

Fair Deal for All Clients

Articles by Gerald F. Phillips

ON BILLING OF CLIENTS BY ATTORNEYS

“Time Bandits,” *Los Angeles Lawyer*, March 2001

“It’s Not Hourly Billing, But How It’s Abused That Causes the Poor Image of Attorneys,” *ABA Professional Journal* 18, No. 3, 2001

“The Rules of Professional Conduct Should Provide Guidance to Attorneys with Respect to Billing,”
ABA Professional Journal 15, No. 1, 2001

“Reviewing A Law Firm’s Practices,”
ABA Professional Journal, Fall 2001

“Slimming Down Legal Costs,” 8-K, Summer 2006

“Building a Better Client-Attorney Relationship through the Retainer Agreement,” *Century City Lawyer*, August 2002

“More Friendly Billing Services,” *Century City Lawyer*, January 2002

“Open Letter to Clients,” *Greater Los Angeles Leadership Exchange*, 2009

“Checking the Bill,” *House Counsel*, September/October 2001

Fair Deal for All Clients

*How to Rekindle Pride in the
Legal Profession*

Gerald F. Phillips

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*Dedicated to the Dartmouth Ethics Institute
and those who endeavor to improve respect for lawyers,
and to Francine A. Phillips, my beloved wife of fifty-five years.*

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Preface: To Rekindle Pride in the Profession

I was raised to be proud of being a lawyer. Louis Nizer, who co-founded the New York law firm Phillips & Nizer in 1926 with my father, Louis Phillips, wrote of my father: “[His] dreaming hours were absorbed by his love of the law. His professional excellence was given nobility because it was rooted in integrity. The law was not, to him, a professional activity. It was his very life, and all else orbited around it. His life was guided by the concepts of honesty, decency, and justice from which he never deviated, no matter what the exigency.”¹ It is this wonderful legacy that I endeavor to follow.

I joined Phillips & Nizer (then known as Phillips, Nizer, Benjamin, Krim and Ballon) directly after Cornell Law School in 1950 and later became partner. In 1951, I was assigned to United Artist Corporation (UA) and spent the first thirty years of my career as an employee and vice president of UA, where I was in charge of litigation, and some years later I was named Vice President of the Special Market Division of the company. I reviewed over 1,000 billing statements submitted by attorneys throughout the country. During that time, I also served as Chair of the Legal Committee of the Motion Picture Association of America (MPAA), the trade organization of the major motion picture production and distribution companies in this country. One of the functions of this committee was to approve payment for all billing invoices sent by counsel representing MPAA companies throughout the country. These dual

1. Comments made by Louis Nizer at the unveiling of bronze bust of Louis Phillips in the law firm’s library. The author has a copy.

roles—house counsel for a major company and partner in an important law firm—gave me an unusual perspective on how lawyers should bill their clients. I have both viewed billing statements as a client and have prepared invoices to send to clients.

For more than ninety years, the American Bar Association (ABA) has provided leadership in legal ethics and professional responsibility for lawyers. Its codes and rules serve as models for the regulatory laws governing the legal profession. The ABA's Model Rules of Professional Conduct (hereinafter, "Model Rules") state, a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." However, not all lawyers adhere to these guidelines, and this has hurt both clients and the profession.

There are various methods by which attorneys bill their clients. These include the following: (1) Hourly billing, which is the most common method. The amount that the clients is billed is determined by multiplying the hourly rate of each associate and paralegal (referred to collectively as "timekeepers"), as set forth in the retainer agreement, by the number of hours or part of an hour which each timekeeper represents to the client in the billing invoice that he or she spent working on the matter; (2) Blended hourly fees, a variation of hourly billing, in which one billing rate applies to all of the timekeepers, whether partner, associate, or paralegal, and that rate is multiplied by the number of hours each timekeeper reports to have spent; (3) A fixed or flat fee, where a fixed amount is agreed upon in advance by the law firm and the client. This is usually used for a defined service, i.e., a regular, routine service by the attorney who has experience in providing that service, such as preparing a will. The parties may also agree on a fixed schedule of fees for each task that the attorney will perform, such as preparing filing the complaint, preparing the case for trial with a separate amount to try the case, and attending the trial for a fixed sum per day; (4) A contingent fee that is based on the results achieved by the attorney. The attorney and the client agree in advance that the fee will be a certain percentage of the recovered damages or the amount of the settlement. A contingent fee is usually employed in personal injury cases; (5) A hybrid fee arrangement, becoming more popular today,

in which the fee is based on a discounted hourly rate plus an additional percentage of the damages or recovery. This method of billing allows the client and the attorney to share the risks and rewards of representation. It guarantees that the attorney will receive a minimum amount based on the hours spent as well as a portion of the amount recovered; (6) A fixed percentage of the amount of a contract to be negotiated, such as the value of a real estate transaction or probate claims on an estate; (7) What is referred to as a “retrospective fee arrangement.” Prior to the advent of the billable hours, it was customary for lawyers to bill clients periodically or when the litigation was completed, at a sum that the attorney believed was fair based on the services rendered. The fee was not in any way mathematically determined, as is done when billing on an hourly basis; (8) A “pure retainer agreement,” in which an attorney or a law firm agrees to be available to render legal services and a nonrefundable retainer amount, usually paid in advance.

Each method of billing has its own advantages and disadvantages. This book will concentrate on hourly billing: specifically, how some lawyers improperly bill clients. Concrete suggestions will be offered to help prevent or minimize the use of improper billing, which currently is too prevalent. These suggestions include urging the ABA and all state bar associations to give greater guidance in their rules in the hope of eliminating improper billing, and to offer programs for members of the public on how to negotiate fair retainer agreements with their new counsel; making all attorneys and law firms aware that improper billing is helping to destroy the profession and encouraging them to become active in a campaign to restore the image of lawyers, urging law schools to teach proper billing practices, and urging the American Bar Association to require that this subject be part of law school accreditation.

There are basically two means by which attorneys overbill their clients. The first is “bill padding,” where attorneys add hours to billing statements for time not spent. The second is “task padding,” where attorneys perform unnecessary tasks. This book will concentrate on bill padding.

I have written this book with three distinct audiences in mind: the general public, which likely has little knowledge of billing (see

Chapter 11); law students, who hopefully will benefit by learning how to properly bill clients (see Chapter 14); and law firms, who hopefully will benefit by recognizing that some of their billing policies are improper (see Chapter 12). I use a first-person writing style in relating my experiences addressing bill padding and serving as an expert witness in fee disputes. This approach should make it easier for the reader to understand how hourly billing is abused and how improper billing can be detected and eradicated.

The title of this book was inspired by a recent speech by President Obama, who said, “This country succeeds when everyone gets a fair shot, when everyone does their fair share and when everyone plays by the same rules.”² Likewise, the legal profession succeeds only when all clients get a fair deal and when all lawyers play by the same rules. Some lawyers follow the rules of their state bar associations, but others do not. Large clients may be able to require their lawyers to bill them in a fair manner, but others lack the ability or leverage to require their attorneys to employ proper billing practices.

This book comes from my desire to help rekindle pride in the legal profession and is largely based on actual fee disputes in which I served as a consultant or an expert witness. While most books dealing with legal subjects are based primarily on court decisions, this book will discuss the evidence of bill padding that I have presented to courts, arbitrators, and mediators. It is not an academic discussion of court cases or a law review. It is my hope that readers will learn by examining the improper billing practices discussed herein. Over the past twenty years, I have been a mediator, arbitrator, and adjunct professor at Pepperdine School of Law’s Straus Institute for Dispute Resolution. I have written and lectured on improper billing practices and have testified as an expert witness in many fee disputes. Of course, improper billing is not practiced by all attorneys, and the failure of some members of the bar to bill honestly has not destroyed my love for the law. Sol Linowitz expressed the same thought when he wrote:

2. A. G. Sulzberger, “Obama Strikes Populist Chord with Speech on G.O.P Turf,” *New York Times*, December 6, 2011.

When I was young I found attacks on lawyers irritating and disturbing, but I was confident that whatever misbehavior might be discovered in its lower depths, its leaders were ethically as well as intellectually admirable. In recent years, through experience as well as observation, I have lost some of that confidence and some of my respect—but not my love for my profession. (Sol M. Linowitz and Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* [Baltimore: Johns Hopkins University Press, 1996], 5.)

If the bar associations are unable or unwilling to address hourly billing and attorneys do not take off their blinders and recognize the crisis in the profession, the profession may be headed toward government regulation. It is my hope that this book will be the needed wake-up call to the profession.

Acknowledgments

I owe my love for the law and my desire to practice law in the highest ethical manner to my father, Louis Phillips, who referred to the law as “a noble profession,” and to my mother, who encouraged me throughout my life and sought the finest educational institutions for me.

Many others have inspired me as well: Robert S. Benjamin and Arthur B. Krim, my former law partners and Chairman and President of United Artists Corporation, both of these public servants taught me that reputation, once lost, cannot be regained; Louis Nizer, my former law partner and mentor, who practiced law in the same high ethical manner as my father; Samuel Arnold, who taught me that reputation and honesty are worth fighting for; Bernard G. Segal, former President of the American Bar Association, who urged me to appreciate that we are officers of the legal system and have a responsibility for the quality of justice; Arlen Adams, former Attorney General of State of Pennsylvania and a judge of the Third Circuit Court of Appeals, who counseled me to honor my father by maintaining his high code of ethics; Dean Ronald Phillips and Anthony Miller, who brought me to Pepperdine Law School; and Thomas Stipanowich and Peter Robinson, who follow the wisdom of Abraham Lincoln that a good lawyer must be a peacemaker and welcomed me to the Straus Institute.

Thank you to Maureen Weston, professor of law at Pepperdine School of Law, who has multiplied the rewards of teaching; Brittany Henry, who assisted me in editing this book and has the qualities that the profession seeks; and Carolina Academic Press and all

who have helped me make this book a reality, including Catherine Herzog, whose helpfulness and excellent editing is most appreciated.

Dartmouth College has been an integral part of my life and the lives of my family. My brother, Howard W. Phillips (class of 1951); Stacy D. Phillips (1980); and my grandson, Andrew Bloomgarden (2012) graduated from the College. In appreciation for what Dartmouth has meant to our family, my wife, Francine, our daughter, Stacy, and I established the Phillips Family Fund (now the Phillips, Victor, and Samuels Family Fund) in memory of my parents, Louis and Helen Phillips, to support the Dartmouth Ethics Institute. Ronald Green and Aine Donovan of the Institute, great teachers of ethics, who enriched my life by helping me make the Institute part of it.

No one has had a greater impact on my interest in legal ethics than William Ross, whose important work *The Honest Hours* inspired me to write this book. I also appreciate the work of Bryan Brannan, who has collaborated with me to improve the reputation of the legal profession. Thank you to former mayor of New York Edward Koch who appointed me Chair of WNYC and permitting me to bring radio and television programming from Japan, Italy, and other countries to New York City.

My former partners and associates at Phillips & Nizer and my colleagues at Phillips & Lerner have made the practice of law truly enjoyable. Reva Salman, chairperson of Phillips, Salman & Stein, and Robert Salman taught me the true meaning of partnership.

Richard Chernick opened a new world for me when he asked me to join him and others to establish the College of Commercial Arbitration. I am also appreciative of the work of the California Dispute Resolution Council and the Center for Civic Mediation of the Los Angeles County Bar Association. I am honored to be a member of the arbitration panel of Independent Film & Television Alliance (IFTA) which has made an important contribution to helping motion picture companies resolve disputes. I am indebted to Diane Karpman, Robert Holtzman, and Mary Culbert, who have been so helpful in answering my many ethical questions. I am grateful for the encouragement to write this book that I have received from

Russ Bleemer, the excellent editor of *Alternatives to the High Cost of Litigation*.

I am most appreciative of the work of the National Association of Legal Fee analysis, its members, and its director, Terry Jesse; and the Association of Professional Responsibility Lawyers. They are doing an important job educating the bar to recognize improper billing practices. I am also grateful for the wonderful education that I received at Cornell Law School and at Dartmouth College and its Amos Tuck School of Business Administration (now called the Tuck School of Business at Dartmouth).

My life has been blessed by my brother, Howard W. Phillips, who in our adult lives has been supportive in my efforts, and by my wife, Francine, who has been an integral part of my life for more than fifty years and has supported my dedication to the rekindling of pride in the noble practice of the law. She has served over the years as my paralegal. Many years ago she found, in researching an antitrust issue in the New York Public Library, an important comment of Senator Sherman which helped us to win an important victory for our firm. Thanks too to Gertrude Kantor, who blessed my marriage to her daughter Francine from the beginning.

Stacy and Louis, our children, have enriched my life. Both have honored me by following in my footsteps—Stacy in the law and Louis as a producer and production executive of motion pictures. His most recent credit is co-producer of *The Hunger Games*. They have brought great honor to the Phillips name. The highest compliment that I can give them is that my father would be proud of them. They are truly children that every father would pray to have. Thank you to Jackie Phillips, who has been there for my son Louis. My grandchildren, Bobby, Andrew, Jeffrey, and Ali, who are following the teachings of their great-grandfather and the family tradition of honesty and integrity.