Esquire*

## Introduction

Presenting an attorney's fee application to a court is a wonderful thing. It means you have prevailed on your claims, and are about to experience the joy of having the other side pay your fees. Undoubtedly, you and your client are in good spirits.

If submitting an application in the U.S. District Court for the District of Maine, however, you will be well served to spend the time to submit a detailed application. Chief Judge Gene Carter has developed a clear set of guidelines over the years, setting forth what the Court expects from a fee

application. Attorneys who fail to meet the Court's expectations will be disappointed by the fee they are awarded.

This article is based on a survey of Judge Carter's opinions regarding what constitutes a reasonable attorney's fee in cases of all types in which a party is entitled to its fees. This article assumes that you have already prevailed and established your entitlement to your fees, and focuses on the Court's analysis of fee applications after the right to a fee is settled. Judge Carter provides a wealth of decisions that lay out clearly what he expects from a fee applica-

tion. Following these guidelines makes good sense regardless of which judge will review your application.

## The General Standards

The party requesting its fees bears the burden: 1) to provide detailed, contemporaneous time records to establish the reasonableness of the hours spent;<sup>1</sup> and 2) to submit affidavits to establish the propriety of the hourly rates requested. The Court uses the "lodestar approach," unless the law granting the fees dictates another approach.<sup>2</sup> The lodestar is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.<sup>3</sup> That number is then (theoretically) adjusted based on several factors.<sup>4</sup> The ultimate award is a matter of the Court's discretion.<sup>5</sup>

## The Application

### 1. Hours Spent

Time Records must be detailed and contemporaneous. They must list not only the hours worked, but also the date of the work, the tasks performed, and the attorney who performed them.<sup>6</sup> The Court will review the total hours spent on a case to determine whether the total is reasonable.<sup>7</sup> It may also review the time spent on individual projects to determine whether that time is reasonable.<sup>8</sup>

There are other pretty well-established rules as well. Time entries must not be "vague or meaningless."<sup>9</sup> For example,



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time billed under an entry like "attention to file" is likely to be stricken. Also, time entered for telephone calls or correspondence must reflect the subject matter addressed.<sup>10</sup> Paralegal and law clerk time are not recoverable.<sup>11</sup> Time spent on media interviews will not be compensated.<sup>12</sup> Reasonable time spent preparing the fee application is payable, but will be scrutinized, and compared to the total time spent on the case.<sup>13</sup>

Finally, the Court demands that the fee application demonstrate "billing judgment," which means that the applicant has combed the application to eliminate all "excessive, redundant, or unnecessary" hours.<sup>14</sup> By way of example, if two attorneys attend one event or work on a single project, the fee applicant must justify the need for both, or eliminate the time for one of the attorneys from the application.<sup>15</sup> The court will also examine closely time spent on activities like reviewing the file or reviewing documents, and may cut down on the time allowed for those efforts.<sup>16</sup> The Court has also been known to determine that a party spent too long working on a single project, like drafting a motion, and cut back on the time allowed for that project.<sup>17</sup> Attorneys would be well-served to display a bit of obvious billing judgment in their application, *i.e.*, voluntarily diminish your bill by not charging for some of your work, and reflect those uncompensated efforts on your time entries supporting your application.

## 2. Hourly Rates

The Court will also review the rates charged. The hourly rate for each attorney who works on a case must be separately provided and justified.<sup>18</sup> If one attorney performed work for more than one client, then the work for each client must be broken down.<sup>19</sup> A reasonable hourly rate is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."<sup>20</sup>

By "reasonably comparable skill and experience," the Court apparently means "almost exactly the same skill and experience."<sup>21</sup> The application should include affidavits from local attorneys of nearly identical years of experience to justify the hourly rates charged. If possible, it is preferable that the affidavits come from attorneys who also work in firms of similar size.<sup>22</sup> The Court also relies on its own experience and knowledge of rates in the area.<sup>23</sup> As a general rule, out-of-town counsel will be compensated at prevailing local rates, unless the

matter required some special expertise not possessed by local attorneys.<sup>24</sup>

The Court may also examine individual tasks, and assign different rates of compensation based on the task performed. The Court has previously admonished partners for billing their usual rates for performing associate level tasks.<sup>25</sup> It has also cut the rate or disallowed entirely time spent on telephone or co-counsel conferences.<sup>26</sup> Again, the reason for such conferences should be listed to help prevent such a response. Travel time is allowed, but at only \$10 per hour.<sup>27</sup> The Court has also been known to review tasks performed, and award only half the usual hourly rate for "non-core" tasks, like tangential correspondence, investigation, or clerical-type work.<sup>28</sup>

On the plus side, the Court is receptive to applying an attorney's current billing rate in a case that has gone on for some time.<sup>29</sup> The higher rate is applied as compensation for the delay in being paid.<sup>30</sup> Attorneys should not assume that they will be awarded a higher, current rate, but it is reasonable to ask for it. Also, there is such a thing as a "multiplier" for an extraordinary result, but the award of a multiplier would be rare indeed.<sup>31</sup> As a guidepost to an hourly rate that the Court finds reasonable, in the recent Kazanjian decision, the Court awarded a rate of \$140/hour to a local attorney with ten years experience, and \$100/hour to an associate with five years experience.<sup>32</sup>

## 3. Expenses

In general, expenses must also be proven to be reasonable.<sup>33</sup> In absence of justification, expenses like faxes, couriers, and Federal Express or overnight mail charges may be reduced by 80%.<sup>34</sup> LEXIS and Westlaw time will not be allowed.<sup>35</sup> Charges for photocopies must include the per copy charge.<sup>36</sup>

## Conclusion

The general impression gleaned from reviewing all these decisions is that a 20% reduction from the amount requested should be anticipated, and may actually be an indication of a good application.<sup>37</sup> An application that disappoints the Court by failing to offer sufficient documentation is likely to be reduced by as much as 80% for being unreasonable, or for failing to carry its burden of persuasion.<sup>38</sup> If an attorney submits a severe paucity of documentation to support an application, the Court will deny that application in its entirety as unreasonable.<sup>39</sup>

In sum, the keys to a good application are:

- (1) to provide detailed records to show time spent, including the subject matter of telephone calls and correspondence;
- (2) to provide affidavits from local counsel of almost identical skill and experience to justify rates (which should probably be darn close to \$140/hr for partners and \$100/hr for associates);
- (3) reflect paralegal and law clerk time entries, but do not bill for them;
- (4) make some obvious cuts to the time billed—*i.e.*, show the time on the time records and then explain which entries are not being charged for and why—that shows billing judgment;
- (5) show LEXIS and Westlaw time but do not bill it;
- (6) bill travel time at \$10/hr; and
- (7) justify expenses where possible, and include the per copy charge for photocopies.

The Court's expectations are well established, and attorneys submitting fee applications should make every effort to meet them.

<sup>1</sup>See *Weinberger v. Great Northern Nekoosa Corp.*, 801 F. Supp. 804, 812 & 816 (D. Me. 1992) (a one-case primer on submitting a fee application).

<sup>2</sup>*Id.* at 811.

<sup>3</sup>*Kazanjian v. MSM Enterprises, Inc.*, No. 93-227-P-C, slip op. at 2 (D. Me. Mar. 15, 1995).

<sup>4</sup>*Id.*; see *Broussard v. CAC, Inc.*, 634 F. Supp. 155, 156 (D. Me. 1986) (factors largely reflected in calculation of reasonable hourly rate). The twelve factors are listed in *King v. Greenblatt*, 560 F.2d 1024, 1026-27 (1st Cir. 1977).

<sup>5</sup>*Kazanjian*, No. 93-227-P-C, slip op. at 2.

<sup>6</sup>*Weinberger*, 801 F. Supp. at 816. See also *FDIC v. Singh*, 148 F.R.D. 6, 10 (D. Me. 1993); *Fleet Bank of Maine v. Trivers*, 799 F. Supp. 1248, 1249-50 (D. Me. 1992) (application denied in its entirety because records submitted with application were inadequate); *Fleet Bank of Maine v. Matthews*, 795 F. Supp. 492, 499 (D. Me. 1992) (amount requested reduced 80% for being unreasonable).

<sup>7</sup>See *Fleet Bank of Maine v. Steeves*, 793 F. Supp. 18, 20 (D. Me. 1992); *Estate of Duplissis v. Bowen*, 648 F. Supp. 849, 850 (D. Me. 1986).

<sup>8</sup>*Weinberger*, 801 F. Supp. at 817.

<sup>9</sup>*FDIC v. Singh*, 148 F.R.D. at 10.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 9; *Fleet v. Matthews*, 795 F. Supp. at 499; *Auburn Police Union v. Tierney*, 762 F. Supp. 3, 5 (D.

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Me. 1991). *But see Wilcox v. Stratton Lumber, Inc.*, No. 95-0039-B, slip op. at 16 (D. Me. Mar. 27, 1996) (Brody, J.) (approving in principle the judicious use of paralegal time). Before district court judges other than Chief Judge Carter, paralegal time should probably be billed.

<sup>12</sup>*Auburn Police Union v. Tierney*, 762 F. Supp. at 4-5.

<sup>13</sup>*Kazanjian*, No. 93-227-P-C, slip op. at 8; *Weinberger*, 801 F. Supp. at 823.

<sup>14</sup>*See Kazanjian*, No. 93-227-P-C, slip op. at 7; *Weinberger*, 801 F. Supp. at 811.

<sup>15</sup>*See Weinberger*, 801 F. Supp. at 819.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Kazanjian*, No. 93-227-P-C, slip op. at 3-4; *Broussard*, 634 F. Supp. at 156.

<sup>19</sup>*Broussard*, 634 F. Supp. at 156.

<sup>20</sup>*Kazanjian*, No. 93-227-P-C, slip op. at 3 (quoting *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 955 (1st Cir. 1984)).

<sup>21</sup>*See Kazanjian*, No. 93-227-P-C, slip op. at 4 (an affidavit from an attorney with fifteen-years experience offers no support for the rate of an attorney with ten-years experience).

<sup>22</sup>*See Kazanjian*, No. 93-227-P-C, slip op. at 4.

<sup>23</sup>*Id. See also King v. Greenblatt*, 560 F.2d at 1027 (trial judge should use own knowledge and experience).

<sup>24</sup>*Weinberger*, 801 F. Supp. at 812-13.

<sup>25</sup>*Id.* at 814.

<sup>26</sup>*Id.* at 818.

<sup>27</sup>*Id.* at 824; *FDIC v. Singh*, 148 F.R.D. at 9; *Fleet v. Trivers*, 799 F. Supp. at 1250 n.2.

<sup>28</sup>*See Kimball v. Shalala*, 826 F. Supp. 573, 576 (D. Me. 1993); *see also King v. Greenblatt*, 560 F.2d at 1027; *Fleet v. Steeves*, 793 F. Supp. at 21 (admonishing applicant for failing to separate "hard" hours from "soft").

<sup>29</sup>*Kazanjian*, No. 93-227-P-C, slip op. at 5-6.

<sup>30</sup>*Id.* at 5.

<sup>31</sup>*See, e.g., Nensel v. People's Heritage Financial Group, Inc.*, 815 F. Supp. 26, 27 (D. Me. 1993).

<sup>32</sup>*Kazanjian*, No. 93-227-P-C, slip op. at 4. *See also FDIC v. Singh*, 148 F.R.D. at 8 (\$140/hour for partner time, \$92/hour for associate time).

<sup>33</sup>*Weinberger*, 801 F. Supp. at 827.

<sup>34</sup>*Id.*

<sup>35</sup>*Kimball v. Shalala*, 826 F. Supp. at 576-77; *Fleet v. Steeves*, 793 F. Supp. at 24.

<sup>36</sup>*Fleet v. Matthews*, 795 F. Supp. at 499.

<sup>37</sup>*See Auburn Police Union v. Tierney*, 762 F. Supp. at 3; *Broussard v. CAC, Inc.*, 634 F. Supp. at 155-56.

<sup>38</sup>*See Fleet v. Matthews*, 795 F. Supp. at 499.

<sup>39</sup>*See Fleet v. Trivers*, 799 F. Supp. at 1249.

### Board of Overseers of the Bar Grievance Commission, Panel E File Nos. 94-K-114 and 94-K-189

*Board of Overseers of the Bar, Petitioner  
FRANCIS M. JACKSON Esquire,  
Respondent*

#### REPORT OF PROCEEDINGS, FINDINGS, CONCLUSIONS AND DISPOSITION

On March 5, 1996, Panel E of the Grievance Commission conducted a public disciplinary hearing in this matter at the Probate Courtroom in Portland, Maine. Panel E was comprised of Paula D. Silsby, Esq., Acting Chair; Keith A. Powers, Esq. and Lois Wagner. There were no objections to the composition of the panel. The Board was represented by Assistant Bar Counsel, Karen G. Kingsley, Esq. The Respondent was represented by John S. Whitman, Esq.

The pleadings consisted of a petition filed by the Board and a response filed by the Respondent. Board Exhibits 1 through 22 were admitted without objection. Respondent's Exhibits 1 through 31, 31(a), 32 and 33 were admitted without objection. The witnesses for Respondent were: Mary Kahl, Esq.; Robert N. Hanson, Esq.; Julie Conroy; Kevin Glynn; Gerald F. Petrucelli, Esq.

#### FINDINGS OF FACT

Respondent was at all times relevant hereto, an attorney duly admitted to and engaging in the practice of law in the State of Maine with an office in Portland, Maine.

#### COUNT I

1. On July 11, 1994, Ann Palozzi (Palozzi) met with Respondent to discuss his handling of an appeal to the Maine State Retirement System (MSRS) concerning the denial of her claim for disability benefits. At this meeting Palozzi informed Respondent of the time constraint for filing the appeal.

2. Jackson agreed to take the case and on July 13, 1994 Palozzi signed a contingent fee agreement.

3. On August 19, 1994 and again on August 26, Palozzi called Respondent's

office. She spoke with his secretary who agreed to send copies of the appeal to Palozzi's address in Hawaii.

4. Having heard nothing from Jackson, Palozzi called his office on October 29, October 31, and November 1, 1994, each time requesting a return call. Respondent never responded.

5. On November 2, 1994, Palozzi checked with the MSRS and was informed that an appeal was never filed. Palozzi again called Respondent requesting that he call her. He did not.

6. Respondent admits having failed to file Palozzi's appeal and return her telephone calls.

7. In September, 1992, Respondent met with Kevin Glynn (Glynn), a member of the South Portland City Council, and Julie Conroy (Conroy), a member of the South Portland School Board, both of whom were active members in the controversial South Portland Concerned Taxpayers' Association.

8. Glynn and Conroy were seeking to challenge certain alleged election violations in the June 9, 1992 primary election by the City of South Portland, City Clerk, Linda Cohen, Corporation Counsel, Mary Kahl and Acting Warden, Barbara Davis. Among the violations alleged was the failure of election personnel to announce the results of the election as soon as the counting was completed.

9. In June, 1992, prior to meeting with Respondent, Glynn and Conroy had brought their complaints to the Director of Elections and District Attorney Stephanie Anderson (Anderson) who requested that an investigation be done by the South Portland Police Department.

10. Glynn and Conroy told Respondent that they were both present at the District One polling place following the close of the polls on June 9. Also present were City Clerk Linda Cohen and Acting Warden, Barbara Davis. Conroy told Respondent that Corporation Counsel Mary Kahl arrived at the polling place after the polls had closed, remained in the official vote counting enclosure area while she was there and at one point in response to Conroy's question to the City Clerk as to whether she was going to declare the election results, Kahl responded that the Clerk had already answered Conroy's question. Conroy and

## HAVE YOU HEARD?

**WILLIAM A McCUE**, announces the opening of his law office at 97A Exchange Street, Suite 402, Portland, telephone 207-775-4242, FAX 207-775-4247, E-mail: WMesqPt@aol.com.