

Online Research Costs: Are They Recoverable?

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When many of us began practicing, we used those dusty old law books. Later, when online research (OLR) became available, many of us adopted this new technology. Many more undoubtedly would have liked to join the club, but as solos and small firm lawyers they found these services to be cost prohibitive. Perhaps, it was suggested, they could afford OLR after all if they recovered the costs from clients. The question of whether to bill clients for these services has caused many discussions and many sleepless nights.

In April 2008 Keith McLennan, then Chair of the General Practice, Solo and Small Firm Division, e-mailed a survey to Division members about recovering costs for online research. We'd all heard the anecdotal evidence, both from lawyers who were billing clients for their OLR costs and from lawyers who were not, but what were the actual numbers? It was time to learn the facts. The survey evolved from an ongoing discussion in the West Solo Legal Advisory Board. The Board is composed of Division members who work with West, a Division sponsor, to develop products and services for solos and small firm lawyers. Too often, we participate in surveys and never see the results. The purpose of this article is to let you know what we found out—and to offer suggestions for you to consider.

Basic Survey Results

The full results of the survey will soon be available on the Division's website (www.abanet.org/genpractice). This article will include a few findings to pique your interest in the rest.

Some 585 Division members answered the survey and told us how they manage online research costs. Sixty-nine percent of respondents had transactional or litigation practices. Ninety percent of the respondents were solos or in firms of two to six persons. Client revenue came from individual and business clients (90 percent). Eighty percent of the respondents billed hourly or on a fixed rate.

Sixty-six percent of respondents subscribe to LexisNexis or Westlaw. Twenty-five percent do not subscribe to any online research services. The remainder use Fastcase, Loislaw, Casemaker, or some other type of research service. The latter services are either low cost (Loislaw) or included in bar association membership dues (Fastcase and Casemaker).

Lawyers incur costs for online research, even when using subscription services such as Westlaw. A lawyer's time is part of the research overhead. Our survey revealed that the recovery of these costs is evenly split: 50 percent of respondents recover all or part of their costs, and 50 percent of respondents do not. This split may reflect uneasiness about what is and is not allowed within a particular state. Ethical considerations play a part in whether to recoup these costs.

Assessing Research Costs

Half of those who charge clients for this research review costs associated with each individual client; a quarter of the rest charge clients for all costs. Most of the lawyers responding include out-of-plan charges and document retrieval as part of their research costs. Forty percent include subscription charges in their cost recovery. In these cases, 62 percent of subscription charges are recovered; out-of-plan charges raise the mean percentage to 67 percent.

The lawyers who recover these costs do not take action in a vacuum. The majority took their experience at other law firms into consideration. One-third looked at the cost-recovery principles of other solos and small firms. A significant number considered ABA guidelines in establishing their protocol. Yet, there was a significant percentage of respondents who did none of this or did not know what considerations came into play.

Available Cost-Recovery Tools

Twenty-nine percent of the lawyers who participated in the survey use in-house tools to assist them. Westlaw and Lexis provide free cost-recovery tools. Unfortunately, most lawyers do not use available cost-recovery tools. This may explain the 50-50 split between lawyers who recover costs and those who do not. Lacking a legitimate means to establish the research cost prevents a lawyer from realizing the amount assessable to a client.

Cost-Recovery Trends

Fifty-four percent of respondents find their recovery rate has remained constant over the past two years, 23 percent saw an increase in those rates, and 12 percent did not know if their recovery had increased, decreased, or remained the same. This indicates that some lawyers are not looking at these costs or are unsure about how or if to recover them.

Strategic planning will help a lawyer recover costs that are part of the practice's overhead yet not represented in billing statements or retainer agreements. Most survey respondents saw ABA guidelines and market research on best practices as the best way to help them with their strategy and processes.

Those Who Don't Recover Costs

The 50 percent of respondents who do not engage in cost recovery do so for myriad reasons. For some lawyers it is a firm tradition not to charge for OLR because they think it is not worth the time and expense required for tracking those costs. Others believe they have a competitive advantage in not billing clients for OLR. More than 80 percent of the respondents who currently do not recover OLR costs say that they do not plan to initiate cost recovery in the next two years.

Those Who Do

The 50 percent of respondents who do attempt to recover OLR costs handle the process in different ways. Many firms do not have a formal, or even informal, policy. From a business standpoint, lacking a policy may create problems when a lawyer tries to justify a charge to a client or a judge.

Some lawyers make the decision about cost recovery on a per-client basis. Others apportion the charges between clients or seek recovery only upon settlement or verdict. One story—about a firm that adds a surcharge to the apportionment—caused a flurry of ethical questions and bewilderment from West Solo Legal Advisory Board members, as most ethics rules do not permit such a markup.

Developing Your Cost-Recovery Policy

If you decide it is time to initiate a cost-recovery policy, it is important to develop a clear, written strategy for doing so. Sole practitioners will want to discuss it with other solos and small firm lawyers. Within a firm, all attorneys need to be aware of the policy and how it is implemented. Agreement among the responsible parties on the policy's goals and objectives is an essential element of policy success.

Plan a policy that includes a client communication protocol and establishes how timekeepers maintain the appropriate records for billing purposes. Revisit the policy on a regular basis, along with other business matters, and tweak it as necessary. Find out what tools your online research provider offers and get the training. The time spent learning the tools will let you increase your practice's revenue.

Westlaw and LexisNexis offer free cost-recovery tools (QuickView and Client Validator, respectively) for subscribers. Contact your provider or representative for information and training.

Client communication is essential. It is that way with everything we do in our practices. Keeping clients aware of what is going on and what it costs allows you to have a better client relationship.

Ethical Considerations

ABA Formal Ethics Opinion 93-379 authorizes lawyers to charge clients reasonable costs associated with online legal research as long as the charges are disclosed to clients. This tracks other client charges. As long as the client knows about potential charges and they are reasonable, there is no prohibition against recouping them.

In conjunction with its analysis of the survey results, West researched the cost-recovery positions of individual states. It found that no state prohibits cost recovery outright, but some impose restrictions. A link to that information will be available in an insert included in the December 2008 *Technology & Practice Guide* issue of *GPSolo* magazine. The insert will include tips on how a cost-recovery policy can benefit your practice. It will also include sample cost-recovery language for you to use with your clients.

A video of the cost-recovery CLE from the National Solo and Small Firm Conference held at the Division's 2008 Fall Meeting in Santa Fe, New Mexico, will be posted on the Division's website. If you were unable to attend the meeting, you will have the opportunity to watch the session on cost recovery online.

The ethical issues regarding cost recovery will be addressed in greater detail in a feature article to appear in the December 2008 *Technology & Practice Guide* issue of *GPSolo*.

Is Cost Recovery for Me?

As much as many of us hate to admit it, the practice of law is also a business. Sound business practices can make our lives easier. We did not learn about the business of law in law school, and it often seems we are now on our own. Still, when you have a quiet moment, think about how you see your practice growing and consider how the issues discussed above might fit into your plans.

No one knows our practices better than we do. We know what works and what does not. Cost recovery is an issue that is being discussed by lawyers in firms of all sizes. For some it makes sense, for others it is an unwieldy burden best left to the large firms. This article should not be construed as endorsing any particular service or path. The issue of cost recovery is

important and ongoing. The purpose of this article is to educate lawyers on what is possible and what other lawyers are doing.

If you want more information about the survey and its findings, visit the Division website at www.abanet.org/genpractice; full data will be posted there soon. And, as always, feel free to contact me at jmburda@mac.com if you want to discuss these matters further.