

Twitter Legal Fees Suit Offers Crash Course In Billing Ethics

By **Lourdes Fuentes** (September 14, 2023, 2:53 PM EDT)

X Corp.'s case against law firm Wachtell Lipton Rosen & Katz, filed over Twitter's legal bill in connection with Elon Musk's \$44 billion acquisition of the company,[1] highlights the importance of following proper billing practices, which are governed not only by contract law but also by the higher standards imposed on lawyers by the rules of professional conduct.

The claims in X Corp. v. Wachtell Lipton Rosen & Katz, filed in early July in California's San Francisco County Superior Court, include restitution (unjust enrichment), breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and violation of California Business and Professions Code, Section 17200.



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The pleading contains a litany of facts but recounts a concise timeline. From when Wachtell was retained on June 21, 2022, to the Oct. 13 party held to celebrate the month-end closing of the deal at the original \$44 billion price, only 114 days had elapsed.

In that time, Twitter received two invoices. These invoices were included as exhibits to the complaint. A review of the invoices reveals blank time entries, vague descriptions, irrelevant references and block billing, among other issues. The invoices amount to close to \$18 million.

To compound these perceived improprieties, the final fee statement then added an extra \$72 million dollars to that tab.[2] This was a "success fee" that was referenced in the closing day letter agreement drafted by Wachtell and signed by Twitter's then-chief legal officer, Vijaya Gadde, allegedly hours before the closing sale of Twitter on Oct. 27.[3] Significantly, the success fee had not been outlined in the engagement letter.

While the validity of the claims will be decided in court, the suit spotlights vital legal billing practices and ethical considerations for attorneys and clients alike. Even if Wachtell defeats X, the suit has put the reputation of the firm's billing practices at risk. Moreover, the suit has put the reputation and ethics of individual attorneys at risk by disclosing the invoices at issue, tying timekeeper names to time entries.

Further, the answer to whether the \$90 million is fair pay or windfall may not be based on the amount itself, but on whether the parties followed the rules of professional conduct governing attorney-client relationships.

By reexamining billing approaches in light of the Twitter fees case, law firms and clients can take away

important lessons on proper billing practices.

The Relevant Rules

Client and lawyer can maintain a positive partnership that is founded on transparency and trust by following an ethical road map.

The claims in the complaint provide us with a good starting point. They are based on common law tort, contract law and the American Bar Association's Model Rules of Professional Conduct, which have been similarly adopted to varying degrees in other states' jurisdictions.[4] These are:

- Section 6147 of the California Business and Professions Code, which addresses contingency fees;[5]
- Rule 1.5 of both the California and New York Rules of Professional Conduct, which prohibit unreasonable or unconscionable fees;[6] and
- Rule 1.8 of both the California and New York Rules of Professional Conduct, which prohibit soliciting gifts from clients.[7]

By keeping these rules — or their equivalent from your jurisdiction — top of mind, practitioners can avoid the appearance of impropriety. Though not mentioned in the complaint, I would also add ABA Rule 1.4, which deals with attorney-client communications, to this list.

8 Crucial Steps for Success Fees

Fees based on the outcome of a case, like the success fee in the Twitter case, are permissible, but they still need to be reasonable.[8] While the ABA rules do not specifically mention success fees, they state that a fee may be contingent on the outcome of the matter for which the service is rendered.[9] The rules do, however, state that:

A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined.[10]

Success fees are common in transactional matters, but these are typically negotiated as part of an engagement letter. They are structured to incentivize the law firm to achieve the best possible outcome for the client.

However, the exact nature and amount of these fees can vary and are a subject of negotiation between the parties. As a result, it is crucial for both parties to follow these steps.

1. Transparency and Disclosure

All terms related to the success fee should be clearly stated in the engagement letter or contract. This includes how the fee is calculated, when it is to be paid, and under what conditions it may be modified or waived.

2. Reasonableness of the Fee

All fees must be reasonable. Look for guidance in ABA Rule 1.5 for factors that can be considered to determine reasonableness of a success fee. These can include:

- The novelty and difficulty of the case;
- The skill required to properly provide legal services;
- Comparable rates in your area for like services;
- The amount at issue and the results obtained;
- Time limitations imposed by the client or by the circumstances;
- The reputation, experience and ability of the lawyers performing the services; and
- Whether the fee is fixed or contingent.[11]

3. Proportionality

The success fee should be proportional to the value provided by the law firm. This could be in relation to the deal size, the complexity of the transaction or the level of risk involved.

4. Incentive Alignment

Make sure that the fee structure selected aligns the firm's incentives with the client's goals. Otherwise, it could be considered a conflict of interest, among other ethical pitfalls.

5. Regulatory Compliance

Understand your state-specific rules or regulations that might apply. For example, California's Section 6147 speaks to contingency fee agreements. Research your jurisdiction's rules and regulations.

Remember, as well, that some jurisdictions may cap or ban certain types of fees.

6. Dispute Resolution

Include a clause specifying how any disputes over the success fee will be resolved, whether through arbitration, mediation or court proceedings.

7. Periodic Review

It may be prudent to include provisions for reviewing the success fee arrangement at various stages of the transaction.

8. Client Consent

Explicit, informed consent from the client is crucial, especially if the success fee arrangement is unconventional or complex.

It is important to note that all fees must not only be reasonable but also adequately explained to clients. Circumventing clear documentation enables end-runs around billing safeguards in violation of ABA Rule 1.5 and violates Rule 1.4.

While a lawyer and client may renegotiate a fee agreement during an ongoing relationship, the lawyer typically carries the burden of establishing fairness of the new arrangement if it is ever challenged.[12]

Fee agreements entered during the attorney-client relationship will get heightened scrutiny to avoid the appearance of undue influence or impropriety.

In the case of Twitter, the success fee was agreed upon allegedly hours before the closing of the deal.

Although Twitter's old board agreed to the fees, the circumstances in which this transpired could be perceived as unethical and improper because of the lateness of the agreement made by the parties to include a success fee. Hence, in addition to challenging the fee as unreasonable, the lawsuit claims that, based on the facts leading to the closing day letter agreement, the success fee should be considered a gift, and hence a violation of ABA Rule 1.8.

10 Proper Billing Practices

The controversy highlighted in the Twitter fee case provides a valuable reminder of the heightened scrutiny in attorney-client relationships due to its fiduciary nature and the rules of professional conduct. In addition to the steps specific to success fees outlined above, it is important to keep these broader billing best practices in mind.

1. Engagement

Always formalize the fee arrangement in a written agreement. This holds true whether you are dealing with an hourly rate, a contingency fee or some other type of fee structure. Any modifications to the engagement terms or fee structure should also be put in writing.

2. Transparency

Clearly outline how legal fees will be calculated, any percentages that may accrue in the case of a contingency fee and any other expenses that will be deducted from the recovery.

3. Client Communication

Keep the client informed about any developments.

4. Alternative Fee Arrangements

There is nothing wrong with exploring creative billing options that can benefit both parties, but ensure they are in line with ethical guidelines and are clearly outlined in the agreement.

5. Data-Driven Metrics

Consider using data-driven methods to establish fees, especially for alternative fee arrangements. This adds an element of fairness and can help align incentives between client and lawyer. Notably, today we have the benefit of using artificial intelligence to come up with creative data-based alternative fee arrangements.

6. Review and Oversight

Periodically review the billing practices to ensure compliance with your client guidelines. Train your timekeepers in proper billing practices and client-specific billing guidelines. This training should be done

annually and while onboarding new personnel.

7. Regulations

Understand the rules governing fees and conflicts of interest. Train your lawyers in the rules of professional conduct. This training should be done annually and while onboarding new personnel.

8. Fiduciary Duty

Always act in the best interest of the client, keeping in mind the fiduciary nature of the attorney-client relationship.

9. Avoid Surprises

Be proactive to avoid sticker shock. Discuss potential scenarios and outcomes openly with the client, so they know what to expect in terms of fees.

For example, one fact alleged in the complaint is that

[I]n the middle of the board's final October 27 meeting, former Twitter general counsel Sean Edgett sent the chart of fees that the Twitter board was meeting to approve. Upon seeing the magnitude of the fees being presented for the board's approval, one former Twitter director immediately exclaimed in an email reply to Edgett: "O My Freaking God." [13]

10. Regular Invoicing

Provide detailed invoices that outline the work done, the time spent and the costs incurred. This not only aids transparency but will also help in resolving any disputes that may arise.

Also remember, your time entries should be treated with as much care as any work product; they should be clear, concise, descriptive and grammatically correct.

By following this ethical road map, the parties will reduce the likelihood of disputes and misunderstandings and, also, maintain a good working relationship.

Conclusion

Whether you are the client or the lawyer, beware falling asleep at the wheel when it comes to new engagements, modifications to billing and billing practices generally. To do so may risk legal action and your reputation.

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[1] X Corp. v. Wachtell Lipton Rosen & Katz, California Superior Court, County of San Francisco, No. CGC-

23-607461. Hereinafter, "the complaint."

[2] The total fee due to Wachtell under the closing day letter agreement was \$90 million (Exh. 18 to the complaint), but it is unclear what part of this constitutes the success fee. Calculations based on hourly billing invoices suggest that this success fee is remarkably high, although its exact value is not specified. If calculated based on previously invoiced amounts (totaling \$17,943,567.49), the success fee would be approximately \$72,056,432.51. Even when accounting for an estimated \$11 million in accrued fees for September 2022, the success fee would still amount to \$61,056,432.51.

[3] Complaint ¶ 3.

[4] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

[5] [https://casetext.com/statute/california-codes/california-business-and-professions-code/division-3-professions-and-vocations-generally/chapter-4-attorneys/article-85-fee-agreements/section-6147-contingency-fee-contract#:~:text=Section%206147%20%2D%20Contingency%20fee%20contract%20\(a\)%20An%20attorney%20who,representative%2C%20to%20the%20plaintiff%2C%20or](https://casetext.com/statute/california-codes/california-business-and-professions-code/division-3-professions-and-vocations-generally/chapter-4-attorneys/article-85-fee-agreements/section-6147-contingency-fee-contract#:~:text=Section%206147%20%2D%20Contingency%20fee%20contract%20(a)%20An%20attorney%20who,representative%2C%20to%20the%20plaintiff%2C%20or). See also, NY requirements for engagement letters here: <https://ww2.nycourts.gov/attorneys/lettersofengagementrules.shtml>.

[6] See, e.g., <https://casetext.com/rule/ca-rules-of-court/california-rules-of-professional-conduct/chapter-1-lawyer-client-relationship/rule-15-fees-for-legal-services>.

[7] See, e.g., <https://casetext.com/rule/ca-rules-of-court/california-rules-of-professional-conduct/chapter-1-lawyer-client-relationship/rule-181-business-transactions-with-a-client-and-pecuniary-interests-adverse-to-a-client>.

[8] https://content.next.westlaw.com/practical-law/document/I03f4b1f4eee311e28578f7ccc38dcbce/Fixed-Fee-Structures-for-Transactional-Matters?viewType=FullText&ppcid=4a80e54fd8c1475f977dbc81facb2f99&originationContext=knowHow&transitionType=KnowHowItem&contextData=%28sc.DocLink%29#co_anchor_a565414.

[9] The ABA Model Rules of Professional Conduct do not specifically mention success fees by name, but Rule 1.5 focuses on the reasonableness of fees and the necessity of communicating how the fees are to be determined. This could apply to success fees, especially if they significantly increase the total fee and are not clearly defined or communicated to the client.

[10] Model Rules of Professional Conduct r. 1.5(c) (American Bar Association 2020).

[11] See Model Rules of Professional Conduct r. 1.5(a) (American Bar Association 2020).

[12] <https://www.lawyeringlaw.com/can-i-re-negotiate-my-fee-agreement#:~:text=Generally%2C%20a%20lawyer%20and%20client,a%20flat%20or%20fixed%20fee>.

[13] Complaint ¶ 11.