

PERILS IN PRACTICE

Auditing and Approving Solicitor Accounts

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When accessed (principally for judicial decision texts and summaries) on an hourly basis, law databanks command significant search fees – for example \$190 (plus H.S.T.) hourly to access the largest of the Canadian law data base collections and up to US\$568 to access its counterpart in the United States. Even when accessed under an annual (considerably less expensive) flat fee arrangement, these databases also command users to input client reference or other information beside each access – i.e., online – time period, which is routinely recorded (to the second) by the accessed databases. Provided the input information is accurate, lawyers have reliable database access disbursement records, to support client invoices and to support bills of cost for recovery from adversaries, when claiming for online charges necessarily incurred in accessing law databases.

Rather than going online, some practitioners subscribe to floppy and compact disk law databases that are updated, usually quarterly, and distributed by courier or post. Unbeknownst to a State of California family law practitioner, some of these disk services, although incapable of receiving data-input from users, record the durations for which the disks are accessed. One such disk service, which that practitioner used, is provided by West Publishing Company.

The practitioner, C., was consulted in San Mateo, California by the mother of a seven-year-old son, to ascertain whether she would encounter any legal impediments to moving with her son from California, to White Plains, State of New York. She informed the practitioner that the boy's psychological father – the boy's stepfather – intended to continue to live in California and wanted the boy to remain

there to facilitate his access, if not physical custody.

Preparatory to furnishing legal advice to the mother, C. accessed his copy of the West CD-ROM [compact disk read only memory] Library set of three disks. The disks contained every judicial opinion (and, apparently, related statutes) published in California during the 33-year period to (and, perhaps, including part of) 1993. After inserting each disk in his computer, C. entered "stepparent/5 custody" to access all opinion (and, apparently, related statutes) over that period, as pertained to the mother's parenting issue. He then went "Define Block," following by "Move" and by "Print," to produce hardcopy of what he had selected from the three disks.

He prepared memoranda from the hardcopy. He conducted other preparation. He advised the mother. He subsequently represented her at a trial in which she was successful. The mother's costs of the trial – C.'s fees and disbursements – were ordered to be paid by the stepfather, subject to judicial approval of the sum.

Mother and son left for White Plains, State of New York. Back in the Alameda County Superior Court, State of California, the mother's lawyer, C., pursued his costs in proceedings which likely consumed more time and energy than the parenting trial which begat the costs.

When C. applied for judicial approval of his fees and disbursements – totaling \$9,591.50 – Duncan J., who presided on the application, determined from C. (an experienced practitioner who had represented more than 1,000 persons in family law disputes over 20 years) that the lawyer's account included \$4,950 for 22 hours of cd-rom research for which C. charged \$225 hourly. Ten of those hours were alleged by C., in his bill, to have been spent over the Fourth of July United States holiday weekend in 1993. The stepfather contended that (i) all of this research was computer-driven and that (ii) large portions of the fruits of the search had been simply appropriated into C.'s memoranda. Moreover, the father maintained that the appropriation of disk law material by C. had been brazenly executed. For example, all but three paragraphs in a seven-page portion of one memorandum

and all but three lines in a nine-page portion of another memorandum had been faithfully reproduced from the cd-rom databases without attribution.

Duncan J. was not impressed by C.'s quantification of research time or by the quality of the resulting memoranda. The Judge (i) wrote that he found "difficult to believe that even a first-year law student could have spent 22 hours cutting and pasting the draft of these ... [documents];" (ii) taxed down the bill from \$9,591.50 to \$3,000, and (iii) directed that the lawyer's behavior be reported to the disciplinary enforcement section of the California Bar.

C. requested reconsideration by Duncan J. of his ruling. In support, C. adduced evidence from William P. Eppes 3d, licensed since 1978 to practice law in Tennessee, who had sold the compact disk library, on behalf of West Publishing Company, to C.. He testified that by entering "cdWestpub/prs" after the C prompt, he concluded that C. had only ever accessed the disks for nine hours and thirty-three minutes. For his part, C. asserted that his entire use of the disks had been on behalf of the mother's child mobility case. Further, he submitted, he reproduced plenteously from the disks into his memoranda because the disk data "was better written than I could have composed it myself," subject to some minor alterations.

Duncan J., on reconsideration, refused to vary his original taxation although he did withdraw his direction that C. be reported to the California Bar because, he reasoned, inefficiency instead of dishonesty explained the excessive research time that C. had claimed.

In treating as "inefficient" C.'s significant overcharge for database research time and, arguably, C.'s breach of copyright and plagiarism, Duncan J. was fair to a fault. Nonetheless, C. was dissatisfied. David Margolick, the eminent legal affairs writer for *The New York Times*, who interviewed C. about the judicial treatment of the account, reported that C. "is still miffed at Judge Duncan." C. characterized Duncan J., to Mr. Margolick, as a "cavalier" judicial "maverick" whose opinions had, not infrequently, been criticized by the California state appellate courts. How did C. know? By accessing the cd-rom disks, Margolick reported, and entering "Duncan" followed by "reversal."

Some clients in Canada and the United States – ranging from family law litigants to multinational corporations (including lawyers' indemnity companies) – have grown dismayed by law database charges and disquieted by inefficiency and imprecision of some lawyers in accessing, and in charging for resulting on-line time and, thus, have stipulated in retention arrangements that such charges be treated by lawyers as costs integral to practice that are not to be onpassed to clients.¹

¹ See: *In re C.*, 07 September 1993 (Alameda Co. Ct., Calif.), Duncan J.; and David Margolick in *The New York Times*, 11 December 1993.