

LITIGATORS CORNER:

Mega-Firms: The Mega-Headache



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An on-line legal journal recently claimed that small to mid-sized law firms that specialize in intellectual property — it fashionably calls them “boutiques,” as if they were selling Prada handbags or Jimmy Choo platform sandals — are having rugged times. They are, we are told, losing out to large firms that are scooping up the business. The article cites the troubles of a couple of firms. It does not say what any of the firms, large or small, charge for their services.

I have written before about how large law firms sometimes offer their clients — instead of excellence — wasted time, padded bills and gobs of lawyers. For instance, I have pointed out how one mega-firm put seven lawyers on one case I was involved in, and all they did was trip over one another. Their only coordinated act was signing a motion to withdraw when their exasperated client replaced them. I also wrote about a pair of mega-firms that sent approximately sixteen lawyers to a two-hour claim construction hearing, while we sent two. Yet another put six lawyers on the telephone for a conference about claim construction; we had one lawyer on the phone.

This past summer, both the legal press and the *Wall Street Journal* reported on the ethical misdeeds of lawyers from two large firms, WilmerHale, and Holland & Knight. In mid-August, reports surfaced that William P. DiSalvatore, a former “rising star” at WilmerHale, a 1000-attorney firm, “offered to resign from the bar in May as he was facing a disciplinary investigation that would have likely led to his disbarment.” What had he done? Quite a lot, it turns out. He admitted to:

- Falsifying credit card receipts to the tune of \$109,000 in personal expenses charged to his firm.
- Forging client signatures on a consent to joint representation and on a conflict waiver.
- Misleading a client into believing an appellate brief was still at the draft stage when it had already been filed.
- Convincing his firm over a two-year period that he was handling matters for two of the firm’s pro bono clients.

In addition, DiSalvatore stated in his affidavit: “I created fabricated engagement letters and fictitious billing records, falsely recording time for work which I never performed.” For more details, please go to the *New York Law Journal’s* website at

<http://www.law.com/jsp/nylj/PubArticleNY.jsp?hubtype=TopStories&id=1155303325775>

Later that same month, the *Wall Street Journal* reported that Matthew Farmer, a junior partner in Holland & Knight’s Chicago office, had quit the 1200-lawyer international firm after reviewing the billing records connected to a month-long trial he had won, after working almost full-time on the case for over two years. The problem: According to Farmer, the partner in charge of billing had grossly padded the client’s bill. Farmer reported this to others in the firm, but they did nothing. Farmer resigned.

According to a letter Farmer wrote to a Minneapolis judge, Janet N. Poston (<http://www.sptimes.com/2006/08/30/imag>

[es/farmer.pdf](#)), the over-billing was not only terribly exaggerated; the hours entered on the bills were “frequently inflated far beyond the hours that the timekeeping attorneys had actually recorded on their computerized timesheets.” One example of over-billing: for the first seven days he did work for the client, between August 7th and 16th, Farmer actually put in a total of 19.4 hours on the case; the client was billed for 45.8 hours. Another example: on August 7th, Farmer actually worked on the case for 0.2 hours, but the client was billed for 6.5 hours of his time. As Farmer put it in his letter to the judge: “For my first seven days of work on the case, the client was billed for 26.4 hours of ‘phantom time’ at my then-hourly rate of \$250. This amounts to a \$6,600 overcharge.” There was a similar level of over-billing for another attorney, a Scott Petersen, who worked on the case with Farmer, but in this case, the overcharge was even more exaggerated. According to Farmer’s letter:

Mr. Petersen’s “phantom” hours for the first twenty-seven days of September, 2002 (76 hours) exceeded the amount he actually billed during that period (67.3). For the days listed above, the client was over-billed \$20,520, based on Mr. Petersen’s then-hourly rate of \$270.”

According to Farmer, this pattern continued, with the over-billing including more lawyers who were working on the case.

How did Farmer’s former partners respond to his allegations? According to the *Wall Street Journal*, L. Kinder Cannon III, the firm’s general counsel stated: “The amount billed by Holland & Knight in the litigation was reasonable and appropriate.” The billing partner declined to comment.

The legal pundits did not seem to be surprised by this kind of egregious behavior. According to an article by Nathan Koppel in the *Wall Street Journal* on the topic (August 30, 2006), William Ross, a law professor, calls the practice of law firm billing-padding “the perfect crime,” and NYU legal ethics professor Stephen Gillers says “there is a general consensus that billing fraud has increased.”

But why are some large firm attorneys over-billing — and to such a large extent? Perhaps it has something to do with the extreme pressure that exists in large firms to generate billings, leading to profits for the equity partners. There are too many mouths to feed. Associates at well-known

firms get handsome starting salaries. But judging from many reports, they more than pay the price in hours and pressure. See, for example, *Proceed With Caution: A Diary of the First Year at One of America's Largest, Most Prestigious Law Firms*, by William Keates. After spending the usual fortune on the modern law school factory education, he worked for about a year and decided it was not for him.

The profits in large firms, by my guess, are enormous. If a firm with 700 lawyers and 400 associates pays its associates an average of \$150,000 each, and bills their time for 2200 hours per year at an average rate of \$400 per hour, then each associate generates \$880,000 per year. If it costs \$100,000 in addition to salary to pay the expense of that associate, then the profit is \$880,000 less \$250,000, or \$630,000 per associate. For 400 associates, the profit from the army of associates is \$252,000,000. If there are 300 partners in the firm, the money earned by the associates gives each partner an average of \$840,000. An article in the May, 2002 issue of the *Hofstra Law Review*, "The Slippery Slope From Ambition to Greed to Dishonesty: Lawyers, Money, and

Professional Integrity," by Lisa G. Lerman, says that, in 1999, the average profits per partner in the top 100 law firms in the United States were \$755,000. The article says that several of the large firms reduced the number of equity partners to 25% of the total number of lawyers, so my percentage, about 42%, is arguably too high. A lower percentage of equity partners would cause the profits per partner to be even greater than \$630,000.

The Hofstra article reports that a lawyer at Chapman & Cutler billed 6022 hours in one year, and more than 5000 hours in other years. To bill 6,000 hours in one year, an attorney would have to work over sixteen billable hours every day of the year. Another lawyer at the same firm fraudulently billed a client \$1.1 million. Two lawyers at Winston & Strawn went crazy, stealing left and right from the firm and clients. These are well reported in the *Hofstra Law Review* article.

Excessive size, combined with a billable hours approach, can lead to over-lawyering, over-charging, and huge costs for a client. It might not be so bad if the quality of the work was uniformly high, but often, it is not. The up-shot is that the profits become

more important than anything or anyone else, including the client. The combination is a mega-headache. And sometimes the pressure leads to fraud. I hasten to say that I have seen good lawyers in large firms. But, despite the talent, the structure surrounding them has many disadvantages for the client with a legal problem.

Some suggest that fixed fees are the way to remove the pressure to bill hours. The ABA Commission on Billable Hours Report in 2002 discusses them favorably. I don't think they work in patent litigation, where so many things can vary: the number of patents and claims; the duration of the case; whether a Markman hearing is held early or late; and particularly, the contentiousness of opposing counsel, a problem which manifests itself more frequently in large, silk-stocking firms than in small ones. Hybrid contingent fee cases with a capped, fixed monthly fee are a bonanza for the law firm, as discussed in my column of July, 2006, *Hysteria Lane*. Fixed fees, billable hours, and hybrid arrangements are not the answer for intellectual property litigation. **IPIT**

Patriot Scientific Confirms Addition of Agilent Technologies to Steadily Expanding Roster of MMP Patent Portfolio Licensees

Patriot Scientific Corporation (OTC Bulletin Board: PTSC) confirmed today that Agilent Technologies has become the 10th major manufacturer to purchase a license to use the Moore Microprocessor Patent(TM) (MMP) Portfolio this year. Patriot Scientific and The TPL Group are co-owners of the MMP Portfolio, which Alliacense(TM), a TPL Group enterprise, exclusively manages. In addition to Agilent Technologies, license agreements have been signed in 2006 with HP, Casio, Fujitsu, Sony, Nikon, Seiko Epson, Pentax, Olympus and Kenwood. Earlier agreements were signed with AMD and Intel.

"The sound growth strategy for Patriot Scientific continues to move forward with the signing of each license agreement," said David Pohl, Patriot Scientific chairman and CEO. "Our strategy is two-fold. While the Alliacense team is actively engaging in communications with manufacturers who are candidates to become licensees of our patented technology, the management and board of Patriot Scientific are actively evaluating opportunities to create or acquire other revenue sources that would be in addition to what the company is realizing from our valuable patent portfolio."

Pohl noted that preliminary discussions are currently being held with several companies that are candidates for Patriot Scientific to possibly either acquire the companies or their technologies, or to enter into joint ventures related to existing or new technologies.

"The global technology leaders that have purchased MMP Portfolio licenses this year recognize the competitive edge to be gained by licensing MMP technologies sooner rather than later," said Alliacense Sr. Vice President, Licensing Mike Davis. "As we welcome Agilent Technologies to our distinguished roster of MMP licensees, we also want to encourage all electronic product manufacturers to contact us regarding the significant competitive advantages of becoming an early MMP Portfolio licensee."

According to Davis, Agilent Technologies has captured one of the "first-mover" MMP Portfolio licensing berths, which encompass electronic measurement, bio-analytical measurement and semiconductor test solutions products. Agilent Technologies is the world's premier measurement company providing core analytical and electrical instruments to the life sciences, chemical analysis, communications and electronics industries. The company has two primary businesses: bio-analytical measurement and electronic measurement. The company currently has approximately 20,000 employees and serves customers in more than 110 countries. Agilent had revenue of \$5.1 billion in fiscal year 2005.

The MMP Portfolio patents, filed in the 1980s, cover techniques that enable higher performance and lower cost designs, and are fundamental to consumer and commercial digital systems ranging from DVD players, cell phones and portable music players to communications infrastructure, medical equipment and automobiles, which today have dozens of microprocessor-based key features and benefits.