

31 **B. General Considerations:**

32 a. Contractual Interpretation

33 The right of an attorney to charge a client for costs and expenses generally is a matter of
34 contract. Consequently, the arbitrator should first look to the written fee agreement, if one
35 exists, to determine the parties' understandings concerning costs and expenses. The initial
36 agreement is generally considered an arm's-length transaction, where the presumption of
37 overreaching does not apply. *See, generally, Setzer v. Robinson* (1962) 57 Cal.2d 213; *Baron v.*
38 *Mare* (1975) 47 Cal.App.3d 304.

39 However, provisions governing the lawyer's right to charge and collect for fees, costs and
40 expenses are evaluated based upon conditions foreseeable at the time they are made, must be
41 explained fully to the client at the outset and must be fair and reasonable. *See, generally,*
42 *Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033; *In re County of Orange* (1999) 241 B.R.
43 212, 221. As the State Bar Court has explained:

44 Generally, an engagement agreement between a client and an attorney is construed as a
45 reasonable client would construe it. ([Rest.3d Law Governing Lawyers § 38](#), com. d; see
46 also *Lane v. Wilkins* (1964) 229 Cal.App.2d 315, 323 [in construing contracts between
47 attorneys and clients concerning compensation, construction should be adopted that is
48 most favorable to the client as to the intent of the parties].) Moreover, "it is well
49 established that any ambiguities in attorney-client fee agreements are construed in the
50 client's favor and against the attorney." (*In the Matter of Lindmark* (Review Dept.2004) 4
51 Cal. State Bar Ct. Rptr. 668, 676; see also *S.E.C. v. Interlink Data Network of Los*
52 *Angeles, Inc.* (9th Cir.1996) 77 F.3d 1201, 1205.)

53 *Matter of Brockway* (Rev. Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944; see also *Severson &*
54 *Werson v. Bolinger* (1991 235 Cal.App.3d 1569. *Matter of Lindmark* (Rev. Dept. 2004) 4 Cal.
55 State Bar Ct. Rptr. 668.

56 Initial disclosure of the basis for charges for costs and expenses, in addition to how fees
57 are to be calculated, fosters communication that will promote the attorney-client relationship.
58 The relationship similarly will be benefitted if the billing statements for services explicitly reflect
59 the basis for the charges so that the client understands how the fee bill was determined. ABA
60 Formal Opinion 93-379 (1993).

61 Even in the absence of a specific agreement as to costs and expenses in the engagement
62 contract or indeed, of any formal retention agreement, the attorney's fiduciary obligations to the
63 client will include the handling of and charging for costs and expenses such that the attorney's
64 charges for costs and expenses during the course of the representation also must be scrutinized
65 for necessity, reasonableness and fairness. *See, Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925.
66 [The cited case does not support the highlighted language—is there better authority.] The
67 question of whether a cost or expense may be incurred and charged to the client generally is
68 within the implied authority of the attorney, as an agent for the client, unless specifically
69 prohibited by the fee agreement. *See*, Civil Code section 2319 ["An agent has authority . . . to do
70 everything necessary or proper and usual, in the ordinary course of business, for effecting the

71 purpose of the agency.”]. Thus, absent specific client instructions not to incur a particular cost or
72 expense, the arbitrator’s review will be only as to the necessity, reasonableness and fairness, or
73 the possible unconscionability of the disputed cost or expense item. [Again, is there authority for
74 this?]

75 b. Statutory Requirements

76 Agreements to charge fees and costs in a non-contingent fee matter must comply with
77 Business & Professions Code §6148. Subsection (b) sets forth statutory requirements for what
78 must be included in a bill and provides that that the cost and expense portion of the bill “shall
79 clearly identify the costs and expenses incurred and the amount of the costs and expenses.”

80 Agreements in contingent fee cases are governed by Business & Professions Code
81 §6147. Subsection (a)(2) provides that the agreement shall include “A statement as to how
82 disbursements and costs incurred in connection with the prosecution or settlement of the claim
83 will affect the contingency fee and the client’s recovery.”

84 Business & Professions Code section 6147(b) and 6148(c) provide that the failure of the
85 lawyer’s bills to clearly identify the costs and expenses incurred may also render the fee
86 agreement voidable at the option of the client.

87 c. Other General Considerations

88 It generally is held that in the absence of agreement to the contrary, an attorney may not
89 charge a client for normal overhead expenses associated with properly maintaining, staffing and
90 equipping an office, including the expense of maintaining a library. The reasoning is that when a
91 client has engaged an attorney to provide professional services for a fee (whether calculated on
92 the basis of the number of hours expended, a flat fee, a contingent percentage of the amount
93 recovered or otherwise) the reasonable expectation of the client would be that charges for general
94 office overhead are included in the attorney’s fee. Thus, in the absence of disclosure to the client
95 in advance of the engagement to the contrary, the client should reasonably expect that the
96 attorney's cost in maintaining a library, securing malpractice insurance, renting of office space,
97 purchasing utilities and the like would be subsumed within the charges the attorney is making for
98 professional services. SDCBA Opinion 2013-3 at p. 4; ABA Formal Opinion 93-379 (1993);
99 *see, also, In the Matter of Kroff* (1996) 3 Cal. State Bar Ct. Rptr. 838 (1998) [endorsing ABA
100 Formal Opinion 93-379 *In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985).

101 On the other hand, the attorney may recoup costs and expenses reasonably incurred in
102 connection with the client's matter for services performed in-house, such as photocopying, long
103 distance telephone calls, **computer research**, special deliveries, secretarial overtime, and other
104 similar services so long as the charge reasonably reflects the lawyer’s actual cost for the services
105 rendered.” SDCBA Opinion 2013-3 at p. 5 (citing ABA Formal Opinion 93-179). With respect
106 to items traditionally viewed as overhead items, the client’s reasonable expectation would
107 normally be that such expenses will not be charged. Accordingly, unless the agreement is clear
108 that such expenses will be charged, the attorney should not be able to recover them. Even when
109 the agreement does clearly encompass such expenses, they remain subject to scrutiny for
110 necessity, reasonableness and fairness, whether they are billed periodically to the client or

111 charged against the client’s recovery under a contingent fee contract. *See, generally*, California
112 Practice Guide on Professional Responsibility, The Rutter Group, 5:550-5:552.

113 When charging for costs and expenses, the charges must reasonably reflect the attorney's
114 actual cost for the services rendered or billed. The attorney may not add a profit element or
115 mark-up on top of such actual cost, except where the client gives informed written consent to
116 such profit element. American Bar Association (ABA) Formal Opinion 93-379 (1993). See also
117 *Matter of Kroff*; and the SDCBA Opinion 2013-3 at pp. 5-6.

118 C. Charges for Specific Costs and Expenses

119 ***Percentage of Fees Administrative Charges:*** One way some attorneys have sought to
120 recoup costs incurred in the representation of a client without providing an itemized billing for
121 costs is to charge the client an additional percentage amount, above the agreed upon fee, to
122 reflect such costs. There is no direct California authority regarding the propriety of charging an
123 administrative fee in lieu of itemized billing of in-house expenses. In *Matter of Kroff*, the State
124 Bar Court noted that whether lawyers ethically may charge a flat periodic fee or lump sum to
125 cover disbursements “is a matter of some controversy.” The court stated that such charges may
126 be valid if the client has given informed consent to arrangement and it does not result in an
127 unreasonable charge to the client. Thus, any such agreement should be scrutinized for
128 unconscionability pursuant to California Rules of Professional Conduct (CRPC) Rule 1.5, such
129 as where it can be established that the administrative charges are unduly high due to the size of
130 the bill unrelated to the actual overhead consumed in support of the billed fees.

131 While no California ethics opinions has addressed the propriety of an administrative fee
132 in lieu of an itemized bill for in-house costs and expenses, ethics opinions from other states are
133 split on the issue. (*See, e.g.*, Va. LE Op. 1056 (1988) [approving a 4% overhead charge based
134 upon the amount of the fee pursuant to a written fee agreement in matters not involving
135 litigation]; Arizona State Bar Formal Ethics Opinion 94-10 [a lawyer may charge a percentage
136 surcharge in lieu of billing actual expenses and costs if agreed to in writing, approximating the
137 actual costs, and the amount charged is reasonable]; *but see* Florida Bar Staff Opinion 30989
138 (2012) [a 4% administrative charge may not be imposed for each file even if it is disclosed in the
139 client’s contract as it would be impossible for each client to give truly informed consent to a cost
140 average or administrative fee/charge without knowing the actual cost amount for all clients].)

141 In the bankruptcy context, courts have disallowed claims by counsel for
142 reimbursement of in-house expenses calculated by utilizing a percentage of the total fee.
143 (*See, e.g.*, *In re Command Services Corp.*, (Bankr N.D.N.Y. 1988) 85 B.R. 230, 234 [“Only
144 fully documented, actual, out-of-pocket expenses will be reimbursed; the Court cannot
145 condone, for whatever reason, a percentage method to establish actual and necessary
146 expenses within the meaning of Code § 330(a)(a).”]; *In re Williams* (Bankr N.D. Cal 1989)
147 102 B.R. 197, 198-199 [“As a matter of law, the Court finds that an expense is not “actual,”
148 and therefore not reimbursable under section 330(a)(2), to the extent that it is based on any
149 sort of guesswork, formula, or pro rata allocation. Concrete documentation, in the form of
150 receipts and invoices, is therefore necessary to support any application for
151 reimbursement.”].)

152 **Travel and Parking:** Normally, where the engagement reasonably requires the attorney
153 to travel on behalf of the client in the course of the representation the client can reasonably
154 expect to be billed as a disbursement the reasonable amount of the airfare, taxicabs, meals while
155 traveling, parking and hotel room. ABA Formal Opinion 93-379 (1993). However, the general
156 rule of informed consent of the client applies. *But see, e.g., In re Tom Carter Enterprises, Inc.,*
157 *55 B.R. 548 (1985)* [parking is considered general overhead not recoverable from a bankruptcy
158 estate].

159 **Luncheons:** These are are considered general overhead, and are not recoverable from a
160 bankruptcy estate. *See, e.g., In re Tom Carter Enterprises, Inc., 55 B.R. 548 (1985); see, also, In*
161 *re Maruko Inc., 160 B.R. 633 (1993);* [in house luncheons among attorney staff alone are
162 considered overhead]. Where requested and approved by the client, such luncheon expenses
163 may be charged to the client.

164 **Secretarial:** Regular secretarial services are normally considered general overhead, and
165 are not recoverable from a bankruptcy estate. *See, e.g., In re Tom Carter Enterprises, Inc., 55*
166 *B.R. 548 (1985).* [There is a good discussion of secretarial overtime in ABA 93-379 and
167 SDCBA 2013-3. Should it be included?]

168 **Messenger Services:** Such charges may be billed where the needs of the matter or of the
169 client legitimately and reasonably require the service and where the client may agree in advance
170 to such charges. SDCBA 2013-3; ABA Formal Opinion 93-379 (1993). However, such charges
171 may not be reasonable where the need for such delivery services arises from the attorney's
172 procrastination or inattention.

173 **Overtime:** Staff overtime generally is considered part of general attorney overhead,
174 except where actions of the client or the nature of the case may require extraordinary overtime
175 and where the client agrees in advance to such charges. ABA and SDCBA do not appear to
176 require advance consent to necessary overtime. Am I misreading?]

177 **Computer Assisted Legal Research (CALR):** Billing for CALR is not a settled issue.
178 There is a school of thought that holds that CALR is overhead, particularly as is the case more
179 and more where the attorney's "library" is predominately electronic. Another school of thought
180 holds that CALR is billable to the client; and, such charges specifically have been found to be
181 recoverable from a bankruptcy estate. *See, In re Maruko Inc., 160 B.R. 633 (1993); In re Tom*
182 *Carter Enterprises, Inc., 55 B.R. 548 (1985).* **BOTH SAN DIEGO AND THE ABA PERMIT**
183 **CHARGES FOR ELECTRONIC RESEARCH AT COST—SHOULDN'T THEY BE CITED?**
184 In light of this uncertainty, at a minimum, the arbitrator should first confirm whether such
185 charges have been agreed to by the client in advance. The next area of inquiry will be the
186 reasonableness of the charge. **If the charge is based on the firm's actual cost, it is acceptable.**
187 Some providers offer "pro-forma" invoices for such charges, but these are not usually the actual
188 amount charged to the firm relative to each client. Thus, where such charges are passed along to
189 the client, the arbitrator should inquire as to the methodology used to assure that the charges
190 were reasonably allocated among all clients using such services for the month or other billing
191 period. Again, the arbitrator should determine whether the client knowingly and voluntarily
192 agreed to pay any premium [what does premium mean in this context—do we mean profit or
193 markup?] charged for CALR. Finally, the arbitrator should consider the mathematical

194 unfairness, if any, where, for example, the attorney pays \$1,000 per month for the services and
195 one client is the only client using the service for the month. Under such circumstances, charging
196 the client the full \$1,000 for a small amount of CALR may be improper and potentially
197 unconscionable.

198 *Photocopying:* Discrete or large photocopying projects specific to a client's
199 representation may generally be charged to the client, especially where there is some
200 extraordinary need for such services, including pleadings, document productions, etc., and where
201 the client agrees in advance. Thus, the attorney and the client may agree in advance that, for
202 example, photocopying will be charged at \$.15 per page. However, the question arises what may
203 be charged to the client, in the absence of a specific agreement to the contrary, when the client
204 has simply been told that costs for these items will be charged to the client. Under those
205 circumstances the attorney is obliged to charge the client no more than the direct cost associated
206 with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a
207 reasonable allocation of overhead expenses directly associated with the provision of the service
208 (e.g., a fair percentage of the salary of a photocopy machine operator). *See*, ABA Formal
209 Opinion 93-379 (1993); SDCBA Legal Ethics Opinion 2013-3. On the other hand, where a large
210 photocopying project may be completed by an outside provider at a page rate less than the
211 general page rate agreed upon by the attorney and client at the outset of the representation, the
212 attorney should retain the outside service (subject to client confidentiality safeguards) to
213 complete the project and bill the client only for the actual cost of the project charged by the
214 outside provider. [Is there authority for this.]

215 *Long Distance Calls:* Given the current state of telephonic communication, long distance
216 calls are more likely to be considered part of general overhead and should not be billed as
217 separate expenses. An exception would be where the call charge is for an attorney's out-of-
218 contract call (such as international calls may be) or part of a video conference or involving
219 multiple parties where the attorney will be billed in addition to the attorney's general telephone
220 cost. [I don't understand this. If the agreement says that the firm can recoup expenses for long
221 distance calls relating to the client's matter, why can't it do so?]

222 *Process Service:* It is appropriate to bill the client for such charges where provided by an
223 outside service. *See, e.g., In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985). Where such
224 service is provided by in-house employees, the charge to the client should be no more than the
225 reasonable cost to the attorney measured by a reasonable percentage of the employee's overall
226 salary. [Does the agreement have to list process service specifically?]

227 *Witness Fees:* These fees are expenses that properly may be charged to the client. *See*,
228 *e.g., In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985). [Again, does there have to be an
229 express agreement? What about hourly fees paid to retained experts?]

230 *Filing & Other Court Fees:* Filing fees and other court charges including mandatory e-
231 filing charges are recoverable as costs. Discretionary court costs require the agreement of the
232 client. [What are discretionary costs? And how does this relate to the lawyer's implied authority.]

233 My recollection is that there is authority about temporary legal personnel and paralegals,
234 too.]

235

CONCLUSION

236 The reasonableness, fairness or unconscionability of an attorney's charges for costs and
237 expenses can never be a matter of exact mathematical calculation. Rather, the attorney's charges
238 for costs and expenses should be evaluated pursuant to the fee agreement, and also examined for
239 necessity, reasonableness, disclosure, method of calculation and the reasonable expectations of
240 the client. Such examination also should include reference the foregoing guidelines of what the
241 arbitrator may consider when the client may dispute the attorney's charges for costs and
242 expenses.

Main document changes and comments

Page 1: Comment [KEB1]	Kenneth E. Bacon	2/18/2020 10:31:00 AM
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I'm not sure of the page as the copy of the opinion on Westlaw does not have pages.

Page 2: Comment [KEB2]	Kenneth E. Bacon	2/14/2020 11:45:00 AM
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I'm not sure what In Re County of Orange adds. That is a bankruptcy case which essentially cited the Alderman case regarding the rules for interpreting fee agreements

Page 2: Comment [KEB3]	Kenneth E. Bacon	2/18/2020 11:13:00 AM
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The case held that an attorney's fiduciary obligations to client apply to costs, even in the absence of a fee agreement. The court specifically stated that in light of the fiduciary obligations, the attorneys did not have carte blanche with respect to costs deducted from the settlement. I think implicit in the holding that attorneys have fiduciary obligations regarding costs is that they should be scrutinized for necessity and reasonableness, especially where there is not fee agreement so the attorney is limited to quantum meruit. I don't know if there is better authority for this, but eh *Gutierrez* case is cited in the Rutter Group Professional Responsibility Guide [5:596]

Page 3: Comment [KEB4]	Kenneth E. Bacon	2/18/2020 11:23:00 AM
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I think that is a correct statement. The Rutter Group Professional Responsibility Guide cites to *Cooley v. Miller & Lux* (1909) 156 Cal. 510. 525-526 for the proposition that absent a contrary agreement, a client is bound to repay attorney for "all outlays made by him in the payment of the expenses of carrying on the litigation."

Page 4: Comment [S5]	Steve	11/19/2019 3:15:00 PM
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Doesn't matter of Kroff expressly state that such agreements are lawful in California, at p. 13? Or am I over-reading it?

Page 5: Comment [S6]	Steve	11/19/2019 3:18:00 PM
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What does this phrase mean? Does the retention agreement expressly have to state that the lawyer will charge travel expenses?

Page 5: Comment [KEB7]	Kenneth E. Bacon	2/18/2020 11:32:00 AM
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I believe the fee agreement should specify what travel costs will be billed to the client

Page 5: Comment [KEB8]	Kenneth E. Bacon	2/18/2020 11:45:00 AM
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Those opinions included computer research amongst a list of "in-house services" necessary for the lawyer's representation of a client, but they did not extensively discuss or analyze computer research as a cost item. Nowadays, a Westlaw or Lexis account is akin to maintaining a physical library, which is an overhead item.

Page 5: Comment [KEB9]	Kenneth E. Bacon	2/18/2020 11:49:00 AM
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I don't think that is necessarily correct. Billing a client a portion of the actual subscription cost (i.e., the attorney's actual cost) is like billing for maintaining a library. I think that's overhead and should not be billed to the client.

Page 6: Comment [KEB10]	Kenneth E. Bacon	2/18/2020 1:08:00 PM
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Here is what was in the draft advisory before Joel's edit:

Computer Assisted Research: Such charges have been found to be recoverable from a bankruptcy estate. See, *In re Maruko Inc.*, 160 B.R. 633 (1993); *In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (1985). However, it is the opinion of the Committee that, since these cases were decided, computer assisted research has become much more commonplace and, in many cases, represent the attorney's only library resource. Accordingly, absent some extraordinary need for computer assisted research, a full explanation of how the charge was calculated and a demonstration of the reasonableness of the charge, it should be considered as general overhead not appropriately billed to the client.

Page 6: Comment [KEB11] **Kenneth E. Bacon** **2/18/2020 1:41:00 PM**

I don't agree with should, too strong. More accurate to say "may"

Page 6: Comment [KEB12] **Kenneth E. Bacon** **2/18/2020 1:44:00 PM**

Nowadays long distance fees not really an actual charge given the free long distance service on cell phones and other plans.

Page 6: Comment [KEB13] **Kenneth E. Bacon** **2/18/2020 1:46:00 PM**

That would be the better practice

Page 6: Comment [KEB14] **Kenneth E. Bacon** **2/18/2020 1:47:00 PM**

Once again, that is a best practice but not required. Witness fees are considered allowable costs per C.C.P. §1033.5

Page 6: Comment [KEB15] **Kenneth E. Bacon** **2/18/2020 1:49:00 PM**

I'm not sure what this meant. That sentence appears to be something Joel added in his last draft. It could mean fees to make copies or something of that nature, but it may be best to just delete that sentence.