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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 601954/2005

LAPIDUS & ASSOCIATES, LLP

VS

REIVER, ALLAN S.

Sequence Number : 005

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided per attached

FILED
MAR 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/24/08

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

LAPIDUS & ASSOCIATES, LLP,

Plaintiff,

-against- Index No.: 601954/2005

ALLAN S. REIVER AND DENCORP INVESTMENTS, INC.,

Defendants.

----------X

ALLAN S. REIVER AND DENCORP INVESTMENTS,

Third-Party Plaintiffs,

-against-

STEVEN R. LAPIDUS, ESQ.,

Third-Party Defendant.

----------X

EMILY JANE GOODMAN, J.:

Motion sequence numbers 005 and 006 are consolidated for disposition.

In this case, plaintiff Lapidus & Associates, LLP (Associates), a law firm, seeks to recover $414,720.80 in legal fees from their former clients, defendants Allan S. Reiver (Reiver) and Dencorp Investments, Inc. (together, Defendants). Defendants have interposed claims against Steven R. Lapidus, Esq. (Lapidus) and Associates (together, Plaintiffs) for legal malpractice and breach of fiduciary duty.

In the first cause of action of their counterclaim, Defendants allege that Associates, their

attorneys in the underlying case (the Underlying Case),[1] did not submit reasonable bills for legal services, thereby "breaching its lawyer's fiduciary duties to ethically, fairly and reasonably bill for services consistent with the Code of Professional Responsibility which acts and omissions caused Defendants to pay . . . excessive fees and costs" of approximately $510,000 in the Underlying Case (Verified Amended Answer, Counterclaims and Third-Party Complaint, at 2-3). In the second cause of action of their counterclaim, and their third-party action, Defendants allege that Associates negligently failed to advise them of risks involved in a strategy concerning the exercise of a put-call option to buy a business, Urban Archaeology Ltd. (Urban Archaeology), in which Dencorp Investments, Inc. was one of two equity partners.

In motion sequence 005, Defendants move, pursuant to CPLR 3211 (a) (1), 3212, and 3126, for an order dismissing the complaint with prejudice on the grounds that Plaintiffs have violated various disciplinary rules of the New York Code of Professional Responsibility (Disciplinary Rules), by making false statements and omissions about their compensation arrangements with two non-party attorneys, Robert Fass and Walter Goldsmith, failing to keep adequate billing records, and engaging in unethical and fraudulent billing practices. Defendants also seek return of the $510,000 in legal fees that they previously paid to Associates, with pre-judgment interest thereon from May 2003. Plaintiffs cross-move, pursuant to CPLR 3124, for an order compelling Defendants to produce the settlement agreement from the Underlying Case.

In motion sequence 006, Defendants move, pursuant to CPLR 3126, to preclude Plaintiffs from offering proof to support their attorney's fees claim. Defendants also move, pursuant to

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[1]The Underlying Case is *Urban Archaeology Ltd., Gil Shapiro and Geraldine Ronan v Dencorp Invs., Inc.*, (Sup Ct, NY County, Index No. 601353/03, *revd* 12 AD3d 96 [1st Dept 2004]). The decisions therein, and this court's prior orders in this matter, contain additional background information.

CPLR 2221, for re-argument of this court's order, dated May 21, 2007, in which the court lifted the CPLR 3214 stay. Plaintiffs cross-move, pursuant to 22 NYCRR 130-1.1, for sanctions and, pursuant to CPLR 3124, for an order compelling Defendants to produce documents concerning their finances during a six-month period in 2003.

Defendants' Motion for Summary Judgment and to Dismiss the Complaint (Motion Sequence 005)

It is undisputed that attorneys Lapidus and Fass represented Defendants in the Underlying Case. Defendants maintain that Lapidus entered into an arrangement with Fass, who is not an associate, member, or partner of Associates, wherein Fass would be paid $273.00 per hour for his work for Defendants on the Underlying Case and Defendants would be billed at $390.00 per hour for Fass's work. Defendants contend that this arrangement was an undisclosed fee-sharing agreement that created a conflict of interest between Plaintiffs and Defendants. Defendants further contend that Plaintiffs' failure to disclose the mark-up, or premium, on Fass's hourly rate (the Premium), in the retainer letter, or subsequent writings, effected a fraud on Defendants, as did Plaintiffs' failure to make and maintain certain time records of services provided to Defendants.[2]

To meet their burden on the motion, Defendants submit Reiver's affidavit, in which he swears that he was unaware of, and did not consent to, the Premium, and that he would not have retained lawyers who engaged in such an "unethical" practice (Reiver Aff., ¶ 2). Reiver also avers that he did not consent to Associates not making and retaining original, contemporaneous

[2]Defendants characterize the Premium as 40% above the $273 that Fass was to receive, or as a discount of Fass's normal rate by "approximately [20%] for Lapidus to get what was in essence a referral fee" (Def. Mov. Aff., ¶ 3). Reiver avers that he may also have been billed a premium on the billing of other lawyers.

time records to support the bills that were tendered to him.

Defendants also submit a copy of the parties' retainer agreement (Retainer Agreement), which is on Associates' stationery, and was agreed to and accepted by Reiver on May 8, 2003. Relevant here is that the Retainer Agreement states:

> "[t]his letter will confirm our agreement pursuant to which you are engaging us to represent the [Defendants] and perform legal services on their behalf in connection with the [Underlying Case] and sets forth our fee arrangements with respect to the representation.
>
> I will be the principal attorney representing you, together with Walter Goldsmith and Robert Fass and, while I will be available to you on all matters, other attorneys in our firms may assist in connection with matters relating to their respective fields of expertise.
>
> . . .
>
> Legal fees for our services are generally determined by the amount of time expended by members of our staff multiplied by their applicable hourly rates. Those rates are based upon the experience and expertise of the person expending time. Our hourly rates for attorneys expected to work on this matter, which generally increase annually, currently range from $390.00 to $395.00, and time is recorded to the tenth of an hour"

(Def. Mov. Aff., Exh. A).

Defendants also provide Fass's deposition (EBT) testimony that he was paid $273 per hour, which Fass stated that he would confirm when he retrieved an unspecified letter, provided he still had it. Fass further testified that, although he could not then recall, he may have had a direct retainer with Reiver, and that he had a retainer agreement, presumably with Defendants, that covered all the matters on which he would work, where Lapidus was the lead attorney.

Fass swore that his time was billed out to Defendants at $390 per hour, his billing rate at the time, and the rate he then charged his own direct client. Fass stated that his agreement with Lapidus was that Plaintiffs would discount Fass's time by 30%, and that he did not recall

charging his customary billing rate to Defendants at any time while working on the Underlying Case.

Fass stated that he believed that he might have mentioned to Reiver on more than one occasion, toward the beginning of the representation, that he was being paid less than what Lapidus was billing him out to the Defendants. Fass also testified that he maintained an office separate from Lapidus, but was able to do research and writing on the Underlying Case using Plaintiffs' office and Lapidus's secretary, and submitted time sheets to Lapidus, or his secretary, for preparation of bills to the client, but not on any regular basis.

In addition, Defendants submit Lapidus's EBT testimony, in which he testified as follows:

> "Q. Did you share in the compensation for their services? In essence, was there a referral fee to you in connection with the service that Fass and/or Goldsmith rendered?
>
> A. No.
>
> Q. So they were received in toto or in total for the time that they actually rendered in these matters?
>
> A. If Mr. Reiver had paid his bills, they would have been paid for the time they expended on his behalf.
>
> Q. Without any adjustments?
>
> A. They would be paid by time.
>
> A. . . . [o]n whatever they did.
>
> . . .
>
> Q. Did they also come within the 390 to 395 an hour?
>
> A. It is my recollection.

Q. In terms of their hourly rate?

A. That is my recollection. It would show on the bills by arithmetic calculation and whether or not their rate and/or my rate went up after that retainer agreement was signed in which the retainer agreement anticipated would be reflected by the bills.

Q. There is a reference in the second paragraph of Defendant's Exhibit 1, quote, "Other attorneys in our firms may assist in connection with matters relating to their respective fields of expertise."

Q. Who were the other attorneys in your firm at the time?

A. None"

(Def. Mov. Aff., ¶ 4).

In opposition to the motion, Plaintiffs submit Lapidus's Affidavit. Lapidus swears that the Retainer Agreement discloses that Fass and Goldsmith would be working on Defendants' matter; the hourly rate charged for their time; and that neither worked for Associates, but were being hired by it to assist in representing Defendants (Lapidus Aff., ¶ 4). Lapidus further swears that he maintained constant supervisory control over the work of Fass and Goldsmith, who, for all intents and purposes, acted as his associates in the Underlying Case, and whose relationship with Associates was not unlike the relationship between a law firm and an associate.

Lapidus also swears that there was no "referral fee" involved here, because when the Underlying Case was commenced, Reiver was not referred to Associates, but already had been a client of either Associates, or another law firm in which Lapidus was formerly a partner. Lapidus avers that Associates also did not refer this matter to Fass and Goldsmith, but hired them to work on the Underlying Case, and that prior to this lawsuit, Defendants never complained about, and

always agreed to pay, the bills.[3]

Defendants argue that they are entitled to summary judgment because Plaintiffs received what was, in essence, a referral fee, for Fass's billable hours, and cannot prove that they properly disclosed to Defendants that Fass was discounting his rate, thus violating 22 NYCRR 1200.12 (DR 2-107). Comparing the Premium to a government kickback scheme, Defendants also assert that Plaintiffs' failure to disclose Associates' arrangements with Fass was a conflict of interest that violated 22 NYCRR 1200.20 (DR 5-101), fraudulent, and that they would not have hired attorneys who engaged in such unethical practices.

Plaintiffs respond that at the time the parties entered into the Retainer Agreement, Defendants were aware that there was to be a division of fees, and consented to it by executing the agreement, which contains any required disclosure. Plaintiffs do not dispute Defendants' assertion that Plaintiffs' arrangement with Fass was that they would pay him $273 per hour for his representation of Defendants on the Underlying Case.

DR 2-107 (a) provides that:

> "(a) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

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[3]Defendants maintain that Fass's testimony contradicts Lapidus's EBT testimony and "proved Lapidus to be a liar" (Pl. Mov. Aff., ¶ 5). They also accuse Lapidus of both seeking to have his attorney block inquiry into the fee-sharing agreement and of asserting a false claim of privilege concerning the conversations he had with Fass about Fass's compensation (*id.*, ¶ 6). Lapidus denies these assertions, swearing that he did not lie, did not testify about the arrangement, and that his testimony has been mis-characterized by Defendants, due to the compound question asked by their counsel. On the record provided, the court can determine only that Lapidus declined to answer Defendants' EBT questions concerning payment arrangements with Fass on the ground of *either* privilege, relevance, or both, and that Defendants' counsel stated that he was marking the testimony for a ruling (*id.*).

> (2) The division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation.
>
> (3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client."[4]

DR 2-107 is generally intended to address referral situations, where the referring lawyer collects a fee without performing work for the client, "to prevent lawyers from surprising clients by having a lawyer outside the firm do the work," as a client has an unfettered right to hire or fire its attorney, as well as to know who is working on its case (Simon, New York Code of Professional Responsibility Annotated, at 404 [2007 ed] [Simon]). The provision is also intended to protect a client against unreasonable fees (DR 2-107 [a] [3]). There has, however,

> "never been a controversy as to whether a lawyer may share fees with a lawyer who actually works on a case. If two lawyers in different firms both work on the same matter, and if either lawyer working alone would have been entitled to receive a fee, and if the client has given consent for both lawyers to work on the matter, then both lawyers are entitled to be paid for the work they have actually done.
>
> . . .
>
> The difficult question is whether a lawyer may share fees with a lawyer who does nothing but refer a case, or at least share fees in a ratio far out of proportion to the amount of work the other lawyer does on the case. The ABA has flip-flopped on this issue, first saying yes, then no, then yes again"

(*id.* at 402).[5]

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[4]Ethical Canon 2-22, which also address the subject of dividing fees, provides:

> "Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer's firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation and if the total fee is reasonable."

[5]One of the policy reasons supporting prohibition against fee sharing between or among lawyers based on referrals is concern about treating clients like "goods to be bought and sold like cattle" (Simon, at 402). In addition, a client has a right to know who represents that client, and to rely on the firm's

New York cases have liberally interpreted DR 2-107 (a) in the context of disputes between attorneys over the enforcement of fee-splitting agreements. For example, in *Carter v Katz, Shandell, Katz & Erasmous* (120 Misc 2d 1009 [Sup Ct, Queens County 1983]), which involved a dispute between attorneys over an agreement to share a contingency fee in a referral case, the court stated:

> "[a] client is simply to be made aware that another attorney is jointly or independently representing his or her interests at no additional expense to her therefor. Any further elaboration or specificity regarding the exact arrangement between the collaborating attorneys is not ethically mandated by this code provision"

(*id.* at 1018; *see also Krug v Offerman, Fallon, Mahoney & Cassano,* 214 AD2d 889, 891 [3d Dept 1995] [finding, in dispute between attorneys over fees, that defendant-attorney's contention that the party's fee-splitting agreement was invalid because it violated DR 2-107 (a) was without merit where there was "evidence that Hahn's wife was notified of plaintiff's appearance in the workers' compensation proceeding from which it can be inferred that Hahn knew that plaintiff was working for him"]). DR 2-107 does not require that attorneys engaging in a fee-sharing agreement disclose to their client the details, such as the percentage split, of their arrangement (Simon, at 404 ["(t)he lawyer need not disclose the percentage or amount or conditions of the split"]).

Defendants do not dispute that Reiver was already a client of Associates when Fass and

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"reputation, pride and supervisory obligations (*see* DR 1-104), and vicarious liability to ensure quality service" (*id.* at 405). Some of the policy reasons for permitting fee-sharing on referrals, where lawyers refer cases and assume joint responsibility for the case, are: difficulty policing the prevalent practice of referral; the unfair disparate impact on small firm practitioners of the right accorded to "rainmakers" to obtain fees for bringing clients to a large firm; and to encourage lawyers to refer matters to those with greater expertise (*id.* at 402-403).

Goldsmith became involved in the Underlying Matter. There is also no dispute that Lapidus, Fass, and Goldsmith all worked for Defendants on the Underlying Case, with Defendants' express written knowledge and consent. The Retainer Agreement discloses to Defendants that Lapidus was acting as the principal attorney, that Fass and Goldsmith also would be working on the Underlying Case, and that other attorneys in the respective "firms" might assist in connection with matters, thus revealing that separate firms and attorneys were involved. The billing arrangements, including the amount that Defendants would be billed per hour for the services of the involved attorneys, are also stated in the Retainer Agreement, and it is undisputed that Associates was the only entity that billed Defendants for services on the Underlying Case.

"[F]ee forfeitures are disfavored" (*Benjamin v Koeppel*, 85 NY2d 549, 553 [1995]), and "the courts are especially skeptical of efforts by clients or customers to use public policy 'as a sword for personal gain rather than a shield for the public good'" (*id.*, quoting *Charlebois v Weller Assocs.*, 72 NY2d 587, 595 [1988]). Furthermore, the courts, not the legislature, enact the Disciplinary Rules (*Niesig v Team I*, 76 NY2d 363, 369 [1990]), and forfeiture should not be based on a purpose for which the rule was not intended, even though a more expansive interpretation of the rule may be desirable in order to benefit clients.[6] DR 2-107 is intended to protect a client against having a case to referred to an attorney the client never hired to represent it, without the client's knowledge or consent, while the attorney that the client *did hire* to do the

[6]Indeed, the situation where one lawyer takes a percentage portion of another lawyer's hourly billing fee is the example given by Professor Simon of a fee-splitting arrangement which does not, by its very nature, violate DR 2-107 or, presumably, any other disciplinary rule, provided that there is disclosure to the client that there will be a division of fees (*id.* at 404). In such instances, Professor Simon suggests specifically telling the client that "[o]ur firm will be sharing in the fees billed by Lawyer B" (*id.* [internal quotation marks omitted]), and indeed this may be a better practice for ensuring client understanding.

work, sits back and collects a fee. That is not the case here.[7] Defendants were made aware, in writing, of the fact that firms other than Associates would be working on their case, and of the identities of the attorneys who would be working for them. With payment being made solely to one firm, Associates, the inference that Fass and Goldsmith's firms would not in some respect be sharing in the fees paid by Defendants to Associates, is not reasonable.[8] Furthermore, Defendants do not allege that the hourly rate that Associates charged for the services of any attorney involved was, in itself, unreasonable,[9] or provide authority to support that a 70/30 split is unreasonable as a matter of law. DR 2-107 (a) (2) requires that in the absence of a writing evidencing that the lawyers assume joint responsibility, the "division is in proportion to the

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[7]In any event, Lapidus also swears that he was the lead attorney on the case, hired Fass and Goldsmith to work on the Underlying Matter, and closely supervised their work. Although the Retainer Agreement uses the term "firms," it also describes Fass by name, and states that Lapidus would be the principal attorney on the case. Fass was not an "associate," as that term is commonly understood (*cf.* Assn of Bar of City of NY Comm on Prof and Jud Ethics Formal Op 1996-8 [NYC Eth. Op. 1996-8, 1996 WL 416301] [stating that the term "associate" "has been interpreted by courts and other ethics committees to mean a salaried lawyer-employee who is not a partner of a firm"]). Giving Plaintiffs the benefit of every reasonable inference, however, they have raised the issue of whether Fass and Goldsmith may be properly characterized as closely supervised temporary attorneys, in which case, disclosure to Plaintiffs was also not required (*see* ABA Comm on Ethics and Prof Responsibility Formal Op 88-356 [1988]).

[8]In fact, in their opposition affidavit, Defendants state that

> "it is apparent from the operative retainer agreement that there would be a division of the fees paid by the defendants, but there was no disclosure that Lapidus would receive not only compensation for his time charged and services rendered but a significant percentage of the fees Reiver was paying for the services of Fass. This included services Fass was rendering when the two lawyers, Fass and Reiver were communicating regarding the case and jointly appearing at Court appearances"

(Def. Reply and Op. Aff., ¶ 9).

[9]While Defendants allege that the bills were excessive, this claim is based on their contention that Lapidus and Fass conferred with each other, or jointly appeared at meetings and court appearances, resulting in Associates' receiving an hourly fee for Lapidus's work and part of Fass's hourly fee, a practice Defendants label as "double billing."

services performed by each lawyer." However, courts "will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either 'refused to contribute more substantially'" (*Graham v Corona Group Home*, 302 AD2d 358 [2d Dept 2003], quoting *Benjamin*, 85 NY2d at 556 [because it was undisputed that the referring attorney performed up to 10% of the work, and did not refuse to contribute more substantially, the referring attorney was entitled to 1/3 of the legal fees, as provided for under the attorneys' agreement]; *Nicholson v Nason and Cohen, P.C.*, 192 AD2d 473, 474 [1st Dept 1993] [where an attorney performs some services which contribute toward the earning of the fee, there is "no requirement that compensation be in proportion to the amount of work actually performed"]; *see Oberman v Reilly*, 66 AD2d 686 [1st Dept 1978], *appeal dismissed* 48 NY2d 602 [1979]). Although there may be a case where, absent a writing evidencing that the lawyers assume joint responsibility, DR 2-107 is violated because the fees are "in a ratio far out of proportion to the amount of work the other lawyer does on the case" (Simon, at 402), Defendants have not demonstrated entitlement to summary judgment based on a violation of DR 2-107.

Defendants argue that Plaintiffs' fee arrangements with Fass gave Plaintiffs an incentive to use Fass to generate greater fees, when Lapidus could have performed the services himself, creating a conflict of interest that violated DR 5-101, and entitling Defendants to summary judgment. DR 5-101 prohibits a lawyer from accepting or continuing

> "employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest."

Defendants maintain that fee arrangements that enable one lawyer to collect a percentage of another lawyer's fee create an inherent strong incentive to have the attorneys work together unnecessarily, and that Plaintiffs were required to disclose their financial interest in Fass's fee to Defendants. The financial interest Defendants describe, however, is inherent in any attorney-client relationship where a firm profits by billing for the work of attorneys, for example, associates. Defendants provide no authority to demonstrate that this is the type of conflict of interest that DR 5-101 was meant to address. Of course, courts carefully scrutinize attorney's fees claims, and a lawyer certainly may not engage in the unnecessary provision of services merely to increase fees to the client. As discussed below, however, Defendants do not provide evidence, with their moving papers, of any actual instance in which Plaintiffs, in order to increase the bill, employed the efforts of two attorneys to do what should have been done by one.

In reply, Defendants argue that their current counsel's review of the billing records reveals that the majority of time entries are inadequate to support any claim for attorneys' fees because they are, among other things, excessive and not adequately descriptive.[10] Defendants, as the moving party on the summary judgment motion, carry the burden to eliminate material issues of fact with admissible evidence (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), but did not provide copies of the bills, or any evidence, with their moving papers to substantiate these assertions. Therefore, summary

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[10]Defendants submit an affidavit that serves as both a reply on their summary judgment motion and opposition to Plaintiffs' cross motion to compel. Defendants' reply improperly introduces new grounds and evidence not previously submitted. For example, in reply, Defendants provide copies of the bills, and the analysis they have conducted thereof, arguing that they demonstrate Plaintiffs' double billing (*see* Def. Reply and Op. Aff., ¶ 12; *see also* ¶¶ 16-17 [describing specific bills that, according to Defendants, demonstrate "the multiple instances of double billing for the same work by the same attorney"]).

judgment must be denied, regardless of the sufficiency of the opposition (*Alvarez*, 68 NY2d at 324). In addition, whether Plaintiffs' legal fees were excessive overall, or they improperly double-billed, or violated DR 2-107 in other respects also cannot be addresed for the first time on reply (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds (or evidence) for the motion"]; *see also Watts v Champion Home Bldrs. Co.*, 15 AD3d 850, 851 [4th Dept 2005]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]).

Defendants argue that they are entitled to summary judgment because Plaintiffs violated 22 NYCRR 1200.46 (DR 9-102) by failing to make, maintain, or produce original and contemporaneous records on a daily basis to support their fee claim. This argument is predicated on Defendants' contention that DR 9-102 (d) requires an attorney to maintain original, handwritten time sheet forms used to record the time expended on behalf of a client (Time Sheets), and that the failure to do so is attorney misconduct.

Among other things, DR 9-102, entitled "[p]reserving identity of funds and property of others; fiduciary responsibility; commingling and misappropriation of client funds or property; maintenance of bank accounts; recordkeeping; examination of records," states that:

> "(d) Required bookkeeping records. A lawyer shall maintain for seven years after the events which they record:
>
> . . .
>
> (5) copies of all bills rendered to clients;
>
> . . .
>
> (9) lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or

> similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded; and
>
> (10) for purposes of this subdivision, a lawyer may satisfy the requirements of maintaining copies by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection."

In opposition, Lapidus and his secretary each provide an affidavit describing Lapidus's time-keeping practices, the gist of which is that Lapidus recorded his activities regularly, by hand, on Time Sheets that were discarded after Lapidus's secretary inputted information from them into a computer to generate and print paper bills, or invoices, that were sent to Defendants after Lapidus checked them for accuracy. Lapidus swears that such invoices are accurate contemporaneous records of the time he spent on the matter, state which attorney performed services, the services provided, the amount of time spent thereon, and the amount billed.[11]

Defendants have not demonstrated that Plaintiffs have violated DR 9-102. There is no dispute that Plaintiffs retained and provided Defendants with paper copies of bills.[12] While Defendants urge that the bills are not enough, undoubtedly, many attorneys input their time directly into a computer or electronic device, foregoing the use of paper time sheets entirely. Defendants have not demonstrated that Plaintiffs' practice violates DR 9-101 [d] [9] and DR 9-101 [d] [10], as preliminary Time Sheets do not fall into the category of "all financial transactions in their records of receipts and disbursements, in their special accounts, in their

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[11]It is unclear how Fass's or Goldsmith's bills were handled, or whether Time Sheets exist for them, and the court does not here opine as to whether Plaintiffs will have sufficient evidence to prove their entitlement to the fees at trial.

[12]On June 22, 2006, in a discovery conference order, Plaintiffs were ordered to produce certain time records. There has never been a discovery issue in this case concerning bills.

ledger books or similar records" (DR 9-101 [d] [9]), or another provision of DR 9-101 [d]. Furthermore, DR 9-101 [d] [10] requires only that an attorney retain a photocopy of the documents he or she is required to keep under DR 9-101 [d].

While, in Reply, Defendants argue that it is "incomprehensible in today's environment that time entries cannot be retrieved from the computer so they can be matched against the bills" (Def. Reply and Op. Aff., ¶ 13), this is not the basis of their motion, and they have made no showing that they have demanded discovery concerning this issue, if it is indeed an issue. In addition, the cases to which Defendants cite to support the proposition that there must be reasonable documentation to support an attorney's fee claim do not aid them where they have not demonstrated that the bills are not sufficient to do so.[13]

As another basis for summary judgment, also apparently premised on violation of the Disciplinary Rules,[14] Defendants argue that they were defrauded because Plaintiffs failed to

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[13]For example, Defendants cite to *Dresses for Less v Lenroth Realty Co.* (260 AD2d 220, 221 [1st Dept 1999]) in which the Court rejected an attorney's fees claim where the attorney "simply estimated the percentage of his time devoted to work on this matter" and thus there was no evidence upon which the Court could fashion a remedy for the proper amount of fees without resorting to conjecture. In *520 East 72nd Commercial Corp. v 520 East 72nd Owners Corp.* (691 F Supp 728 [SD NY 1988], *affd* 872 F2d 1021 [2d Cir 1989]), the court found that a contingency fee agreement was unenforceable as grossly disproportional to services provided, and unconscionable when entered and, due to the law firm's failure to maintain time records, permitted only a quantum meruit recovery of $10,000 for attorney's fees. In *Carroll Air Servs. v Northland Aviation* (225 AD2d 870, 872 [3d Dept 1996]), the Court stated "in the absence of contemporaneous time records or, for that matter, any showing of the legal services necessarily rendered on plaintiff's behalf, the time expended or the applicable hourly rate, there was no basis for the award of counsel fees made by Supreme Court." The court does not here opine as to whether Plaintiffs will ultimately be able to prove their claim, but notes that in *Red Apple Supermarkets v Malone & Hyde* (259 AD2d 357, 358 [1st Dept 1999]), the Court stated that "[d]efendant attorneys' computer generated billing statements show the work that was performed each day and contain an abundance of detail that was more than sufficient to support a request of $186,000 for the services of two law firms in collecting a $2.3 million loan."

[14]Defendants cite to the definition of fraud from 22 NYCRR 1200.1 which states that:

"(i) Fraud does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing

disclose that Lapidus was marking up Fass's time-based hourly billing rates, an omission, Defendants claim, of a material fact concerning Defendants' representation of Plaintiffs, upon which they relied. Defendants further argue that Plaintiffs defrauded them because the Retainer Agreement provides for billing based on an hourly rate for time expended, and they were thus wrongly led to believe that original and contemporaneous records would be kept in order to resolve billing issues that might later arise.

However, "issues of material misrepresentation and reasonable reliance, essential elements of a fraud claim, are not subject to summary disposition (*Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]). In addition, Defendants have not demonstrated that contemporaneous time records were not kept, and their argument about Plaintiffs' alleged failure to retain such records involves conduct that had yet to occur at the time the parties entered into the Retainer Agreement (*see Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958] [stating that the essential elements of a cause of action for fraud are "representation of a material existing fact, falsity, *scienter*, deception and injury"]).

Finally, in their memorandum of law only, Defendants complain that Lapidus engaged in a business transaction brokering for them a mortgage at above-market interest rates. The court is quite familiar with this case, having had numerous encounters with counsel for the parties during the course of this litigation. Defendants' assertion that Lapidus acted as a broker on a mortgage, however, is not one with which the court is familiar, is not in Defendants' pleadings, is made only in a memorandum of law, and may otherwise not be granted because it is not supported with admissible evidence (*Zuckerman*, 49 NY2d at 562; *Alvarez*, 68 NY2d at 324).

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failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another."

Plaintiffs' CPLR 3124 Cross Motion to Compel (Motion Sequence 005)

Plaintiffs move, pursuant to CPLR 3124, to compel Defendants to provide a copy of the settlement agreement (Settlement Agreement) entered into by the litigants in the Underlying Case, one of whom is not a party to this action. Plaintiffs state that Defendants calculate their damages for the legal malpractice claim as the difference between what the Urban Archaeology business would have been worth had they been able to purchase it (exercise the option), and the amount actually received by, or due to, Defendants from the business's founder, Gil Shapiro, who bought out Defendants' interest. Plaintiffs contend that the best evidence of the buy-out figure is the Settlement Agreement, which Defendants previously agreed, but now refuse, to produce.

The CPLR directs that there be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The test of whether discovery sought is material and necessary is one of "usefulness and reason" (*Allen*, 21 NY2d at 406), and the court's discretion in supervising disclosure is broad and will not be disturbed unless clear abuse is shown (*Matter of People v Pharmacia Corp.*, 39 AD3d 1117 [3d Dept 2007]; *Bohlke v General Elec. Co.*, 27 AD3d 924, 924 [3rd Dept 2006]; *Daniels v City of New York*, 291 AD2d 260, 260 [1st Dept 2002] ["[i]t is settled that Supreme Court is vested with broad discretion to supervise disclosure and that its orders in this regard should not be disturbed absent an abuse of that discretion"]; *Kamhi v Dependable Delivery Service, Inc.*, 234 AD2d 34 [1st Dept 1996]).

Defendants ask that the court review the Settlement Agreement in camera due to concerns

that information in it will be disclosed that is confidential to Reiver, and his former business associate, non-party Gil Shapiro. They also argue that the information in the Settlement Agreement is irrelevant, and that Plaintiffs withdrew their previous discovery demand for information about Reiver's current financial information, and now seek, improperly, to obtain that information from the agreement.

While the courts may prevent involuntary disclosure where materials sought have no relevance (*Matter of New York County Data Entry Worker Prod. Liab. Litig.*, 162 Misc 2d 263 [Sup Ct, NY County 1994], *affd* 222 AD2d 381 [1st Dept 1995]), Defendants have not countered, or disputed, Plaintiffs' contention concerning calculation of the damages element of their legal malpractice claim, and their arguments that the information in the Settlement Agreement is irrelevant is conclusory. Moreover, Defendants do not state that the Settlement Agreement contains a confidentiality clause. In any event, the court is not without the means to fashion an order that will aid in the protection of confidential information from disclosure (*see e.g. Whalen v Kawasaki Motors Corp.*, 175 AD2d 667, 669 [4th Dept 1991]), as are the parties themselves, through an agreement, and without court intervention.

However, as the Settlement Agreement concerns the interests of a non-party to this action, any disclosure order must be made on adequate notice to that non-party, as a signatory to the Settlement Agreement. Accordingly, the cross motion to compel is denied, without prejudice.

Defendants' CPLR 3126 Motion to Preclude (Motion Sequence 006)

In motion sequence 006, a separate motion filed by Defendants a short time after the summary judgment and CPLR 3126 motions discussed above, Defendants seek an order

precluding Plaintiffs from offering evidence at trial to support their causes of action. On this motion, Defendants merely repeat and add to many of the arguments made on their previous motion. Thus, to the extent that they argue for preclusion because: the actual (percentage) division of fees was not disclosed (Def. Mov. Aff., ¶ 10); Plaintiffs have not produced Time Sheets; or due to the "deceit [Lapidus] has evidenced in respect to his time records and an undisclosed fee sharing agreement " (*id.*, ¶ 14), the court will not entertain this rehashing of arguments, and the motion is denied.

To the extent that Defendants move for preclusion because Plaintiffs have not produced the agreement that may exist between Fass and Associates, it is also denied. "While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion for the court, an order of preclusion should only be imposed where the moving party establishes that the failure to disclose is willful and contumacious" (*Anthony v Anthony*, 24 AD3d 694 [2d Dept 2005] [citations omitted]). Defendants have not demonstrated that Plaintiffs' failure to produce the agreement was contumacious, or in bad faith or, that such a document exists.

Defendants' motion for an order for the continued deposition of non-party Fass is also denied. Defendants have not demonstrated that they have requested that Fass appear for a continued deposition, and the motion is otherwise unsubstantiated. Finally, to the extent that Defendants may be making other arguments on this motion, or attempting to seek additional relief from this court, such requests are denied as Defendants' arguments are not adequately articulated, substantiated, or separated from arguments in motion sequence 005, and the relief is not requested in the notice of motion, rendering the court unable to fashion meaningful relief.

Defendants' CPLR 2221 Motion to Re-Argue (Motion Sequence 006)

As summary judgment has not been granted, Defendants' motion to re-argue this court's order, dated May 21, 2007, lifting the CPLR 3214 stay of discovery, is denied as moot.

Plaintiffs' Cross Motion for Sanctions Pursuant to 22 NYCRR 130-1.1 (Motion Sequence 006)

Plaintiffs move for sanctions based on what they characterize as Defendants' obstructionist approach to discovery and frivolous motion practice in this matter in order to delay resolution of the matter. Plaintiffs also seek sanctions based on the "repeated unilateral last minute reversal on agreements [and] repeated false statements to the Court and its staff" by Defendants and their counsel (Pl. Mov. Aff., ¶ 2).

"Conduct is frivolous and can be sanctioned under 22 NYCRR 130-1.1 if it is 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law' or it is 'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another'" (*Ofman v Campos*, 12 AD3d 581, 582 [2d Dept 2004], quoting 22 NYCRR 130-1.1 [c] [1] [2] [finding trial court's imposition of sanctions in the amount of $250.00 provident where party made three consecutive motions seeking essentially the same relief in each]). The proper use of sanctions is an appropriate way to discourage abusive litigation tactics (*Watson v City of New York*, 178 AD2d 126, 128 [1st Dept 1991]).

While an overall pattern of conduct may form the basis for sanctions, which are appropriate where rulings are "ignored, despite the court's warnings to cease delaying tactics" (*see Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33-34 [1st Dept 1999), Defendants' request for

relief in motion sequence 006 was not entirely duplicative of the relief sought in their earlier motion, and despite their complaint of Defendants' discovery delays, Plaintiffs did little to aid in the speedy resolution of this case prior to their retention of present counsel. Accordingly, Plaintiffs have not demonstrated that sanctions are warranted.

Plaintiffs' Cross Motion to Compel (Motion Sequence 006)

Plaintiffs seek an order compelling Defendants to produce any and all documents that would tend to substantiate or belie Reiver's June 25, 2007 testimony that he had the financial capability to purchase Urban Archaeology. Plaintiffs state that one of their defenses to the legal malpractice action is that Reiver did not have the financial resources to purchase Urban Archaeology, because he was in the process of purchasing another property at that time, and not financially able to purchase both. Previously, Plaintiffs' counsel sent an e-mail message to Defendants' counsel requesting that Defendants produce documents, for the period from January to July 2003, to substantiate Reiver's deposition testimony that he was financially able to purchase Urban Archaeology during that time period.

Defendants oppose the motion, arguing that Plaintiffs' motion to compel them "to produce a net worth statement with back up is both oppressive and will not lead to relevant or material evidence and is only being sought so [Plaintiffs] can ascertain whether [Defendants] are viable recovery sources for their anticipated judgment" (Def. Reply and Op. Aff., ¶ 4). Defendants contend that because business purchasers often obtain third-party financing, Defendants' ability to purchase an asset is not relevant to their claim that Plaintiffs failed to adequately disclose the material risks of not exercising the option to purchase Urban Archaeology in accordance with its terms.

Whatever the common financing practices of the business world, they are not dispositive to circumstances in this particular case, and Defendants' assertion that a demand for documents concerning a six-month period in 2003 is a pretext, made so that Plaintiffs may assess Defendants' current net worth, is unsupported, and thus conjecture. Plaintiffs' demand, however, for documents ranging from purchase invoices and sale receipts, to banks statements and appraisals for several businesses is not sufficiently narrowly tailored, and the motion is denied, without prejudice to address the issue again at the next discovery conference, if so-advised by counsel, provided that Plaintiffs formulate a more narrowly-tailored demand.

Accordingly, it is

ORDERED that the defendants/third-party plaintiffs' motion for summary judgment dismissing the complaint (motion sequence 005) is denied; and it is further

ORDERED that the plaintiffs' cross motion to compel (motion sequence 005) is denied without prejudice; and it is further

ORDERED that the defendants/third party plaintiffs' motion to preclude and re-argue (motion sequence 006) is denied; and it is further

ORDERED that the plaintiffs' cross motion for the imposition of sanctions and to compel discovery (motion sequence 006) is denied; with leave to revisit the discovery issue at the next conference in accordance with this decision.

This Constitutes the Decision and Order of the Court.

Dated: March 24, 2008

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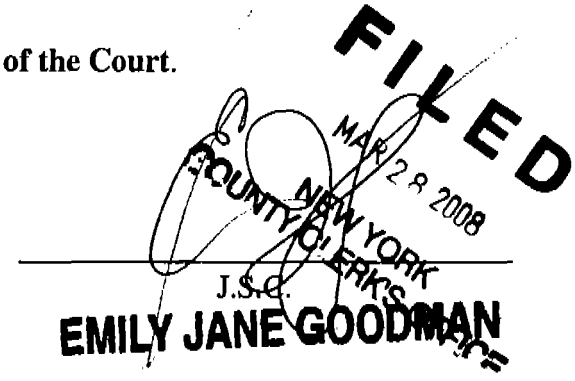

J.S.C.
EMILY JANE GOODMAN