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Paralegal Services and Awards of Attorneys' Fees Under Arizona Law

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PARALEGAL SERVICES AND AWARDS OF ATTORNEYS' FEES UNDER ARIZONA LAW

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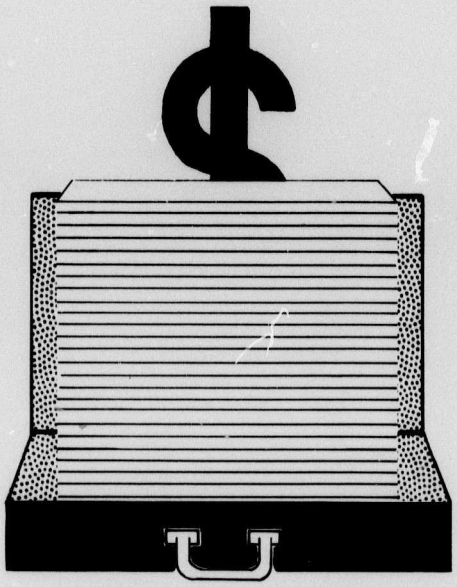
Successful litigants are frequently entitled to an award of attorneys' fees under Arizona law. Such an award may be based upon a specific contractual provision providing for fee recovery or upon a statutory authorizaiton.[1] The broadest statutory authorization, A.R.S. §12-341.01, permits the court to award reasonable attorneys' fees to the successful party in an action arising out of contract or in any action in which "the claim or defense constitutes harassment, is groundless and not made in good faith." While Arizona courts have been called upon to deal with several issues relating to the availability of attorneys' fees in particular situations,[2] they have not yet spoken definitively on the recoverability of fees attributable to paralegal participation in litigation.[3] Trial courts have reached inconsistent results on this question. Given the growing involvement of paralegals in the rendition of legal services,[4] the question is one of increasing significance. It should be answered in the affirmative. Where attorneys' fees are recoverable at all, sound public policy requires that fees attributable to paralegals also be recoverable.

There is little doubt that the effective use of paralegals can reduce clients' legal bills.[5] This reason alone justifies the use of paralegals whenever appropriate. But it does not compel the conclusion that courts should



include paralegal services in attorneys' fees awards. Such a conclusion depends both on the propriety of considering paralegal time as an element of attorneys' fees and the purposes underlying an award of fees in the first place.

Although no Arizona state court has made a definitive pronouncement on whether paralegal services may be included in an award of attorneys' fees, several courts in other jurisdictions have considered the matter. The results have varies, but most courts that have focused on the issue have held that paralegal time is a proper element to consider in awarding attorneys' fees.[6]

For example, the Ninth Circuit endorsed an award of attorneys' fees for paralegal time in *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), an antitrust case. In *Pacific Coast*, a judgment was returned against

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1. *See, e.g., Bouldin v. Turek*, 125 Ariz. 77, 607 P.2d 954 (1979). Among the specific statutory provisions that allow attorneys' fees to be awarded are: A.R.S. §12-348 (certain actions involving the State of support action); A.R.S. §41-1481(J) (action for discrimination in employment); A.R.S. §13-2314(A) (civil action for injury from racketeering); A.R.S. §33-420(A) (action for invalid claim, lien or encumbrance on real property).
2. *See, e.g., Bouldin v. Turek, supra* (retroactivity of A.R.S. §12-341.01); *Kromko v. State*, 132 Ariz. 161, 644 P.2d 897 (1982) (retroactivity of A.R.S. §12-348); *Taylor v. Southern Pacific Transportation Co.*, 130 Ariz. 516, 637 P.2d 726 (1981) (attorneys' fees awarded under A.R.S. §12-341.01 as a sanction for violating a court order); *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 639 P.2d 321 (1982) (under A.R.S. §12-341.01, court may award attorneys' fees incurred in connection with appeal as well as fees incurred at trial court level); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983) (guidelines for preparing fee application and for determining a reasonable fee).
3. Although the propriety of including paralegal time in an award of attorneys' fees seems to be a subject of dispute in connection with many of the applications for an award of fees that are filed in the Superior Court, the United States District Court for the District of Arizona has on several occasions approved an award of fees that includes paralegal time. *See, e.g., State of Arizona v. Maricopa County Medical Society*, 578 F. Supp. 1262 (D. Ariz. 1984), where Judge Carroll said:

> Paralegal time has been included as a part of the lodestar calculation rather than being allowed as costs. Once more, I realize this is an issue as to which courts differ. The use of paralegals, if properly supervised and directed, can be cost effective. It is reasonable to recognize and encourage a continuation of paralegal usage in appropriate circumstances. *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1272 (N.D. Cal. 1979); *Richardson v. Restaurant Marketing Associates, Inc.*, 527 F. Supp. 690, 700 (N.D. Cal. 1981).

Id. at 1270. *Also see Goddard v. Babbitt*, 547 F. Supp. 373, 378 (D. Ariz. 1982) and *Burchett v. Bower*, 470 F. supp. 1170, 1172-73 (D. Ariz. 1979).
4. *See, e.g.*, Fry, *Emerging Work of Paralegals*, 48 Fla. B.J. 742 (1974); Stevenson, *Using Paralegals in the Practice of Law*, 62 Ill. B.J. 432 (1974).
5. *See, e.g., Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 373 (E.D. Pa. 1976); Eidman, *Quality Legal Services and a Reasonable Fee: Are They Compatible?*, 14 *Forum* 427 (1979); Stevenson, *Using Paralegals in the Practice of Law, supra*.
6. *See* footnote 3, *supra*.

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Sunkist, and the trial court awarded treble damages and attorneys' fees, including fees attributable to services performed by paralegals. In upholding the attorneys' fees award, the Ninth Circuit said:

> The [trial]court also demonstrated considerable knowledge of the contributions made by legal assistants to the attorneys, noting

"As a matter of practice, most attorneys engaged in the antitrust practice use such legal assistants, particularly in digesting and indexing discovery and trial materials, much of the work heretofore performed by relatively inexperienced lawyers. . . . *As a matter of policy, the use of paralegal help in this fashion greatly reduces the cost of legal services to the public and is thus a practice to be encouraged."*

Id. at 1210, n. 19 (emphasis added). The Ninth Circuit again considered the propriety of awarding attorneys' fees for paralegal time in *Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 545 F.2d 1176 (9th Cir. 1976). That action had been brought under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901, *et seq.* (1970). Although the Ninth Circuit read the statute as precluding an award of fees directly to a non-lawyer,[7] it nonetheless indicated that an award could be made for the reasonable value of time spent by a non-lawyer in assisting an attorney. The court reasoned:

> One of the necessary incidents of an attorney's fee is the attorney's maintaining of a competent staff to assist him. Paralegals and other assistants can free the attorney to spend his more costly time for greater productivity in more important areas.
>
> In the instant case, allowing an attorney's paralegal assistant to be included as "reasonable attorney fees" not only saves the attorney time, but would save the employer here costs as well. Paralegals can do some of the work that the attorney would have to do anyway and can do it at substantially less cost per hour, resulting in less total cost billed to the employer. Therefore, paralegal time at paralegal rates can reasonably be counted along with the attorney's time as "attorneys' fees."

545 F.2d at 1182. *See also Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1250 (7th Cir. 1982), *aff'd* 104 S. Ct. 1464 (1984) (rejecting the view that paralegal fees are recoverable only to extent included as overhead in attorney billing rates); *Liebman v. J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974) (holding that the use of non-lawyers to assist attorneys in the preparation of cases is desirable, and compensation for their services is appropriate); *Halderman v. Pennhurst State School and Hospital*, 533 F. Supp. 649, 655-56 (E.D. Pa. 1982) (reviews different approaches to the issue, and concludes that recovery of reasonable hourly fees for paralegal time is appropriate).

Other courts have taken other approaches to the issue. A few courts have simply declined to allow any portion of an attorneys' fee award to be based on paralegal services, on the technical basis that paralegals are not "attorneys." For example, in *TransWorld Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970), *modified*, 449

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F.2d51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), the court "excluded some 4,000 hours that are credited to persons who worked on the case but who were not members of the bar in the year that the services were rendered."[8] And in *Association for Retarded Citizens v. Olson*, 561 F. Supp. 495 (D.N.D. 1982), *modified*, 713 F.2d 1384 (8th Cir. 1983), the court stated that services rendered by law clerks and paralegals "are not compensable as a separate item under Title 42 U.S.C. §1988." *Id.* at 507. It observed that "work done by law clerks, paralegals, or expenses connected with secretaries are generally regarded as part of law office overhead." *Id.* at 507 and 502. *Also see Scheriff v. Beck*, 452 F. Supp. 1254, 1261 (D. Colo. 1978) (court declined to award sums for paralegals or law clerks under civil rights statute).

While recognizing that paralegals are not "attorneys", other courts have nonetheless allowed a limited recovery of litigation "costs" based on the wages paid to paralegals. For example, in *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 495 F.2d 488 (2d Cir. 1974), the District Court approved an award of attorneys' fees that included paraprofessional services, expressing the view that using paraprofessionals might reduce the cost of litigation. 356 F. Supp. at 1390. On appeal, however, the Second Circuit reversed on the fees issue because the District Court had failed to hold an evidentiary hearing regarding attorneys' fees and had not employed the proper standards for making an award. 495 F.2d at 473-74. The court also stated that paralegal time cannot be considered as a component of a fee award. But the court said that the wages of paraprofessionals were a reimbursable or taxable court cost. 495 F.2d at 473. On remand, the District Court concluded that the attorneys' fee award should include an allocation of $53,267.00 for "[p]araprofessionals at cost." *City of Detroit v. Grinnell Corp.*, 1976-1 Trade Cas. (CCH) §60,913 (S.D.N.Y. 1976), *aff'd in part and rev'd in part on other issues*, 560 F.2d 1093 (2d Cir. 1977). *Also see Greenspan v. Automobile Club of Michigan*, 536 F. Supp. 411 (E.D. Mich. 1982) (costs in civil rights action include wages paid to paralegals); *Barnett v. Pritzker*, 73 F.R.D. 430, 432 (S.D.N.Y. 1977) (cost of paralegals added as expense item).

This brief catalog of cases indicates that there are three general approaches to the treatment of paralegal time in making an attorneys' fee award. Recognizing that use of paralegals can promote lawyer efficiency and reduce client costs, some courts have sought to encourage such usage by allowing fee awards to include paralegal time. A few courts have rejected consideration of paralegal time on the technical ground that only attorneys can generate attorneys' fees. And, in a kind of compromise result, other courts have allowed the wages paid to paralegals to be assessed as costs.[9]

As noted, the reported Arizona decisions do not deal explicitly with the issue. However, both the language and the legislative history of Arizona's broad attorneys' fee statute, A.R.S. §12-341.01, suggest that, as a matter of public policy, Arizona courts should include paralegal costs in making an award of attorneys' fees. A.R.S. §12-341.01 provides in relevant part:

> A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees . . . .
>
> B. The award of reasonable attorney's fees awarded pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted, but such award may not exceed the amount paid or agreed to be paid.
>
> C. Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith . . . .

The aim of the statute is two-fold: to encourage meritorious claims and defenses while discouraging unjust ones. The legislative history of the statute underscores these purposes. In 1976, the Senate Judiciary Committee considered Senate Bill 1243, which contained an earlier version of the attorneys' fees provision. There was testimony presented to the Committee that the Bill was "a client relief bill" that would

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7. The statute in that case authorized an award of attorneys' fees to claimants utilizing the services of an "attorney at Law".

8. 312 F. Supp. at 482. The court did not identify the source of the 4,000 excluded hours, but it is likely that they represented the hours of law clerks or paraprofessionals. It should be noted that some later decisions by federal courts in the Second Circuit permit recovery of paralegal expenses as "costs." *See, e.g., City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 495 F.2d 448 (2d Cir. 1974).

9. In a further refinement of the issue, one court has suggested that fees should generally not be awarded for paralegal services, except that such fees could be awarded in complex antitrust cases to highly trained paralegals for services that would otherwise be performed by attorneys. *See Postow v. Oriental Building Association*, 455 F. Supp. 781, 787-88 (D.D.C. 1978), *aff'd in part and rev'd in part*, 627 F.2d 1370 (1980). Of course, if the justification for the award is that specialized paralegals perform services that are otherwise performed by attorneys, that rationale certainly applies to other than antitrust cases. Indeed, in any case in which paralegal fees are requested as part of an award, it would be appropriate for the court to consider, as part of its determination of the reasonableness of the fee, whether the work done by paralegals is work "that has traditionally been done by an attorney." *See Jones v. Armstrong Cork Co.*, 630 F.2d 324, 325 n.1 (5th Cir. 1980); Comment, *Court Awarded Attorneys' Fees in Recognition of Student Lawyering*, 130 U. Pa. L. Rev. 162 (1981).

penalize "the unscrupulous defendant" and afford reasonable attorneys' fees to prevailing parties. Minutes of the Committee on the Judiciary, Journal of the Senate, First Special Session 1976, March 1, 1976, at 14, and March 29, 1976, at 3. It was also suggested that the effect of the Bill would be to reduce the volume of litigation by deterring non-meritorious litigation. *Id.* These same purposes were reiterated during the Committee's 1978 consideration of amendments to discourage "unjust claims and defenses." Specifically, it was hoped that the legislation would "make people think twice about asserting a claim which is not made in good faith or a defense which is not made in good faith." Minutes of the Committee on the Judiciary, Journal of the Senate, First Special Session 1978, March 27, 1978 at 6. Other testimony before the Committee emphasized the need to encourage meritorious lawsuits by removing the fear that the attorneys' fees incurred would be greater than the likely recovery. *Id.* at 7.

If paralegal services are not considered as an element of an attorneys' fee award, increased litigation costs will be encouraged.

The policy favoring mitigation of legal fees incurred by parties with meritorious claims and defenses would be advanced by allowing paralegal services to be considered and, where appropriate, included in awards of attorneys' fees. Such an allowance would tend to encourage utilization of less expensive paralegal services for appropriate litigation tasks by reducing costs to the client during the pendency of the litigation and by shifting to the losing party the reasonable costs of work done by paralegals upon the conclusion of the litigation.

In contrast, if paralegal services are not considered as an element of an attorneys' fee award, increased litigation costs will be encouraged. While an attorney might otherwise prefer to utilize paralegal services for some aspects of a litigated matter, if such services cannot be recovered as part of a fees award, a decision to utilize paralegals could actually inure to the client's disadvantage in the event of success, since a correspondingly smaller portion of the bill would be eligible for fee shifting. Ironically, the decision to utilize paralegals would benefit the client most in the event of failure, since his bill for legal services would at least be reduced to the extent of the paralegal time used. Of course, this benefit would hardly console a client, who, in addition to losing the lawsuit, might also be required to bear the attorneys' fees of the prevailing party. Public policy thus supports inclusion of paralegal

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services in awards of attorneys' fees.

These considerations also suggest the inadequacy of both the "technical" approach to attorneys' fees, as illustrated by the *Association for Retarded Citizens* case and the "reimbursable cost" approach reflected in the *Grinnell* decision. Neither of these approaches would permit the prevailing party to receive the full benefit of fee-shifting for paralegal charges. Even under the reimbursable cost approach, the prevailing party would be billed for that portion of paralegal services which is not recoverable as costs, and that differential might exceed the amount the client would have had to pay if the work had been performed by an attorney whose hourly cost could have been shifted to the losing party.

These alternative approaches suffer from other deficiencies as well. First, it should be noted that even the technical approach to attorneys' fees still permits indirect compensation for services performed by non-lawyers. If not directly compensable, services rendered by secretaries and other office workers are routinely factored into client bills by way of the hourly rates charged by attorneys. Since such "overhead" factors are compensable in an attorneys' fee award, the technical approach to the issue is not as conceptually clear as it may seem to be at first. More importantly, to the extent a refusal to include paralegal services in an award of fees results in paralegal time being included in an attorney's hourly rate as part of overhead, other clients suffer to the extent the user of paralegal services does not bear the full costs of the services he actually uses.[10]

In addition, the technical approach is inconsistent with how attorneys' fees are perceived by the client. When a client receives a bill from an attorney who has utilized paralegal assistants, he is often expected to pay a single fee for the value of all legal services rendered. Even when the bill is itemized, it is not suggested or understood by either the attorney or the client that the portion of legal services rendered by paralegals is somehow not a part of the attorneys' fee. Judicial recognition of the reality that paralegal time is a legitimate component of attorneys' fees is

[10] Some law firms may not bill clients for paralegal services directly, but instead may adjust their attorney billing rates to reflect paralegal utilization as part of overhead. If this procedure is followed, then a separate award for paralegal services should not be made. *See, e.g., Municipal Authority v. Pennsylvania*, 527 F. Supp. 982, 998-99 (M.D. Pa. 1981). More commonly, however, law firms bill clients directly for paralegal services. When this procedure is followed, courts should not treat the paralegal expenses as if they were overhead expenses. *See, e.g., Chapman v. Pacific Telephone and Telegraph Co.*, 456 F. Supp. 77, 82 (N.D. Cal. 1978):

> It is arguable that the cost of providing paralegal-law clerk services is an overhead cost just as any other employee cost, defrayed by attorneys out of the proceeds from their fees, and hence not separately reimbursable. Unlike the work of secretaries and other supporting personnel, however, the work of paralegals and law clerks is ordinarily charged directly to particular litigation and is therefore a clearly identifiable cost. Were it to be treated as an overhead expense, payable out of the general receipts of the attorney, the across-the-board cost of services to the attorney's clients generally would be burdened by paralegal costs incurred in connection with particular matters of no interest or benefit to other clients. The Court therefore rejects the notion that the cost of providing these services should be treated as a non-reimbursable overhead expense.

In short, the technical approach to paralegal services may discourage a proper allocation of costs among the users of legal services.

therefore consistent with client experience and expectations.

The reimbursable cost approach to the issue suffers from an additional difficulty as well. Under Arizona law, "costs" are rather strictly defined by statute, and the definition does not include charges attributable to paralegal services. *See* A.R.S. §12-332. Moreover, in *Sweis v. Chatwin*, 120 Ariz. 249, 585 P.2d 269 (Ct. App. 1978), the Court of Appeals stated that unless provided for by statute, litigation expenses are not recoverable as costs. An avenue for exception might exist in A.R.S. §12-332(A)(6), which permits costs to include "[o]ther disbursements made or incurred pursuant to an order or agreement of the parties." But even if a stipulated agreement were to be reached by the parties in a particular case to consider wage disbursements to paralegals as "costs," this would hardly be an adequate substitute for a general rule of consistent application.[11]

As a matter of sound public policy, Arizona courts should include paralegal services as an element in awards of attorneys' fees. Both the technical and the cost reimbursement approaches run counter to the public policy objective of reducing litigation costs for parties with meritorious claims or defenses. In addition to discouraging the proper allocation of litigation costs, they also suffer from other practical deficiencies, including, in the case of the cost reimbursement approach, a basic unworkability under Arizona law. No principle of Arizona law requires the adoption of either of these alternative approaches; accordingly, the door is open to a decision based upon the economic realities of the practice of law and upon the public policy favoring the reduction of litigation costs. Both factors support the inclusion of paralegal services in awards of attorneys' fees. □

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11. Some courts have also criticized the cost reimbursement approach as inadequate because of its failure to fully account for normal overhead expenses and its tendency to discourage use of paralegals. *See, e.g., Richardson v. Restaurant Marketing Associates, Inc.*, 527 F. Supp. 690, 700 (N.D. Cal. 1981); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366 (E.D. Pa. 1976).