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FEATURED TOPIC

WILL INCREASING ASSOCIATE SALARIES LEAD TO RULE 1.5 ISSUES?

The post-Covid round of salary increases at many large firms in the United States has recent law graduates and more senior law firm associates happily planning to make large purchases and pay down debt. It also has in-house legal counsel shaking their heads wondering what these new salaries will mean for law firm billing rates. Ostensibly these increases are to reward associates for their service during Covid, but the reality seems more likely that they are the result of another round of large firm competition for the lawyers they consider to be "the best and brightest."

Above the Law, one of the leading legal industry blogs has been covering the publication of the new salary scales by the largest American law firms assiduously and with something of a jaundiced eye. The new "scale" adopted by these firms is—for most lawyers, who do not inhabit such lofty realms—nothing short of breath-taking. The first law firm to announce new salary rates was the venerable firm of Milbank, which was soon followed by Davis Polk, Goodwin Proctor, Polsinelli, Dechert Price, and Cravath among a now growing list.[1] These new scales generally start at $200,000-205,000 for the entering associate class of 2021 (Polsinelli, notably, has differentiated among offices based on market conditions) and go up to $355,000-365,000 for the associate class of 2013. Many of these firms have also indicated that they will grant bonuses to associates ranging from $12,000 for the class of 2020 to $65,000 for the class of 2013.

It will come as no surprise to anyone that these raises have begun to be of concern to the people who will ultimately pay for them: clients. Stacey Zaretsky, a blogger for Above the Law, quotes an anonymous in-house counsel in her blog on Above the Law:[2]

> This isn't of too much consequence or import to us if firms don't attempt to pass the cost through to clients in the form of higher rates. But even if they say they don't/won't, clients may tend to wonder. It seems a bit tone-deaf and unseemly in this market and coming off of the pandemic (with so much economic dislocation) for firms to be raising salaries to these levels and talking publicly about bonuses and how well partners are doing. Discretion would be the much better part of valor here.

But client discomfort may not be the only concern for the firms that have raised associate compensation to such high levels. There is also the question as to whether these salary levels and the fees that firms may have to charge to maintain such salaries will run into Rule 1.5 problems.

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[1] For a list of firms and their new salary scales, see, Above the Law, 11 June 2021.
[2] Above the Law, 11 June 2021.

In a nutshell: For years, law firm financial analysts have suggested that a healthy financial law firm structure requires that each associate earn approximately three times her salary. If we apply this rough rule of thumb to the newly announced salary scales, that means a new associate in the class of 2021 who earns $205,000 per year must bring in approximately $615,000 per year in fees (or $651,000 when the bonus is included). Let us assume the firm has a relatively high collection rate of 90%; that means the new associate must bill a total of $683,333 to collect $615,000. If this first-year associate works fifty weeks per year and bill fifty hours per week (2,500 hours/year), her work would have to be billed out at roughly $275/hour. If an associate were to work a more reasonable schedule and bill only 1,800 hours per year, this would require a billing rate of approximately $375/hour—for an associate in her very first year of practice.[3] At the high end, the numbers become even more startling—at least to the average lawyer or client in Kansas or Missouri. An associate earning the top salary of $365,000 with a $64,000 bonus would need to bill approximately $1,430,000 to collect $1,287,000 each year. This would require a billing rate—assuming fifty billable hours per week for fifty weeks (2,500 hours/year) of approximately $575/hour. Billing a 1,800 hours per year, the associate's hourly rate would need to be at $800/hour.

If one analyzes the billing rates that would be necessary under the new salary scales adopted by increasing numbers of American law firms, interesting ethical questions must arise. Specifically, we must ask how these billing rates hold up under Rule 1.5(a):

> **(a)** A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > **(1)** the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> > **(2)** the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> > **(3)** the fee customarily charged in the locality for similar legal services;
> > **(4)** the amount involved and the results obtained;
> > **(5)** the time limitations imposed by the client or by the circumstances;
> > **(6)** the nature and length of the professional relationship with the client;
> > **(7)** the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> > **(8)** whether the fee is fixed or contingent.

Can a 2021 law school graduate claim either the experience or the reputation that would justify a $275-$375/hour billing rate?

[3] Adding in the $12,000 bonus makes only a trivial difference in the hourly rate.

The analysis of the projected billing rates for members of the associate class of 2013 is much the same except that the billing rate is double that of their beginning colleagues. However, one might argue that a lawyer with seven or eight years practice experience is, in fact, worth these high rates and does work close to or even at the standard of a law firm partner. The question then becomes, how much does a young partner earn and what is the difference in the skill levels of a young law firm partner and a senior associate? And does either have the experience and reputation that would justify a $575-800/hour rate?

In many cases where the reasonableness of billing rates is challenged, the primary factor considered and introduced into evidence is the third factor stated in Rule 1.5(a)(3): " the fee customarily charged in the locality for similar legal services." However, there must be some limit to how much is a reasonable fee under Rule 1.5(a) regardless of what other lawyers may charge. Otherwise, as long as all lawyers in a locality decided to charge a particular minimum per hour fee, there would be literally no limits to what lawyers could charge clients and still comply with Rule 1.5. In essence any fee, no matter how high it was, would always be reasonable under Rule 1.5 so long as the majority of lawyers in a locale charged that rate.

It is difficult to believe that this will prove to be the case if high fees are challenged in court. At some point clients may begin to challenge the billable rates necessitated by what Above the Law has called "the salary wars." And courts may begin to use Rule 1.5(a) to put a limit on the seemingly ever-increasing billable rates. If that happens, it will put the firms that charge such high rates into a serious financial dilemma. At the point that this does occur, firms that have participated in the "salary wars" will find that further salary increases will become far more expensive—because they will not be able to cover those higher salaries without decreasing firm net profits. The firms may have to even reduce associate salaries to maintain net profits thereby causing associate morale, recruitment, and retention problems. And clients may simply shift business away from these firms to smaller law firms with lower fees. In fact, many attorneys who were once the coveted associates paid these high salaries now work at smaller firms and bill at more reasonable rates while having more experience.

In the end, the law firms that continue to engage in the so-called "salary wars" must understand that the reasonableness requirement of Rule 1.5(a) may, at some point, have unforeseen negative consequences for those firms. Thus, these firms might be well advised to think carefully before they continue to let associate salaries spiral upwards without sufficient justification under the Rule 1.5(a) factors.

NEW AUTHORITY

MISSOURI HB 85 BECOMES LAW, RULE 4-1.2(F) AND COMMENT (8): A CONUNDRUM FOR MISSOURI LAWYERS

On June 12, 2021, Missouri Governor Mike Parson signed into law House Bill 85 — termed the "Second Amendment Preservation Act." The law is designed to nullify all federal laws that:

> …collect data, restrict or prohibit the manufacture, ownership, and use of firearms, firearm accessories, or ammunition exclusively within this state exceed the powers granted to the federal government except to the extent they are necessary and proper for governing and regulating land and naval forces of the United States or for organizing, arming, and disciplining militia forces actively employed in the service of the United States Armed Forces. Infringing actions would include any registration or tracking of firearms, firearm accessories, or ammunition or any registration or tracking of the ownership of firearms, firearm accessories, or ammunition;

And:

> Declares that all federal acts, laws, executive orders, administrative orders, court orders, rules, and regulations, whether past, present, or future, that infringe on the people's right to keep and bear arms as guaranteed by the Second Amendment to the United States Constitution and Article I, Section 23 of the Missouri Constitution must be invalid in this state, including those that impose a tax, levy, fee, or stamp on these items as specified in the bill; require the registration or tracking of these items or their owners; prohibit the possession, ownership, use, or transfer of a firearm; or order the confiscation of these items;

And:

> Declares that it must be the duty of the courts and law enforcement agencies to protect the rights of law-abiding citizens to keep and bear arms and that no person, including a public officer or state employee of this state or any political subdivision of this state, can have authority to enforce or attempt to enforce any federal laws, orders, or rules infringing on the right to keep and bear arms…

Furthermore,

> …any entity or person who knowingly acts under the color of any federal or state law to deprive a Missouri citizen of the rights or privileges ensured by the federal and state constitutions to keep and bear arms must be liable to the

> injured party for redress, including monetary damages in the amount of $50,000 per occurrence and injunctive relief.

Leaving aside any preemption or other constitutional issues that this new Missouri law raises, lawyers subject to the Missouri Rules of Professional Conduct must ask themselves how Missouri Rule 4-1.2(f) affects lawyers who counsel their clients on activities that may fall within its scope, particularly in light of the newly revised Comment 8 to Rule 4-1.2(f).

Comment 8 to Missouri Rule 1.2(f) was changed by direction of the Missouri Supreme Court only a year ago in response to the uncertainty created by the Missouri Legislature legalizing the production, distribution, and sale of cannabis products for medicinal use. Although Missouri made such activities legal under Missouri law they remained criminal under federal law. Lawyers subject to the Missouri Rules found themselves asking whether it was a violation of Rule 1.2(f) for a licensed Missouri attorney to counsel clients engaged in the cannabis industry since the industry had been legalized under Missouri law but remained illegal under federal law.[4] Other states had taken a variety of positions on whether lawyers could counsel clients about activities that were legal under state law but illegal under federal law. The answer given by the Missouri Supreme Court in Comment 8 to Rule 4-1.2(f) was that Missouri lawyers would run the risk of violating Rule 4-1.2(f) if they did counsel clients about activities legal under Missouri law but criminal under federal law:

> In counseling or assisting, if a state law conflicts with federal law, the lawyer should advise the client of that fact but cannot (1) undertake conduct that would violate federal law or (2) counsel or assist the client as to how to perform an act that would violate federal law even if that conduct would be lawful under the state statutory or constitutional law. See Rule 4-1.1and 4-1.4.

Although this was clearly directed to lawyers who counseled cannabis industry clients, the new law prohibiting enforcement of many federal gun laws in Missouri may well set up another Rule 4-1.2(f) problem for Missouri lawyers. As was the case in regard to the Missouri laws legalizing medicinal cannabis, the new anti-federal gun law sets up a situation where state and federal laws are at odds and actions that might comply with state law, in this case the newly signed HB 85, might be deemed illegal under federal law.

In light of Comment 8 to Rule 4-2.1(f), what should a Missouri licensed attorney do when asked to give advice on the issue? This might be a classic example of the workings of "the law of unintended consequences," which may put some Missouri lawyers at risk of being disciplined because of the conflict between state and federal laws.

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[4] See, LEMR July 2020 on this subject.

Kansas lawyers who might be inclined to shrug and say "it's just Missouri" should pause before ignoring this development. Indeed, lawyers in Kansas should pay close attention to what happens in Missouri in this situation because it is not at all unlikely that a version of HB 85 will be introduced in the Kansas Legislature in years to come, and Kansas lawyers may well face a similar ethical dilemma.

ETHICS & MALPRACTICE RESEARCH TIP
NEW PERIODICAL LITERATURE FROM *ST. MARY'S JOURNAL ON LEGAL MALPRACTICE AND ETHICS*

Add the following articles from the *St. Mary's Journal on Legal Malpractice and Ethics* to your summer reading list.

Volume 10, No. 2 (2020):

1. John G. Browning, *Should Judges Have a Duty of Tech Competence?*, 10 St. Mary's Journal on Legal Malpractice & Ethics 176 (2020).

Practicing lawyers are clearly held responsible for tech competency under Rule 1.1. This article examines whether the same requirement should be extended to judges.

2. Dru Stevenson, *Ethical Issues with Lawyers Openly Carrying Firearms*, 10 St. Mary's Journal on Legal Malpractice & Ethics290 (2020).

Have you had an opponent show up at a meeting with a weapon? Here are some thoughts on the ethical issues that may arise.

Volume 10. No. 1:

3. Robert Derner, *Ethical Limitations on Lawyer-to-Lawyer Online Consultations Regarding Pending Cases*, 10 St. Mary's Journal on Legal Malpractice & Ethics 102 (2020).

4. Joshua L. Sandoval, *Ethical Considerations for Prosecutors: How Recent Advancements Have Changed the Face of Prosecution*, 10 St. Mary's Journal on Legal Malpractice & Ethics60 (2020).

This provides an excellent analysis of the history and current state of prosecutorial ethics—a must read for both prosecutors and criminal defense attorneys.

Volume 9, No. 2 (2019):

5. Gregory C. Sisk, *"The More Things Change, the More They Remain the Same:" Lawyer Ethics in the 21st Century*, 9 St. Mary's Journal on Legal Malpractice & Ethics 342 (2019).

Sisk provides an extremely interesting look at the constants of our Rules of Professional Conduct even as technology and the practice of law change.

6. Susan S. Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, 9 St. Mary's Journal on Legal Malpractice & Ethics 190 (2019).

This is an important and thoughtful article by one of the lead American experts on legal malpractice.

Volume 9, No.1 (2019):

7. Cassandra B. Robertson, *Conflicts of Interest and Law-Firm Structure*, 9 St. Mary's Journal on Legal Malpractice & Ethics 64 (2018).

"This article examines mega-firm conflicts from a client-protection perspective. It analyzes the policy goals underlying traditional rules on conflict imputation, including the need to protect client confidences and loyalty."

BLAST FROM THE PAST
CHEAPNESS OF LAW

> *Cheapness of Law*. The London Legal Observer cites a passage from Faux's Memorable Days in America, to prove that the cheapness of law has a pernicious effect upon society. He says, 'It is bad for the people that law is cheap, as it keeps them constantly in strife with their neighbors, and annihilates that sociability of feeling which so strongly characterizes the English.'

American Jurist and Law Magazine, Vol. 5 (April, 1831), p.409. By the reasoning of this note from 1831, today's large firms are actually serving the public interest by continuing to raise their fees. Certainly, this justification provides some degree of amusement to those of us concerned about legal costs.