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with the petition. The floppy disk satisfies the requirement of Fed. R. Bankr. P. 1007(a) that the mailing list be filed with the petition; practitioners need not file a paper copy of the mailing list.

**For Petitions Filed Via Fax Intermediary:** When a petition is filed via fax intermediary, it is not possible to meet this requirement. Practitioners filing by fax should send the floppy disk by guaranteed next-day delivery mail or courier. Fax a copy of the mail or courier receipt with the faxed petition to assure the court that the disk is to arrive the next day.

**For Petitions Filed by Mail or in Person:** When the floppy disk mailing list does not accompany the petition, the clerk's office has additional work, notice is delayed, and, in some cases, the §341 meeting is not held within the time limits prescribed by Fed. R. Bankr. P. 2003(a). The board of directors of the Bankruptcy Law Section has urged the clerk to keep a record of practitioners who fail to comply with the floppy disk filing requirement, to bring the names of these practitioners to the attention of the judges, and, where warranted, to obtain the assistance of the Assistant United States Attorney in moving to dismiss a bankruptcy petition or seek monetary sanctions against an attorney in a flagrant case. The court has begun to keep such records.

## NM Disciplinary Board Disciplinary Note

A complaint was filed with the Disciplinary Board based in part upon the fee agreement of a personal injury attorney. This attorney's fee agreement provided that legal assistant or paralegal fees would be charged as a cost, separate from the one-third (1/3) contingency fee to be received by the attorney.

This was an issue of first impression for the Disciplinary Board, and it prompted several actions by disciplinary counsel. First, an informal (and unscientific) survey was done of attorneys in the Albuquerque area who practice in the area of personal injury. The vast

majority of these attorneys felt that it was inappropriate and unethical to charge a paralegal's fee as a separate cost in a contingency fee case. The attorneys said things such as: "[P]aralegal services are part of what an attorney has contracted to do — not a cost;" "Such a practice is just wrong;" "Some young turks may be doing this, but paralegal fees are part of the contingency fee;" and "Not customary." It is interesting to note, however, that it was also made clear that the Respondent-Attorney in the complaint was not the only attorney charging paralegal fees as costs in contingency fee cases.

Second, disciplinary counsel set out to research this matter. There is no caselaw which is determinative of whether or not it is appropriate to charge paralegal fees as a cost in a contingency fee case; however, there is caselaw regarding what should be included in the award of attorney's fees which is instructive.

In an Arizona case, *Continental Townhouses East Unit One Association v. Brockbank*, 733 P.2d 1120 (Az. Ct. App. 1986), the question of awarding attorney's fees in a contract action was discussed. The court recognized that the use of legal assistants and paralegals had become an essential part of the practice of law. Specifically, the court said.

Legal assistants are being employed increasingly both in Arizona and elsewhere, in many law practice categories, particularly in large firms. (citation omitted). . . . Authoritative projections suggest the number of such positions will nearly double during the next years, from an estimated 53,000 in 1984 to 104,000 in 1995. U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Quarterly*, at 19 (Spring 1986).

*Id.* at 1127.

The court then determined that when awarding attorney's fees, legal assistants and paralegal fees should not be considered part of taxable court "costs." Rather, "they are instead properly considered as a component of attorney's fees, since an attorney would have performed these services if a legal assistant was not employed instead." *Id.* (emphasis added)

Routinely, courts have viewed the inclusion of paralegal costs in the award of attorney's fees as a cost-saving measure. Attorneys are commonly using (and should be using) paralegals to save the client money, not to increase their own fees. As the court said in *Continental Townhouses East*,

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## CONFIDENTIAL AND FREE LAW FIRM AUDITS & TOLL-FREE RISK MANAGEMENT CONSULTATION

The Professional Liability Committee of the State Bar of New Mexico has received funding from the sponsored American National Lawyers Insurance Reciprocal Risk Retention Group (ANLIR) to provide free educational services to members of the State Bar in the area of professional responsibility, with particular emphasis on prevention of professional malpractice claims.

A malpractice self-audit is now available **free** upon request by calling the State Bar at 800-876-6227 or 505-842-6132. This self-audit will permit you to privately evaluate your own practice and procedures. Attorneys insured by ANLIR will automatically receive a free copy of the audit and do not need to request a copy from the State Bar.

If you have questions about any particular areas of professional liability risk management, call the bar's toll-free hotline, 800-215-7854, for a **free** attorney consultation with one of the bar's two independent risk managers. For information about the ANLIR program itself, call the bar's administrator, Health Agencies of the West, Inc. at 800-556-0800.

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Moreover, lawyers should not be required to inflate their hourly rates to include legal assistant time as a general overhead component. Doing so would make fair allocation of the cost of such services impossible, since some clients and matters may require a much higher proportion of legal assistant and law clerk services than others.

*Id.* at 1128. See also, *Gill Savings Assoc. v. International Supply Company, Inc.*, 759 S. W.2d 697, 704 (Tex. App. - Dallas 1988)("[J]ustice would not be served by requiring attorneys to perform tasks more properly performed by legal assistants solely to permit that time to be compensable in the event that a request for attorney's fees is ultimately submitted to the court."); *Lea Company v. North Carolina Board of Transportation*, 374 S.E.2d 868, 871 (1989)(work performed by paralegals is both valuable and can result in reduction of the fees

charged by attorneys for the same service); and *Baldwin v. Burton*, 850 P.2d 1188, 1200 (1993)(attorney doing same work as paralegal would result in higher fee charged to client).

Even in a case where the court determined that paralegal time should not be awarded as part of the attorney's fees, the court held that "assessable costs [] concededly do not cover paralegal service. . ." *Bill Rivers Trailers, Inc. v. Miller*, 489 So.2d 1139, 1142 (1986).

It is clear that a paralegal or legal assistant does work which would otherwise have to be done by the attorney. See, e.g., *Baldwin v. Burton*, 850 P.2d 1188, 1200-1201 (1993); *Gill Savings Assoc. v. International Supply Company, Inc.*, 759 S.W.2d 679, 704 (Tex. App. - Dallas 1988). Further, the comment to Rule 16-503 of the Rules of Professional Conduct states in pertinent part:

Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.

A distinction has been drawn by the disciplinary board between a paralegal and an investigator, because the investigator does work which the attorney would not normally do. A paralegal, on the other hand, is hired to aid the attorney in legal work that he or she would have to do whether or not an assistant was hired.

There may be instances when the paralegal's time should be billed separately from the lawyer, just as an investigator's work is billed separately. For example, an attorney involved in a large complex case might hire a paralegal for document control and case management. In such a case, the paralegal enables the attorney to provide more comprehensive representation and the paralegal is, in fact, doing work which the attorney would not be able to do alone. Such use of paralegals often allows smaller firms and sole practitioners to compete with the large firms for the "big" cases. In cases such as this, the attorney should be certain that the cli-

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# Twelve Angry Jurors

Directed by Paul Ford



## The Legal Community On Stage

To Benefit Legal Aid of Albuquerque

Audition Dates

Performance Dates

May 5 & 6 at 7 p.m.

October 3, 4, & 5

Albuquerque Little Theatre,  
Second Story Arts Center

Kimo Theatre

**Open Call for Talented Lawyers/Actors and others interested in volunteering their time and talent for this benefit production**

For more information, call Judge Bill Lang, Judge Earl Waits, or John Baugh

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ent understands that those paralegal costs will be charged as a separate fee from the attorney's contingency fee agreement. In those cases, however, the traditional paralegal work, which the attorney would otherwise do, should not be charged to the client.

In the instant case, the Respondent-Attorney received 1/3 of the settlement in a routine personal injury matter, plus the paralegal costs were paid by the client. Essentially, the client paid twice for legal work: once as a cost and once in the 1/3 contingency fee paid to the attorney. This sort of "double-dipping" is directly contrary to the public policy reason for using paralegals, which is to reduce attorney's fees.

It is the position of the Disciplinary Board that paralegal or legal assistant fees should be included by the attorney within the contingency fee charged by attorneys, not charged as a separate cost, except in certain cases such as those noted above. This is true whether the paralegal is an employee of the lawyer or is providing contract paralegal services.

This not to say that the Disciplinary Board is going to begin to regulate fee disputes. Under the Rules of Professional Conduct, the Disciplinary Board can become involved in a fee dispute only if the fee charged by an attorney is illegal (for example, a fee in excess of what is set by statute for some particular types of cases) or so grossly excessive as to shock the conscience. See, *In the Matter of Jones*, 119 N.M. 229, 889 P.2d 837 (1995). Fee disputes are better addressed by fee arbitration or the courts. However, if in the future, an attorney charges paralegal fees as a cost in a contingency fee case, the question as to whether or not the fee is "grossly excessive" will quickly be called into question. Any complaint alleging paralegal services were charged as a cost in a contingency fee case, after publication of this note, may be treated as a violation of Rule 16-105, reasonableness of fees.

This Disciplinary Board Note is simply a notification of how the office of disciplinary counsel will treat complaints of this nature in the future. This

is in no way an attempt to set civil law, interfere with an attorney's right to contract or direct anyone as to how attorney's fees will be awarded by courts. This Disciplinary Note *advises* attorneys as to how their conduct will be viewed ethically for the purposes of disciplinary matters. Each case presented would certainly be decided on a case by case basis, taking into consideration the circumstances of the specific matter.

Again, the office of disciplinary counsel may treat any complaint alleging the charge of a paralegal's services as a cost in a routine contingency fee case, after publication of this notice, as a violation of Rule 16-105, reasonableness of fees.

## NM Workers' Compensation Administration Public Hearing

Notice is hereby given that the New Mexico Workers' Compensation Administration will hold a public hearing on rules pertaining to definitions, medical cost containment, maximum allowable payments for health care provider services, individual self-insured employers, group self-insured employers, self-insured pools of governmental entities, and coverage by insurance companies.

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### "Lawyers Care" Pro Bono Project Sign-Up Form

Name \_\_\_\_\_ Bar No. \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_

Year Admitted to Practice in New Mexico \_\_\_\_\_

I speak the following languages \_\_\_\_\_

I am willing to volunteer to:

- Serve on a Volunteer Attorney Referral Panel \_\_\_\_\_
- Engage in Community Education
- Serve as a Consultant/Mentor in the Following Areas: \_\_\_\_\_
- Do Anything that is Needed: \_\_\_\_\_

To address the immediate crisis, I am willing to consider becoming substitute counsel in a case where I am needed

- Yes  No

In general, I am willing to accept pro bono referrals in the following areas:

- |   |  |
|---|--|
| <input type="checkbox"/> Civil Rights and Discrimination          | <input type="checkbox"/> Protective Services   |
| <input type="checkbox"/> Consumer Protection                      | <input type="checkbox"/> Public Benefits       |
| <input type="checkbox"/> Education                                | <input type="checkbox"/> Real Property         |
| <input type="checkbox"/> Employment and Unemployment Compensation | <input type="checkbox"/> SSI                   |
| <input type="checkbox"/> Family Law                               | <input type="checkbox"/> Tax                   |
| <input type="checkbox"/> Health Care                              | <input type="checkbox"/> Torts Defense         |
| <input type="checkbox"/> Housing/Landlord-Tenant                  | <input type="checkbox"/> Water Law             |
| <input type="checkbox"/> Other (specify) _____                    | <input type="checkbox"/> Any areas I am needed |

I prefer:  Litigation  Non-litigation

I am willing to volunteer:

- In my own local community or county (please specify)
- Statewide

Signature \_\_\_\_\_

Return this form to Sarah M. Singleton, State Bar of New Mexico  
P. O. Box 25883, Albuquerque, NM 87125-5883; Fax 843-8765.