

# The Fee Examiner's Perspective: Sensible, Ethical, and Effective Lawyer Billing Hygiene

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## **Beverly Hills Bar Association, Bankruptcy Law Section**

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# Rapoport

Prof. Rapoport: UNLV Distinguished Professor; Garman Turner Gordon Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas; and Affiliate Professor of Business Law and Ethics, Lee Business School.

In 2022, UNLV's Alumni Association awarded Rapoport the title of Outstanding Faculty Member of the Year.

Prof. Rapoport is a Fellow of the American College of Bankruptcy.

Rapoport is a published author, a frequent lecturer to lawyers, and a successful competitor in American Rhythm and American Smooth ballroom dancing.

Rapoport gave a key lecture at the July 2023 Ninth Circuit Judicial Conference (***The Cutting Edge -- AI and Fee Application Issues***).

Prof. Rapoport and Joseph Tiano, ***Reimagining 'Reasonableness' Under Section 330(a) in a World of Technology, Data, and Artificial Intelligence*** (97 Am. Bankr. L.J. 254).

In September 2023, Prof. Rapoport spoke at the National Legal Malpractice Conference for the American Bar Association Standing Committee on Lawyers' Professional Liability.

Prof. Rapoport authored an article for publication on disinterestedness, bankruptcy disclosures, and judicial ethics (***Am I My Colleagues' Keeper When It Comes to Disclosing Connections?***).

Rapoport has served as a fee examiner in large cases, including ***In re Toys R Us, Inc.***, U.S. Bankruptcy Court, Eastern District of Virginia, #17-34665 KLP, ***In re Caesars Entertainment Operating Co, Inc.***, U.S. Bankruptcy Court, Northern District of Illinois, #15-01145 ABG, and ***In re Zetta Jet USA, Inc.***, U.S. Bankruptcy Court, Central District of California, 2:17-bk-21386-SK.

With the help of data analysts (like Legal Decoder) and a cadre of law students and recent law graduates, Rapoport has studied ***thousands of billing entries*** from bankruptcy professionals.

# Bovitz

Board Certified -- Business Bankruptcy Law -- The American Board of Certification (past chair).

Certified Specialist -- Bankruptcy Law -- State Bar of California Board of Legal Specialization (past chair).

Rated "AV Preeminent" by Martindale-Hubbell.

Southern California "Super Lawyer" in Bankruptcy & Creditor/Debtor Rights (since the program began).

Fellow, American College of Bankruptcy.

Former Adjunct Professor: California Western School of Law; William S. Boyd School of Law, University of Nevada, Las Vegas; and Loyola Law School.

Produced more than 673 songs (bovitz.com), active in ham radio competitions (n6mi.com), and has never stepped on a ballroom dance floor.

# Introducing the art of ... crafting consistently compensable time entries

J. Scott Bovitz, **Billing Tips from a Fee Examiner: An Interview with Prof. Nancy B. Rapoport**, ABI Journal, Feb. 16, 2021 [Rapoport quote]:

Most attorneys have forgotten that billing entries are the story of our legal work. Thus, a professional's **billing entries should tell a story**.

Collectively, the time entries should **compel a creditor client to pay our bill** or convince a bankruptcy court to authorize payment from the estate.

The timesheets are the **daily diary of good legal work** that was planned, budgeted, correctly staffed, and efficiently performed.

# Should we teach “billing” to the juniors?

J. Scott Bovitz, **Billing Tips from a Fee Examiner: An Interview with Prof. Nancy B. Rapoport**, ABI Journal, Feb. 16, 2021 [Rapoport quote]:

We don't usually teach billing in law school, but we should. (And I do, in my Professional Responsibility course.) You hear a lot about alternative billing becoming the new normal, but bankruptcy professionals are still largely an hourly billing group. ...

Meanwhile, unless a student lands a clerking or summer associate job at a law firm, a law student can make it all the way through law school without any instruction on billing. **What should get billed? What is just overhead or a casual conversation with another professional? How should time be recorded, so that a supervising lawyer can understand the work performed? How can a junior professional justify his work to the client and the reviewing partner?** It shouldn't always be “think like a lawyer.” **We should teach “think like a client.”** Always exercise billing judgment.

Start here:

California Rule of Professional Conduct 1.5

# Rule 1.5(a)

A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.



# Rule 1.5(b)

Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:

- (1) whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee;
- (2) whether the lawyer has failed to disclose material facts;

# Rule 1.5(b)

- (3) the amount of the fee in proportion to the value of the services performed;
- (4) the relative sophistication of the lawyer and the client;
- (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (7) the amount involved and the results obtained;

# Rule 1.5(b)

- (8) the time limitations imposed by the client or by the circumstances;
- (9) the nature and length of the professional relationship with the client;
- (10) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (11) whether the fee is fixed or contingent;
- (12) the time and labor required; and
- (13) whether the client gave informed consent to the fee.

Bankruptcy lawyers also worry about...

# 11 U.S.C. § 330(a)(1)

Under 11 U.S.C. § 330, a court may award:

- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
- (B) reimbursement for actual, necessary expenses.

# 11 U.S.C. § 330(a)(3)

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall 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 skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

*This is the lodestar*

# What's a “fee examiner” anyway, Rapoport?

A fee examiner reviews fee applications, usually in larger bankruptcy cases.

The purpose of using a fee examiner for fee review is to **help a bankruptcy court with its duty to determine reasonableness** under 11 U.S.C. § 330.

# What is a fee examiner looking for?

Answer: The same thing that a real-world client is looking for.

The individual **experience and expertise** of each timekeeper.

The **time that it took** to complete each task relative to industry-wide benchmarks.

How many people worked on the case during a particular month.

Whether a task handled by one professional appears to have **duplicated the tasks** handled by another professional.

Whether a task was undertaken by the lowest efficient biller.

**Reasonable charges** for the work.



How efficiently the biller used his or her time.

Whether the **quality of the work product** resulting from those professionals' efforts was commensurate with the fees billed for that work product.

Whether **expenses were reasonable**.

How many individual billers have billed on the case.

How many individual billers have **consistently billed in excess of 14 hours a day** (as many sequential long days can lead to inefficiencies over time).

# U.S. Trustee guidelines

<https://www.justice.gov/ust/fee-guidelines>

In 1996, in accordance with 28 U.S.C. § 586, the USTP promulgated Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses filed under 11 U.S.C. § 330 (“1996 guidelines”). 28 C.F.R. Part 58, **Appendix A**. ...

Until the USTP adopts other superseding guidelines, [Appendix A] will continue in effect for the review of applications filed under section 330 in

- (1) larger chapter 11 cases by those seeking compensation who are not attorneys,
- (2) all chapter 11 cases below the larger case threshold, and
- (3) cases under other chapters of the Bankruptcy Code.

# Appendix A

<https://www.ecfr.gov/current/title-28/chapter-I/part-58/appendix-Appendix%20A%20to%20Part%2058>

Recognizing that the final authority to award compensation and reimbursement under section 330 of the Code is vested in the Court, the **Guidelines focus on the disclosure** of information relevant to a proper award under the law.

In evaluating fees for professional services, it is relevant to consider various factors including the following: the time spent; the rates charged; whether the services were necessary to the administration of, or beneficial towards the completion of, the case at the time they were rendered; **whether services were performed within a reasonable time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed**; and whether compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

<https://www.ecfr.gov/current/title-28/chapter-I/part-58/appendix-Appendix%20A%20to%20Part%2058>

Names and hourly rates of all applicant's professionals and paraprofessionals who billed time, explanation of any **changes in hourly rates from those previously charged**, and statement of whether the compensation is **based on the customary compensation** charged by comparably skilled practitioners in cases other than cases under title 11. ...

**In a chapter 7 case**, a summary of the administration of the case including all moneys received and disbursed in the case, when the case is expected to close, and, if applicant is seeking an interim award, whether it is feasible to make an interim distribution to creditors without prejudicing the rights of any creditor holding a claim of equal or higher priority. ...

**In a chapter 11 case**, whether a plan and disclosure statement have been filed and, if not yet filed, when the plan and disclosure statement are expected to be filed ...

Time **entries should be kept contemporaneously with the services rendered** in time periods of **tenths of an hour**.

Services should be **noted in detail** and **not combined or “lumped” together**, with each service showing a separate time entry; however, tasks performed in a project which total a de minimis amount of time can be combined or lumped together...

Time entries for telephone calls, letters, and other communications should give **sufficient detail to identify the parties to and the nature of the communication**.

Time entries for **court hearings and conferences should identify the subject** of the hearing or conference.

If more than one professional from the applicant firm attends a hearing or conference, the applicant should **explain the need for multiple attendees**.

To borrow the immortal lyrics of Grammy nominee Samantha Fish, time entries should never be...

“All ice – no whiskey”



<https://www.youtube.com/watch?v=nrjdKHAKlxs>

Any expense for which reimbursement is sought must be **actual and necessary** and **supported by documentation** as appropriate. ... Whether the expense is **reasonable and economical**. ...

Whether the requested expenses are customarily charged to non-bankruptcy clients of the applicant. ...

Whether applicant has provided a **detailed itemization of all expenses** including the date incurred, description of expense (e.g., type of travel, type of fare, rate, destination), method of computation, and ... **purpose of the expense**. ...

Whether applicant can demonstrate that the amount requested for expenses incurred in-house reflect the **actual cost of such expenses to the applicant**. The United States Trustee may establish an objection ceiling for any **in-house expenses** that are routinely incurred ...

# Appendix B Guidelines for Reviewing Applications (larger cases)

<https://www.federalregister.gov/documents/2013/07/05/2013-16123/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>

... **guidelines** for reviewing applications for compensation and reimbursement of expenses filed by attorneys **in larger chapter 11 cases with \$50 million or more in assets and \$50 million or more in liabilities**, aggregated for jointly administered cases ...

The United States Trustees will use these Guidelines to review applications for compensation filed by attorneys employed under sections 327 or 1103 of the Code in all chapter 11 cases that meet the threshold ...



... bankruptcy professionals are subject to the same client-driven **market forces, scrutiny, and accountability** as professionals in non-bankruptcy engagements. ...

To ensure adherence to the requirements of section 330 of the Code so that all professional compensation is reasonable and necessary, particularly as compared to the **market measured both by the applicant's own billing practices for bankruptcy and non-bankruptcy engagements and by those of other comparable professionals.** ...

To **encourage the adoption of budgets and staffing plans** developed between the client and the applicant to bring discipline, predictability, and client involvement and accountability to the compensation process. ...

To **decrease the administrative burden** and increase the efficiency of **review of fee applications.**

<https://www.federalregister.gov/documents/2013/06/17/2013-14323/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>

Whether the applicant provided sufficient information in the application to establish that the compensation sought is reasonable as compared to the **market measured by the billing practices of the applicant and its peers for bankruptcy and non-bankruptcy engagements**. ...

Whether there was **duplication** of effort or services, or whether the **seniority or skill level of the applicant's professional was commensurate with the complexity**, importance, and nature of the issue or task. ... if **multiple professionals unnecessarily attend hearings or meetings**. ...

The United States Trustee encourages applicants to consider how to **assign and staff more routine and “commoditized” work, such as avoidance actions and claims objections**, and to consider whether **lower cost co-counsel should be retained** for discrete types of work, while being careful to avoid duplication, overlap, and inefficiencies. ...

# What about that emergency matter?

J. Scott Bovitz, **Billing Tips from a Fee Examiner: An Interview with Prof. Nancy B. Rapoport**, ABI Journal, Feb. 16, 2021 [Rapoport quote]:

What if an emergency arises -- and might have been handled by a junior professional during the work week -- but only Mr. Big was available over the holiday weekend? Perhaps Mr. Big (\$1,500.00 an hour) handled the task because no one else was available.

Okay, but why should Mr. Big charge \$1,500.00 for that routine (but urgent) task?

Should Mr. Big discount the cost of the work to the rate of the lower-level professional who should have handled the matter?

In the business world, wouldn't general counsel ask for this type of concession?

<https://www.federalregister.gov/documents/2013/06/17/2013-14323/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>

The United States Trustee may object if the applicant fails to **justify any rate increases as reasonable.**

<https://www.reuters.com/legal/legalindustry/top-bankruptcy-firm-kirkland-boosts-billing-rates-nearing-2500-an-hour-2023-12-15>  
**(“U.S. litigator David Boies' hourly billing rate this year in a class action lawsuit against Deutsche Bank was \$2,110. Covington & Burling said last year in a filing that senior partners' top rate at that firm was \$2,500 an hour. The \$2,465 top rate for Kirkland, which lists 329 restructuring lawyers on its website, matches what prominent Hogan Lovells appellate lawyer Neal Katyal charged for his time last year in a high-stakes bankruptcy case involving a Johnson & Johnson subsidiary.”)**

# Increasing fees during the engagement?

## **Judge blocks Brown Rudnick lawyer's 50% fee increase in PFAS bankruptcy**

<https://www.reuters.com/legal/litigation/judge-blocks-brown-rudnick-lawyers-50-fee-increase-pfas-bankruptcy-2024-06-05/> Dietrich Knauth June 5, 2024, 10:47 a.m.

A Delaware bankruptcy judge on Wednesday rejected a Brown Rudnick attorney's request to increase his hourly fees from \$1,000 to \$1,500 in a PFAS bankruptcy case, saying that no client would approve such a steep fee hike in the middle of a case. Chief U.S. Bankruptcy Judge Laurie Selber Silverstein in Wilmington said the firm, which represents the court-appointed creditors committee in the bankruptcy of fire-protection company Kidde-Fenwal, did not justify the sudden increase for partner Gerard Cicero in its latest fee application.

*Transitory professionals:* Whether any of the applicant's professionals **billed only a few hours to the matter with insufficient evidence of benefit to the estate.** ...

*Vague or repetitive entries:* Whether the application contains sufficient information to **identify the purpose of the work or the benefit to the estate.** The United States Trustee may object to vague or repetitive entries that are otherwise unjustified. Phrases like **“attention to” or “review file,” without greater specificity or more detail, are generally insufficient.** ...

*Overhead:* Whether the application includes activities that should be considered part of the **applicant's overhead and not billed to the estate.** Tasks that the United States Trustee may object to as overhead include clerical tasks and word processing. The United States Trustee may also object to fees for summer clerks or summer associates, which are more properly the firm's overhead for recruiting and training.

*Geographic variations in rates:* Whether the applicant increased the hourly rates of its professionals and paraprofessionals based solely on the geographic location of the bankruptcy case. **The United States Trustee will not object to “non-forum” rates of professionals when the “non-forum” rates are based on the reasonable rates where the professionals maintain their primary office, even if the locally prevailing rates where the case is pending are lower (i.e., a professional may bill the same reasonable rate in any forum).**

Conversely, the United States Trustee will object if professionals increase their rates based on the forum where the case is pending when they bill lower rates where they maintain their primary offices.

<https://www.federalregister.gov/documents/2013/06/17/2013-14323/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>

In a larger chapter 11 case ... the United States Trustee **ordinarily will seek the use of fee and expense budgets and staffing plans**, either with the consent of the parties or by court order as soon as feasible after the commencement of the case.



# Budgets? But litigation is unpredictable!

<https://www.federalregister.gov/documents/2013/06/17/2013-14323/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>

Budgets are a planning tool for disciplined and deliberative case management that business clients routinely expect of their professionals outside of bankruptcy. The pervasiveness of this practice supports the conclusion that **budgets are effective to focus the scope of the engagement and the efficiency in staffing.**

Moreover, **the concern about the alleged unpredictability of bankruptcy engagements in particular is overstated.** All budgets—whether for a bankruptcy case, a litigation matter, a chapter 13 debtor, a law firm, a business, or the government—are an informed estimate of expectations, identifying that which is predictable based on historical experience and that which is truly volatile and beyond the budgeter's control.

# Fee examiner role (Appendix B)

<https://www.federalregister.gov/documents/2013/06/17/2013-14323/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>

In a larger chapter 11 case where a significant number of professionals will be retained and the normal fee application and review process would be especially burdensome, the United States Trustee ordinarily will seek the court's appointment of **a special fee review entity, such as a fee review committee or an independent fee examiner.**

Such an entity can **assist the court and parties in reviewing fee applications and can bring consistency, predictability, and transparency to the process.**

# Prof. Rapoport, how does it feel to be a “special fee review entity”?

How does someone get this gig (fee examiner)? Nice work, eh?

Entry of order of employment of a professional fee examiner.

Review draft fee applications (before filing).

Identify problems (electronic search, manual search).

Gather information.

Negotiate reductions (if needed).

Review final fee applications of other professionals.

File a report with recommendations to the court.

A fee review entity's primary purpose is to **ensure that professional fees and expenses paid by the estate are reasonable, actual, and necessary**, as required by section 330 of the Code. Thus, a fee review entity should **monitor, review, and where appropriate, object to interim and final applications for fees and expenses** filed by professionals who seek compensation from the estate. ...

The fee review entity can also establish **other measures to assist the court and the professionals in complying** with the Code, the Federal Rules of Bankruptcy Procedure, local rules or general orders, the Guidelines, and other controlling law within the jurisdiction.

In the absence of local rules or general orders and other controlling law within the jurisdiction, a fee review entity should **monitor, review, and where appropriate, object to interim and final fee applications under section 330** in accordance with these Guidelines.

# Fee examiner: a mediator with expanded powers

J. Scott Bovitz, **Billing Tips from a Fee Examiner: An Interview with Prof. Nancy B. Rapoport**, ABI Journal, Feb. 16, 2021:

At times, a bankruptcy court contemplates that the fee examiner will serve as a “**mediator with expanded powers**” to investigate and resolve potential fee disputes.

Unlike a typical mediation, “settlement” communications between a fee examiner and a billing professional may not be confidential under Federal Rule of Evidence 408. Prof. Rapoport relies upon separate confidentiality agreements to address this issue.

<https://www.federalregister.gov/documents/2013/06/17/2013-14323/appendix-b-guidelines-for-reviewing-applications-for-compensation-and-reimbursement-of-expenses>

A fee review entity should be **authorized, subject to court approval, to retain professionals**, including but not limited to attorneys and fee auditors, to assist in discharging its duties. ...

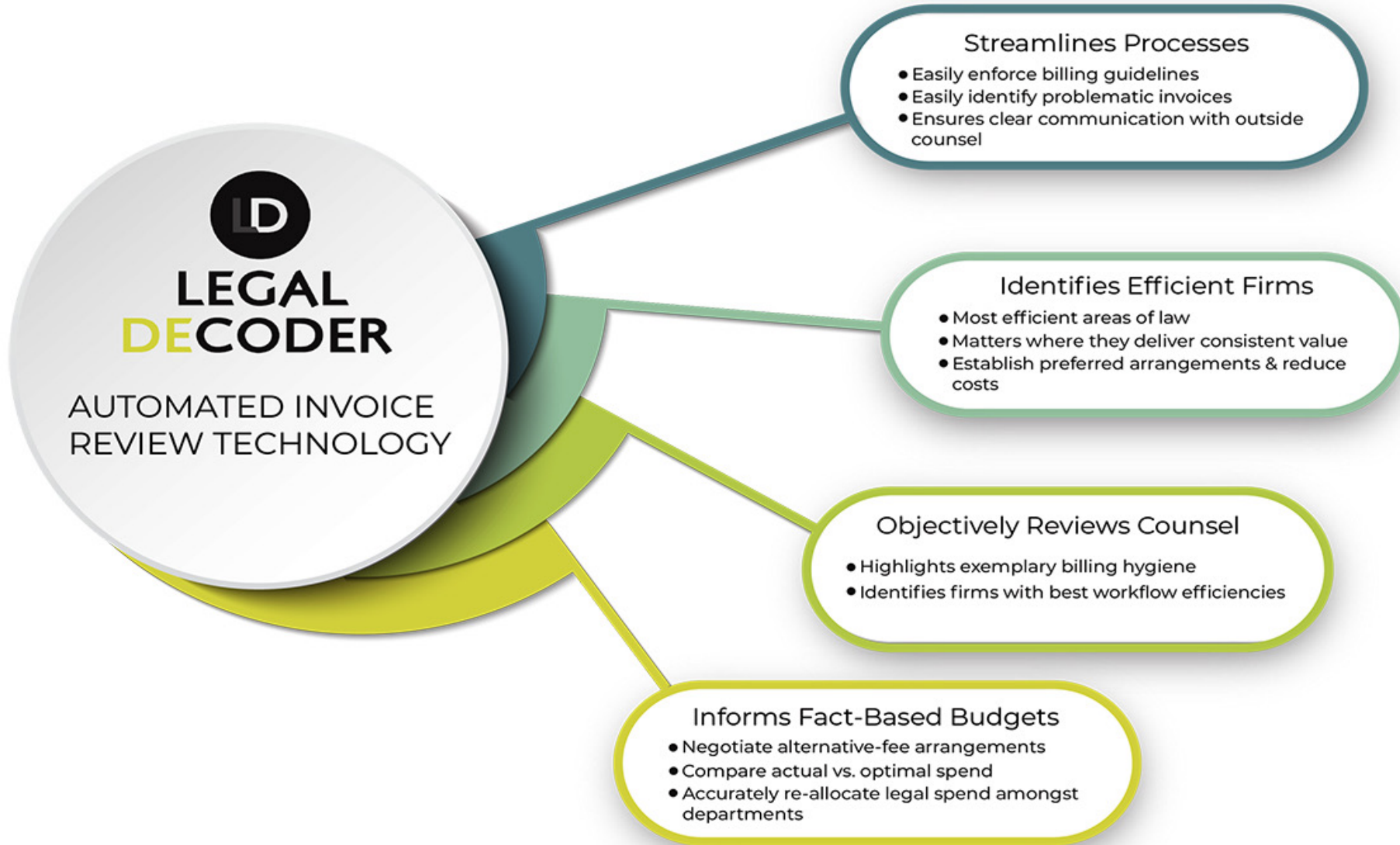
The **Fee Review Committee's professionals, the Independent Member, and the Independent Fee Examiner should be compensated** in accordance with the fee procedures established in the case and should file interim and final fee applications for consideration under the reasonableness standards set forth in 11 U.S.C. § 330(a). ...

A fee review entity should **establish procedures to resolve fee disputes** with retained professionals, while retaining the right to file and prosecute objections if disputes cannot be resolved.

# Fee examiner's technology

LEDES (<https://legal.thomsonreuters.com/en/insights/articles/what-is-ledes-format>) (“Keep it **simple**. Make it **unambiguous**. Diverge from existing formats as little as absolutely necessary. Only ask for information the law firm is typically able to provide from their financial system. Meet the needs of enterprises, law firms and legal industry software vendors to the maximum extent possible consistent with the first four criteria.”).

Legal Decoder (<https://www.legaldecoder.com>).





# How should a law firm set the hourly rates?

Flat rates/contingency fees/hourly rates/blended rates.

Market rates (filed with local fee applications).

Legal specialization (State Bar of California Board of Legal Specialization, American Board of Certification). Bovitz says, "Certification is valuable to the professional."

Office expenses (home/mailbox office or big suite on Wilshire Boulevard).

Demands of target clients (small debtors, big debtors, banks, utilities).

<https://www.reuters.com/legal/litigation/judge-blocks-brown-rudnick-lawyers-50-fee-increase-pfas-bankruptcy-2024-06-05/> Dietrich Knauth June 5, 2024, 10:47 a.m.

"There may be a reason, but a 50% increase of someone's rates is not something that any client I ever had would have accepted," Silverstein said at a court hearing. "If he's behind market, I don't think he gets to catch it all up at one time." ...

She will allow Brown Rudnick to come back later to provide more support for the higher rate, but she said she would be "skeptical" of any such request.

# How can a law firm ensure that its professionals are billing accurately and contemporaneously?

Enter all billable time. Daily. Don't delay.

Not every moment with the client is chargeable (distractions, butt-in-chair time, administrative bits, non-chargeable time). Bill "no charge" entries on the timesheet.

Send monthly invoices, without delay.

Protect attorney-client confidences/strategy on soon-to-be-public bankruptcy billing.

Teach the billing professionals about client and court expectations.

Close review by the managing partner before the bills are submitted.

# Billing hygiene

J. Scott Bovitz, **Billing Tips from a Fee Examiner: An Interview with Prof. Nancy B. Rapoport**, ABI Journal, Feb. 16, 2021 [Rapoport quote]:

I look for bad billing hygiene. Assume that someone (the judge, the committee, the trustee, and maybe me) will read your entries, long after you have forgotten what you did last Tuesday. A professional **should use time entries to say what that professional was doing and why.**

As suggested by the Florida Bar, I look for the **subject matter in each entry.** You attended a meeting or made a call. What was the conversation about? Here is a good entry: “Telephone call with J. Scott Bovitz regarding statute of limitations argument raised by defendant.” If the time entry needs to be redacted down the road, so be it. Here is another good entry: “Review and drafting of response to demand from J. Smith regarding alleged breach of contract.” I look for **action-oriented words (prepare, develop, create, edit, organize, negotiate, summarize, and analyze).** What did the lawyer do, exactly?

# Final words from the panel

Nancy B. Rapoport, Joseph R. Tiano, Jr., *Billing Judgment*, 96 Am. Bankr. L.J. 311, 312 (2022) (“The economic model fascinates us because it gives legal professionals broad discretion to charge for tasks with sometimes dubious value. It's distressing because we know that uncompensated billed time is lost forever.”).

Nancy B. Rapoport, *Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals*, 15 Brook. J. Corp. Fin. & Com. L. 359, 359 (2021) (“There's a Dilbert comic strip that has resonated with me over the years: In that strip, the pointy-haired boss told Dilbert to charge 100% of his time to project codes, and Dilbert responded by pointing out that charging 100% of his time that way would lead to overbilling the firm's clients. What's the punchline of the strip, a copy of which hangs in my home office? Dilbert asks, ‘Did you learn that in ‘flaw’ school?’ That’s actually a darn good question.”).