BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

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| PEOPLE OF THE STATE OF ILLINOIS,<br>Complainant, | ) | PCB 96-98 |
| v. | ) | Enforcement |
| SKOKIE VALLEY ASPHALT, CO., INC., EDWIN L. FREDERICK, JR., individually and as owner and President of Skokie Valley Asphalt Co., Inc., and RICHARD J. FREDERICK, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc.,<br>Respondents. | ) | |

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Respondents' Post Hearing Closing Arguments on the Issue of the Complainant's Request for Attorneys' Fees and Costs , a copy of which is hereby served upon you.

David S. O'Neill

January 19, 2007

David S. O'Neill, Attorney at Law
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Chicago, IL 60630-1249
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## RESPONDENTS' CLOSING ARGUMENT

The Respondents, SKOKIE VALLEY ASPHALT, CO., INC., EDWIN L. FREDERICK, JR., individually and as owner and President of Skokie Valley Asphalt Co., Inc., and RICHARD J. FREDERICK, individually and as owner and Vice President of Skokie Valley Asphalt Co., Inc.,, by and through its attorney, David S. O'Neill, herein present their Post Hearing Closing Arguments on the Issue of the Complainant's Request for Attorneys' Fees and Costs and in support thereof states as follows:

## FACTUAL BACKGROUND

Skokie Valley was an asphalt-paving contractor with its main office located at 768 South Lake Street, Grayslake, Lake County (site). (Tr. at 277-78.) East of the site is the Avon-Fremont Drainage Ditch that flows north through the town of Grayslake into a lake called Third Lake. (Tr. at 145-46; Comp. Exs 25 and 32.) The lake, Grayslake, for which the town is named, is located to the northeast of the site. (Comp. Ex. 32.) On April 4, 1986, the Agency issued a site specific NPDES permit to Skokie Valley for the storm water runoff from the site. (Tr. at 137, Comp. Ex.1.) Skokie Valley was permitted to discharge storm water into Grayslake under

NPDES permit No. IL 0065005. (Tr. at 221;Comp.Ex. 1.) The permit, which became effective on May 4, 1986, and expired on March 1, 1991, required Skokie Valley to submit monthly DMRs. (Tr. at 27-29, Comp. Ex.1.) To comply with this requirement, Skokie Valley would have an employee take a sample from a discharge pipe and deliver the sample to North Shore Sanitary District for testing. (Tr. at 283.) The results were mailed to Skokie Valley and the DMR was usually completed by Skokie Valley dispatcher Bob Christiansen and signed by Richard Frederick as an officer of Skokie Valley Asphalt. (Tr. at 286, 313.)

Skokie Valley was an Illinois corporation until its sale to Curran Contracting and dissolution in 1998. (Tr. at 299-300, 432.) The sale was a sale of assets and included all of the records of Skokie Valley. (Tr. at 319-21.) Edwin Frederick was the president of Skokie Valley from 1978 until its sale in 1998. (Tr. at 432-35.) Edwin Frederick's brother, Richard Frederick, was the vice president of Skokie Valley from 1978 until its sale in 1998. (Tr. at. 276.) Edwin and Richard Frederick each owned 50 percent of Skokie Valley, were the only shareholders of Skokie Valley and were the only corporate officers of Skokie Valley. (Tr. at 435-37.)

Richard Frederick was responsible for the scheduling of all jobs, estimating, budgeting, hiring, and controlling of all employees and subcontractors, equipment purchasing and repair and review of equipment. (Tr. at 279-80.) Edwin Frederick was responsible for estimating, insurance issues, management of payroll, job-site meetings, consultation with foremen and engineers, and liaison with government officials and customers. (Tr. at 282.)

Prior to 1978, Liberty Asphalt operated the Skokie Valley site. (Tr. at 124.) Liberty Asphalt was an asphalt manufacturing company owned and operated by Edwin and Richard Frederick's parents. (Tr. at 279.) Edwin Frederick worked for Liberty Asphalt for over 20 years. *(Id.)* Neither Richard Frederick or Edwin Frederick were owners or management participants in Liberty Asphalt. (*Id.*)

From 1978 to at least 1981 the site was operated as an asphalt plant. (Tr. at 279, 294-96.) The Respondents sold the plant and had it removed in 1981 or 1982. (Id.) Since the removal of

the plant, the site was used as an office, and a maintenance and storage garage for equipment, trucks, asphalt liquid stored in above-ground tanks, asphalt primer coatings stored in above-ground storage tanks and other above-ground storage tanks. (Tr. at 278, 438, Comp. Ex. 32 and 34.) The site housed the estimating department, the office and all the people who did billing. (Tr. at 277-78.)

The land between the site and the Avon-Fremont Drainage Ditch is a working farm field. (Tr. at 359.) A farm drainage tile ran through the site toward the Avon-Fremont Drainage Ditch. (Tr. at 340-41.) The outfall from the tile drains to the ditch due east of the site. (Comp. Ex.22.) From December 1994 through April 1995, there was an oily discharge in the Avon Fremont Drainage Ditch. (Tr. at 340-41, Comp. Ex.34.) Upon discovering the oily sheen on the water in the tile, the respondents plugged it. (Tr. at. 340.) After the respondents plugged the drain tile on their property, the oil discharge in the ditch subsided and stopped. (Tr. at 361-62; Comp. Ex. 34.)

In March 1995, the Agency sampled the effluent from the farm drainage tile that ran through the site at the Avon-Fremont drainage ditch. (Tr. at 152.) The concentration of oil gravimetric of the sample contained 664 milligrams of oil per liter. (Tr. at 155-56; Comp. Ex. 21.)

The Agency does not have any records showing that Skokie Valley submitted any DMR's in 1986 or 1987. (Tr. at 49-50; Comp. Exs. 1, 8A and 26.) According to the Agency's DMR Submission Record, Skokie Valley submitted two DMRs in 1988, five DMRs in 1989, and eleven in 1990. (Tr. at 51-52; Comp.Exs. 1, 8 and 26.) The Agency does not have a record of Skokie Valley submitting a DMR for the month of July in 1992. (Tr. at 53; Comp.Ex. 8F.)

The DMR submitted for December 1990, contained the same data as the submitted for November 1990. (Tr. at 37-38; Comp.Exs.2-3.) The DMR originally submitted by Skokie Valley for February 1991 contained the same data as the report submitted for January 1991. (Tr. at 40; Comp.Exs.4-5.) Skokie Valley subsequently submitted a corrected DMR for February of

1991. (Tr. at 485. Resp.Ex.4.) Attached to the letter are non-duplicative DMRs for the two months in question. (Id.)

The DMR that Skokie Valley submitted in August 1991 indicated a 30-day average concentration for TSS of 55 mg/L and a daily maximum concentration for TSS of 55 mg/L. (Tr. at 54; Comp.Ex.9.) The DMR that Skokie Valley submitted for September 1991 indicated that their storm water discharge had a 30-day average concentration for TSS of 25 mg/L. (Tr. at 54-55;Comp.Ex.10.) The DMR that Skokie Valley submitted for October 1991 indicated that their storm water discharge had a 30-day average concentration for TSS of 41 mg/L and a daily maximum concentration of 41 mg/L. (Tr. at 55;Comp.Ex.11.) The DMR that Skokie Valley submitted for February 1992 showed that their storm water discharge had a 30-day average concentration for TSS of 18 mg/L .(Tr. at 55-56;Comp.Ex.12.) The DMRs that Skokie Valley submitted for November and December 1992 indicated that their storm water discharge had a 30-day average concentration for TSS of 22 mg/L and 24 mg/L respectively. (Tr. at 56; Comp.Exs.13 and 14.) The DMR that Skokie Valley submitted for May 1993 indicated that their storm water discharge had a 30-day average concentration for TSS of 24 mg/L. (Tr. at 56-57;Comp.Ex.15.) The DMR that Skokie Valley submitted for June 1993 indicated that their storm water discharge had a 30-day average concentration for TSS of 35 mg/L and a daily maximum concentration of 35 mg/L. (Tr. at 57;Comp.Ex.16.) The DMR that Skokie Valley submitted for April 1995 indicated that their storm water discharge had a 30-day average concentration for TSS of 126 mg/L and a daily maximum concentration of 126 mg/L. (Tr. at 57-58; Comp.Ex.17.)

The Complainant's witness, Mr Garetson, testified that the high levels of TDS were the result of a number of factors beyond the control of the permit holder including rain fall and run off from neighboring farm fields. (Trial at 78.) Mr. Huff testified that the IEPA had decided before this case was filed that the TDS standards that were routinely inserted in NPDES permits at the time that Skokie Valley's permit was issued were too stringent. They subsequently changed the standard and did not enforce against the exceedences in existing permits (Id at 414-415.)

In discussion with the IEPA the Respondents were informed that they would not be required to reapply for an NPDES permit. There permit requirement could be covered by an industry permit. For reasons not known to the Respondents. The IEPA changed the requirement. (Id. at 416-417) The Agency received Skokie Valley's NPDES permit renewal application on June 5, 1991. (Tr. at 42; Comp.Ex. 6.) Because the NPDES permit expired in March of 1991, the Agency sent a compliance inquiry letter to Skokie Valley in April 1991. (Tr. at 42-46; Comp.Ex.6.) The Respondents discussed the idea of coverage under a blanket permit instead of an individual NPDES permit with an Agency representative. (Tr. at 322-325.) To date, the IEPA has not issued the NPDES permit for the site. It appears that an NPDES permit was not required.

Agency inspector Kallis inspected the site on May 21, 1991, even though he did not have a warrant to enter the site. (Tr. at 139-40; Comp.Ex.19.) Donald Klopke worked in the Agency's Office of Emergency Response on April 19, 1995, when he inspected the site, the Avon-Fremont drainage ditch and the surrounding area. (Tr. at 218-22.) On that day, Mr. Klopke inspected the site with fellow Agency employees Ken Savage and Betty Lavis – the on-scene coordinator from the U.S. EPA. (Tr. at 227-28.; Comp.Ex.25.) Mr. Klopke saw the oil sheen on the surface of the ditch. (Tr. at 222.) Ms. Lavis prepared a pollution report on May 3, 1995 describing her visit to the site on April 18, 1995, that mistakenly stated the source of the petroleum release into the Avon-Fremont drainage ditch was Skokie Valley. (Tr. at 227-28; Comp.Ex.25.) In her report, Ms. Lavis wrote that she had planned to conduct additional sampling, but that she was informed by Edwin and Richard Frederick who informed her that they had found a leak and would address the problem with the assistance of their consulting engineer, Mr James Huff. (Tr. at 228-31; Comp.Ex.25.) The Respondents signed a notice of federal interest in an oil pollution incident and agreed to submit a clean-up project plan to the U.S. EPA for review. (Comp.Ex.25.) The U.S. EPA requested Skokie Valley to search for additional sources for the release on their site and suspected that there might be a pool of oil product accumulated under their site. (Id.) Three USTs that were installed in 1978 by the former owner of the site – Liberty Asphalt – were removed from the site after April 1995 incident at the total expense of Skokie Valley Asphalt. Edwin Frederick and Richard Frederick individually and as

officers of Skokie Valley Asphalt. (Comp. Ex. 34, pg. 8.). This amount was in excess of $150,000 at the time of the hearing and has since risen to over $200,000.

Agency inspector Chris Kallis also investigated the site in 1995. On March 1, 1995, Mr. Kallis took samples from the point where the farm drainage tile discharged into the ditch, observing at the time, an oil sheen coming from the farm drainage tile and downstream in the ditch. (Tr. at 151-55.) Mr. Kallis did not notice any sign of contaminant upstream from the drainage tile. (Tr. at 154.)

On April 22, 2995, the Respondents contacted and retained environmental engineer James Huff after finding a visible sheen of oil on an opened drain tile on Respondents' property and after no other party including the Illinois EPA and the USEPA and other landowners abutting the site took ant action to address the problem. (Tr. at 347-48.) On Huff's advice, the respondents plugged the drain tile on respondents' property at the total expense of the Respondents. (Tr. at 340-41.) Solely at their own expense, the Respondents were able to resolve the problem of releases to the Avon Ditch. No releases have occurred since Respondents plugged the drain tile. (Tr. at 348.) Huff visited the site a few days later and saw that the drain tile had been plugged and the soil brought to grade. (Tr. at 352.) The Respondents addressed the oil sheen problem by having absorbent booms placed in the Avon-Fremont drainage ditch by the USEPA. (Tr. at 348.) He noticed an oil sheen near where the booms were in place and observed that the oil sheen did not exist a mile downstream from were the drain tile empties into the ditch. (Tr. at 348-49.)

On April 25, 1995, Respondents excavated a trench at the site to again locate the drain tile and Huff noticed oil in the center of the trench. On April 28, 1995, the Respondents discovered that an underground heating oil tank contained in water and reported a leaking underground storage tank incident to the Illinois Emergency Management Agency (IEMA). (Tr. at 363-68.) On April 28, 1995, the Respondents followed 3's recommendation and purchased higher quality booms and placed them in the drainage ditch. (Tr. at 351-352.)

After removing the underground storage tank, Huff determined that the release from that tank was minor and now thinks the oil sheen on the drainage ditch from 1994 to 1995 was caused by one or more items on the south side of the site. (Tr. at 386-87.) Huff ultimately concluded that the release to the drainage ditch was attributed to the abandoned gasoline and diesel lines from an above ground storage tank to the former pump island, that had been installed by previous site owner. (Comp. Ex. 34.)

After the sale of the site, and continuing at least until the time of the hearing, Edwin and Richard Frederick continue to fund the effort to eliminate any potential source of a release from the site. (Tr. at 387-88.) To date, the Fredericks have paid Huff at least $150, 000 for environmental work performed at the site. (Tr. at 467-68.)

## PROCEDURAL HISTORY

On November 3, 1995, the Complainant filed a complaint Skokie Valley Asphalt Co., Inc. The complaint alleged violations dating back to 1986. Prior to the filing of the Complaint the Respondent worked in good faith to resolve the issues on which the complaint was based and was of the opinion that the matter had been resolved with the Attorney General's office. The Complainant filed a first amended complaint that added an additional count against Skokie Valley Asphalt, but did not add any additional Respondents on December 29, 1997.

In June of 1999, the first discovery period for this matter was established. The Complainant's First Set of Interrogatories and First Request for Production were sent to Skokie Valley Asphalt on June 10, 1999. The Respondent filed complete responses to Complainant's discovery request on January 21, 2000. The Respondent made no discovery request to Complainant during the first discovery period.

The Board allowed the Complainant's a second discovery period on April 7, 2007. Under a hearing officer order, all discovery was to be completed by October 20, 2000. During this discovery period, the parties agreed to a settlement of the matter. The settlement included the execution of a consent decree which was to be prepared by the Complainant and the payment of

a penalty of approximately $20,000.00. Neither party requested any further discovery during this second discovery period.

Mr. Halloran left the Attorney General's office before executing the consent decree with the Respondent. Ms Kelly Cartwright filed an appearance in this matter on May 12, 2000. The Respondent and its attorney discussed the settlement with Ms. Cartwright and she recognized the existence of the agreement and the need for the Complainant to prepare the consent decree but she failed to do so.

On April 16, 2001, the Complainant filed a motion for summary judgment. The Respondent filed a response to the motion for summary judgment on April 30, 2001 and the motion was denied by the Board on May, 2001. The Board also denied the Complainant's motion for reconsideration of its order denying summary judgment on June 6, 2001.

In September of 2001, the hearing officer set a third discovery schedule for this matter at the request of the Complainant. All written discovery was to be completed by November 16, 2001 and all depositions were to be completed by December 17, 2001. The Respondent fully complied with the Complainant's request for discovery. The Respondents made no request for discovery upon the Complainant. On May 2, 2002, the matter was set for hearing. The hearing was scheduled for June 27, 2002. However, prior to the hearing, the parties agreed to settle the matter on the terms previously agreed to by the parties. Again, the Complainant was supposed to prepare the consent decree but failed to do so.

On June 14, 2002, Mr. Cohen filed an appearance on behalf of the Complainant. On the motion of the Complainant, the Board canceled the hearing that was scheduled for June 27, 2002. The Respondents agreed to the canceling of the hearing based on representations made by Mr. Cohen that he would honor the settlement agreement made with Ms. Cartwright. However, instead of preparing the required consent decree, Mr. Cohen filed a second amended complaint in which Mr. Cohen added Mr. Richard and Mr. Edwin Frederick as Respondents. The second

amended complaint was filed with the Board on July 26, 2002, without previous notice to the Respondent's attorney.

On July 30, 2002, Mr. Joel Sternstein filed an appearance on behalf the Complainant in clear violation of the Board's procedural rules which prohibits a former Board employee from representing a client in a matter before the Board if that attorney had previous worked on that case while a Board employee. While both the Board, the Complainant and Mr. Sternstein knew that Mr. Sternstein was previously a Board employee who had done a substantial amount of work in this case at the Board, they allowed Mr. Sternstein to file his appearance, work on the matter and failed to divulge the conflict and breach of the rules to the Respondent or the Respondent's attorney.

On July 26, 2002, a full fifty-six months after the first amended complaint was filed and eighty-one months after the original complaint was filed and fourteen years after the alleged violations first occurred, the Complainant filed a second amended complaint. In the complaint, the Complainant added the Fredericks as Respondents. The second amended complaint alleged that the Fredericks violated Sections 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f)(2002)), as well as Sections 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a) of the Board's regulations. The complaint alleged that the Fredericks falsified discharge monitoring reports, submitted a late application for a National Pollutant Discharge Elimination System (NPDES) permit, failed to comply with sampling and reporting requirements in their NPDES permits, discharged oil into a drainage ditch, and violated NPDES permit effluent limits.

On September 25, 2002, the Respondents filed a Motion to Strike Complainant's Second Amended Complaint because the Complainant's failed to ask leave of the Board to file its Second Amended Complaint as required by the Board's Procedural Rules. The Complainant's filed a response to the Respondents Motion. The Response was prepared by Mr. Sternstein who was not supposed to be practicing before the Board on this matter. Even though Mr Sternstein's response failed to address the main issue put forth in the Respondent's motion, the Board ruled

in favor of their former employee. In its Order of October 11, 2002, the Board found that the Complainant did, in fact again violate Board procedural rules by failing to ask leave of the Board to file an amended complaint. However, the Board said they would not enforce their procedural rules against Mr. Sternstein and the Complainants choosing to allow the filing of the Second Amended Complaint in the interest of "judicial economy" and at the expense of the Respondent's right to due process. As a result of this ruling in favor of Mr. Sternstein, the Respondents lost their right to contest the Complainant's Second Amended Complaint. To date, Complainant's Second Amended Complaint has not been properly served on any of the Respondents.

On October 17, 2002, the Board accepted the People's second amended complaint. People v. Skokie Valley Asphalt, CO., PCB 96-98 slip op. at 3 (Oct. 17, 2002). On December 20, 2002, the Respondents filed Respondents' Answer and Affirmative Defense to the Complainant's Second Amended Complaint. In this filing the Respondents offered an affirmative defense based on laches.

On January 3, 2003, the Complainant, through Mr. Sternstein, filed a trivial Motion to Deem Facts Admitted and for Summary Judgments. The Respondents filed a response to Mr. Sternstein's Motion on January 17, 2003. On March 20, 2003, the Board issued an order that denied the Complainant's motion for summary judgment, accepted the Respondents' answer into the record, and directed the hearing officer to proceed to hearing. People v. Skokie Valley Asphalt, Co., PCB 96-98 (June 5, 2003).

However, in an action completely in violation of its own procedural rules and in violation of any semblance of justice and due process, the Board sent Mr. Sternstein a copy of the decision apparently prior to the decision being made available to the general public or the Respondents. The copy of the decision made available to Mr. Sternstein included retractions from an earlier draft of the Order. The document or the fact that the Order was provided to Mr. Sternstein was never divulged to the Respondents by the Board or the Complainant. The Respondents first became aware of this document when it received the Complainant's partial response to its

request for documents with respect to legal fees. The copy of the document discovered by the Respondents from the Complainant's files has a hand written note on it which says "Mitch– enjoy – we are probably not supposed to see the crossed-out stuff! – Joel". The Board has acted diligently to prevent the Respondents from including any information concerning Mr. Sternstein in its discovery efforts.

On April 18, 2003, the Complainants filed a Motion to Dismiss or Strike Respondent's Affirmative Defenses. The Respondents only offered one affirmative defense based on laches and equitable estoppel. In its response to the Complainant's Second Amended Complaint, the Respondent clearly entitled the section including its Affirmative Defense as "Affirmative Defense" and not "Affirmative Defenses. The Respondents simply delineated the elements of the affirmative defense in the Response as is proper practice.

However, the Board has allowed the Complainant to confuse this issue with claims that the Respondents had filed multiple defenses. The Board has failed to sanction the Complainants for filing numerous trivial actions based on the fabricated multiple defenses position and instead has cause the Respondent to spend a great deal of time and money addressing a non-issue fabricated by the Complainant and adopted by the Board. In its Order of June 5, 2003, the Board struck the elements of the Respondents affirmative defense of laches but stated that it would allow the affirmative defense of laches. The Board denied the Respondents' motion to reconsider the June 5, 2003 order in a July 24, 2003 Board order. *See* People v. Skokie Valley Asphalt, Co., PCB 96-98 (July 24, 2003). In its Order of July 24, 2003, the Board attempted to clarify a decision that never should have been entered by saying that the issue of laches could still be considered.

A hearing was held on October 30 and 31, 2002 at the Village Hall in Libertyville. Six witnesses testified. The People filed 42 Exhibits, and the Respondents filed eight exhibits. All offered exhibits were accepted into evidence. On November 3, 2003, Board Hearing Officer, Carol Sudman, issued a hearing repot that set a briefing schedule and found the witnesses credible.

On January 15, 2004, the Complainant filed its Closing Argument and Post Trial Brief in the above captioned matter along with a Motion to File Instanter which was required because the closing argument was filed after the deadline for filing set by the hearing officer's order. Again, the Board allowed the Complainant to defy a Board order and allowed the brief to be filed late. The Board did not allow the Respondents extra time respond to the Complainants late filed Closing argument. On March 12, 2004, the Respondents filed their closing brief on time and in accordance with the Board's imposed deadline.

In the Closing Argument and Post Trial Brief, the Complainant failed to ask for attorneys' fees with the specificity required under Illinois law and instead made an ambiguous plea for "Complainant's costs and fees". (Complainant's Closing Argument of January 15, 2004 at 48). On April 15th, 2004, the Complainant filed its Closing Rebuttal Argument and Reply Brief which included a petition for attorneys' fees and costs. (Complainant's Rebuttal Argument and Reply Brief at 38.) On May 17, 2004, the Respondents filed a Motion to Strike and Objections to Complainant's Closing Argument and Reply Brief, in which, in part, the Respondents objected to the Complainant introducing materials beyond the scope of rebuttal in the filing including the petition for attorney's fees and costs. (Resp. Mot. at 1-2.) In its Order of September 2, 2004 the Board failed to address the issue of whether or not the Complainant could seek attorneys' fees if it had not raised the issue at hearing or in closing arguments. Again, the Board allowed the Complainant to act in clear defiance of the Board's procedural rules

In its order of September 2, 2004, the Board granted the Respondents motion to strike in regards to attorneys' fees and costs. (Order of September 2, 2004.) The issue of attorneys' fees was not raised by the Complainant at hearing or in its closing argument and because the Board granted the Respondents' motion to strike "that portion of the People's reply that addresses attorney fees and cost exceed the scope of the arguments made in the Respondents' brief..." (Id at 6.) Therefore, the issue of attorneys' fees and costs was never brought to the Board for consideration.

However, the Board somehow granted the Complainant's non-existent request for attorneys' fees and costs (Id. at 23.) and in doing so the Board stated that it would "withhold a decision regarding attorney fees and cost until the matter is **fully** addressed by the parties." (Id. at 2.) (emphasis added). On December 16, 2004 the Board contradicted its Order of September 2, 2004 by issuing an order in which it stated that it would not hold any hearings on the issues of fees and costs. (Order of December 16, 2004 at 3.) In doing so, the Board, without basis or justification, denied the Respondents the right to fully address the issue of attorneys' fees and cost that the Board had granted to the Respondents in the Order of September 2, 2004.

April 7, 2005, the Board issued an Order in which the Board granted the Respondents' motion for extension of time to allow for discovery. The Order states that "the Board will grant the Respondents additional time in order to conduct discovery..." (Order of April 7, 2005 at 3). This Order again contradicted the Board's granting of the Respondents' right to fully address the attorneys' fees and costs issues in the September 2, 2004 Order by stating that "the Board grants the Respondents' motion for extension of time to allow for **limited** discovery". (Id. At 1.) (Emphasis added.) In the Conclusion of the Order, the Board "grants Respondents' motion for extension of time and authorizes Respondents to conduct discovery on the attorney fees issue". (Id at 4.). The Board also directed the hearing officer to proceed to hearing as expeditiously as possible. (Id.) It is difficult rationalize why the board can grant the Complainant four full discovery periods, including a discovery period after the Respondents had complied with the first three discovery requests, then sold their business including all corporate records and then were unwilling to allow the Respondents discovery on the issue of Attorneys' fees or even to require the Complainants to comply with the limited discovery that was supposed to be allowed.

On April 25, 2005, the Respondents filed with the Board the "Respondents' First Set of Interrogatories Regarding Attorneys' Fees, Costs and Expenses", Respondents' First Set of Document Requests Regarding Attorneys' Fees, Costs and Expenses", "Respondents' First Request for Admission of Facts Regarding Attorneys' Fees, Costs and Expenses" and "Notice of Deposition Regarding Attorneys' Fees, Costs and Expenses". On April 19, 2005, Mr. Michael Partee, Esq. filed an appearance in this matter on behalf of the Complainant. As such, Mr.

Partee's costs and fees became potentially eligible for recovery under the Complainant's petition for fees and costs and therefore subject to discovery.

In its Notice of Deposition, the Respondents requested that the Complainant produce Mr. Mitchell Cohen and Mr. Bernard Murphy for deposition on June 24, 2005 pursuant to the provisions of Section 2-1003 of the Illinois Code of Civil Procedure. The Complainant failed to produce either Mr. Cohen or Mr. Murphy for deposition on June 24, 2005 as required under Section 2-1003 of the Illinois Code of Civil Procedure. On July 6, 2005, the Respondents filed a Motion to Strike Complainant's Objections to Discovery and Motion to Compel Complainant's Response to Discovery Request in which the Respondents requested the Board to strike Complainant's objections to discovery and compel Complainant's responses to discovery and cooperation in scheduling depositions. On July 20, 2005, the Complainant filed a Complainant's Response to Respondents' Motion to Strike Complainant's Letters of May 24, 2005 and June 14, 2005 Regarding Discovery and Complainant's Motion for Protective Order and Response to Motion to Compel Complainant's Response to Discovery Request.

In its Order of November 11, 2005, the Board refused to uphold the People's objection to discovery. (Order at 9.) The Board allowed the Respondents thirty days from the date of the Order to further respond to each objection. The Board also stated that it would direct the hearing officer to reserve ruling on the Respondents' Motion to Compel until the time for additional response is lapsed. (Id.). Consequent to the Respondent's filing of its further responses of December 19, 2005, the Complainant filed a barrage of trivial motions in an attempt to avoid responding to the Respondents' discovery request. In its order of September 7, 2006, the Board once again further limits the Respondents' rights to fully address the issue of attorneys' fees and costs that it had granted to the Respondents in its Order of September 2, 2004 by establishing a very limited pre-hearing schedule for discovery and stating that no further discovery request would be allowed. (Order of September 7, 2006 at 8.).

The Order of September 7, 2006 stated that Notices of Depositions needed to be filed by October 31, 2006. (Id.) In the Order of September 7, 2006, the Board clearly stated its intent to strictly enforce the established timetable to complete discovery by stating:

> "All discovery activities must be completed on or before the dates provided above."

and

> "The parties are notified that any failure to abide by the schedule set forth will result in sanctions that may include the barring of testimony of the striking of pleadings pursuant to Section 101.800 of the Board's procedural rules."

The Complainant failed to file and serve new responses to all of the pending written discovery by September 19, 2005 as ordered by the Board. During a status hearing on October 5, 2006, the Respondents repeatedly requested that the Complainant comply with the Board's order and file and serve new responses to all of the pending written discovery that had been requested by the Respondents. The Complainant repeatedly stated to both the Respondents and the Hearing Officer that it had no intention of complying with the Board Order of September 7, 2006 and would not be filing and/or serving new responses to the pending written discovery that had been requested by the Respondents.

On October 10, 2006 the Respondents filed a motion for sanctions with the Board based on the Complainant's failure to comply with the discovery schedule established by the Board in its Order of September 7, 2006 and the Board's statements in the same Order stating that it would strictly enforce the established timetable. On November 2, 2006, the Board issued an Order in which it denied the Respondents' motion for sanctions.

On October 18, 2006, the Respondents filed a Deposition Notice to Complainant Regarding Complainant's Fee Petition. In the Notice, Respondents requested to take the discovery deposition of Mr. Michael C. Partee commencing at 2:00 p.m. on Friday November 10, 2006. In the Order of September 7, 2006, the Board stated that Objections to Notices must be filed and served by November 8, 2006. (*Id.*) The Complainant did not file an Objection to the Respondents' Notice to Deposition with the Board prior to November 8, 2006. The Complainant failed to produce Mr. Partee for deposition on November 10, 2006 as required under Section 2-1003 of the Illinois Code of Civil Procedure. In the Order of September 7,

2006, the Board clearly stated its intent to strictly enforce the established timetable to complete discovery by stating:

> "All discovery activities must be completed on or before the dates provided above."

and

> "The parties are notified that any failure to abide by the schedule set forth will result in sanctions that may include the barring of testimony of the striking of pleadings pursuant to Section 101.800 of the Board's procedural rules."

On November 15, 2006, the Respondents filed a Second Motion for Sanctions based on the Complainant's failure to produce a witness for deposition as required by the Board's Order of September 7, 2006 Order. In the Board Order issued in response to the Respondents Second Motion for Sanctions, the Board failed to enforce its own scheduling order and refused to sanction the Complainant.

As a result of the Board's failure to allow for meaningful discovery with respect to the issue of the Complainant's claim for attorneys' fees and costs, the Respondents do not have the information they required to fully examine this issue. Even with the limited discovery allowed the Respondents, there is a clear showing that the Complainant has not submitted the information required to allow the Board to determine if the attorneys' fees and costs requested are reasonable.

## LEGAL STANDARD FOR RECOVERING ATTORNEYS' FEES AND COSTS

The Illinois courts generally follow the "American rule" which provides that the prevailing party in a lawsuit must bear its own attorneys' fees. Brundridge v. Glendale Federal Bank, F.S.B. 168 Ill. 2d 235 (1995). However, Section 42 of the Environmental Protection Act allows a court of competent jurisdiction to award costs and reasonable attorneys' fees to the attorney General in a case where it has prevailed against a party that has committed a wilful, knowing or repeated violation of the Act. (415 ILCS 5/42(f) (2002)). Illinois Supreme Court Rule 1.5 states that a "lawyers fees 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.

(b) When the lawyer has not regularly represented a client, the basis or rate of the fee shall be communicated to the client before or within a reasonable time after commencing the representation.

In the case of In Re Estate of Callahan, 144 Ill. 2d 32,578 N.E.2d 985 (1991), the Illinois Supreme Court had the opportunity to consider how a court should properly determine the reasonable value of an attorney's services. The court set forth the a standard which closely mirrors the factors included in Rule 1.5 of the Rules of Professional Conduct. The court stated that the factors a court should consider in determining a reasonable fee are:

(1) the skill and standing of the attorney employed;

(2) the nature of the case and the difficulty of the question at issue;

(3) the amount and the importance of the subject matter;

(4) the degree of responsibility involved in the management of the case;

(5) the time and labor required;

(6) the usual and customary fee in the community; and

(7) the benefit resulting to the client

Estate of Callahan, supra at 990, (citing Mireless v. Indiana Harbor Belt R.R. Corp., 154 Ill.App.3d 547, 507 N.E.2d 129 [(1st Dist 1987)]. These are the factors that the Board has set forth in their Order of April 7, 2005

The courts have applied these rules consistently in a number of wide ranging cases. In all cases, only those fees which are determined to be reasonable are to be allowed. (Fiorito v. Jones (1978), 72 Ill.2d 73, 377 N.E.2d 1019; In re Estate of Healy (1985), 137 Ill.App.3d 406, 484 N.E.2d 897). The party seeking the fees bears the burden of presenting sufficient evidence from which the trial court can render a decision as to their reasonableness. (Ealy v. Peddy (1985). 138 Ill.App 3d 397, 485 N.E.2d 1182)

The trial court has the discretion to determine what is reasonable in awarding attorneys' fees. (Pietrzyk v. Oak Lawn Pavilion, Inc. 329 Ill.App.3d 1043,1046, 769 N.E.2d 136,137 (2002); Leader v. Cullerton (1976) 62 Ill.2d 483, 343 N.E.2d 897). The trial court is not limited to the evidence presented at hearing, but may also use its knowledge it has acquired in the discharge of its professional duties when valuing legal services. (Anderson v. Anchor Org. For Health Maintenance, 274 Ill.App.3d 1001,1008, 211 Ill.Dec..at 220, 654 N.E.2d at 682.) However, the reasonableness of fees can not be determined on the basis of conjecture or by the opinion or the conclusions of the attorney seeking the fees (Flynn v. Kucharski (1974), 59 Ill.2d61, 319 N.E.2d 1; In re Marriage of Angiuli (1985), 134 Ill.App.3d 417, 480 N.E.2d 513)

The petition for fees must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rate charged therefore. (Ealy v. Peddy (1985). 138 Ill.App3d 397, 485 N.E.2d 1182, Fiorito v. Jones (1978), 72 Ill.2d 73, 377 N.E.2d 1019) The petitioner must present detailed records maintained during the course of the litigation containing facts and computations upon which the charges are predicated. (Flynn v. Kucharski (1974), 59 Ill.2d61, 319 N.E.2d 1) If the documents supporting the fee petition lack foundation and are devoid of any meaningful information to assist in determining the reasonableness of the fees charged, they can not be the basis for determining the reasonableness of legal fees. (Kaiser v. MEPC American Properties, Inc. 164 Ill.App.3d 978 (1987) 518 N.E. 2d 424) The courts have no power to award costs and fees on merely equitable grounds. (Vincencio v. Lincoln-Way Builders, Inc. 204 Ill.2d 2959 (2003), 789 N.E.2d 290).

## APPLICATION OF THE LAW

1. **The Complainants request for fees fails to meet the threshold requirement of reasonableness and therefore must be denied.**

While section 42 of the Act allows a court of competent jurisdiction to award costs and reasonable attorneys' fees, the court has the discretion to determine what is reasonable in awarding attorneys' fees. Pietrzyk v. Oak Lawn Pavilion, Inc., 329 Il App. 3d 1043, 1046, 769 N.E.2d 136,137 (2002). In all cases, only those fees which are reasonable will be allowed (Fiorito v. Jones (1978), 72 Ill.2d 73, 377 N.E.2d 1019). In this matter, none of the costs and fees submitted by the Complainant should be determined to be reasonable. All of the costs and fees incurred by the Complainant's attorneys were strictly the result of the Complainant's and its attorney's actions to avoid reasonable resolution of this matter and to force litigation of the matter at great expense to both the Complainant and the Respondents.

Even before the complaint was filed with the Board, the Respondents had worked to resolve this matter with the Complainant and its attorneys. The Respondents were of the opinion that the issue was resolved through negotiations with the Attorney General's Office before the case was filed. In 2000, the Respondent Skokie Valley Asphalt and its attorney again reached a settlement of this matter with Assistant Attorney General Bradley P. Halloran. The settlement called for the execution of a consent decree and the payment of a penalty of approximately $20,000. Mr. Halloran left the Attorney General's office without completing the consent decree and the matter was assigned to Ms. Kelly Cartwright. Ms Cartwright was informed of the settlement agreement by the Respondents and agreed to the terms after renegotiation between the parties. However, Ms. Cartwright also failed to draft the required consent agreement for execution.

Mr. Mitchell Cohen filed an appearance with the Board with the hearing on the matter pending. Mr. Cohen contacted the attorney for the Respondent and requested that the Respondent settle the matter and asked for an agreed to motion to postpone the hearing. The

Respondent stated that it would settle the matter under the terms agreed to previously by the Attorney General's office and acted in good faith in allowing the Attorney General to represent to the Board that the parties had agreed to postpone the hearing. In his testimony at this hearing, Mr. Cohen lied in stating that Ms. Cartwright participated in this conversation. (Transcripts at 99.)

However, instead of drafting the required consent decree, Mr. Cohen drafted and filed a second amended complaint in this matter. Mr. Cohen filed the second amended complaint without asking leave of the Board, consequently eliminating the Respondent's ability to object to the filing of the second amended complaint. Mr. Cohen also failed to properly serve either the existing respondent or the parties added as respondents in the second amendment complaint to avoid any possibility of objections.

The Respondents filed a motion to vacate the second amended complaint because the Complainant had not asked for leave of the Board before making the filing. However, even though the Board acknowledged that the Board's procedural rules had been violated, the Board refused to disallow the filing of the second amended complaint citing judicial economy and convenience over the Respondents' right to due process.

After the second amended complaint was accepted by the Board, the Complainant refused to recognize the settlement agreement terms negotiated by the parties. All of the future proposed terms for settlement were totally unacceptable to the Respondents. Mr. Cohen continually used the fact that the Attorney General would be able to collect attorneys' fees and costs if the matter went to trial as a bargaining chip in negotiations. Consequently the matter was prolonged and excessive legal fees were incurred. At hearing, Mr Cohen falsely testified that very little work was performed on this case before it was assigned to him. (Hearing Transcripts at 45.) Mr. Cohen is fully aware that this case had been settled before he became involved.

The Respondents argue that compiling legal fees and cost in a case that had been and could be settled upon reasonable terms simply for the purpose of increasing the cost of resolving the matter to the Respondents is unreasonable. In the Callahan decision, the Illinois Supreme Court held that the "the benefit resulting to the client" was one of the factor that needed to be considered in determining the reasonableness of attorneys' fees. In this matter, the interest of the client to ensure compliance and guarantee clean up of the Avon Ditch through a consent decree was overshadowed by its attorney's interest in incurring and collecting fees. Awarding the attorney excessive fees in this matter would be an unreasonable endorsement of this type of practice.

2. **The Complainant has failed to submit any credible evidence or testimony to support its claims for legal fees and costs and as a result the request for fees must be denied.**

In order to prove the reasonableness of many of the factors to be considered in determining legal fees, the testimony of opinion witnesses and/or the client needs to be introduced. The Complainants failed to offer either. Instead, the Complainant relies exclusively on the testimony of two of the seven attorneys that represented them in this case. The reasonableness of fees can not be determined on the basis of conjecture or by the opinion or the conclusions of the attorney seeking the fees (Flynn v. Kucharski (1974), 59 Ill.2d61, 319 N.E.2d 1; In re Marriage of Angiuli (1985), 134 Ill.App.3d 417, 480 N.E.2d 513)

The attorneys are able to testify as to the time and labor they put into the case but the Callahan decision states that the reasonableness of the fees needs to be based on the time and labor required. An expert opinion witness would need to be retained to determine if the time spent was in any way related to the time required. The attorneys were not produced or qualified as opinion witness. Therefore, they were not allowed to testify as to their opinions concerning any of the other factors listed as criteria for determining the reasonableness under Callahan. Opinion testimony would be needed to ascertain the skill and standing of the attorneys employed. Similarly, an expert would be needed to determine the usual and customary fee in the community.

It may be possible to establish the benefit resulting to the client, the amount and the importance of the subject matter, nature of the case, the difficulty of the question at issue and the degree of responsibility involved in the management of the case through the testimony of the client as opposed to an expert opinion witness but the attorneys seeking fees can not offer credible testimony with respect to these issue. Failing to offer independent corroborating testimony to address the factors, the Complainant has failed to meet its burden of proof.

The Complainant's attorneys were in a position to present testimony from expert opinion witness and/or their clients. The client has a long-standing relationship with the attorneys and had representatives testify at the original hearing in this matter. It should have been possible to have the Complainant testify as to the resulting benefit, the degree of responsibility, the difficulty of question at issue and the importance of the subject matter. There are a number of expert witnesses in the field that could have been retained and unlike the situation of the Respondents, the cost of retaining an expert witness would not seem to be a factor. A party that claims to have spent over $136,000 simply for the hearing portion of this case would have no financial constraints on paying an expert to testify on their behalf to collect their fees.

Additionally, Attorney Michael Partee of the Attorney General's office was originally disclosed as a potential witness in this matter. Mr. Partee would have been in a position to testify to almost all of the points in the Callahan decision. However, not only did Mr. Partee not testify, he refused to allow the Respondents to take his deposition. The inference that can be drawn is that no representative of the client, no other attorney from the Attorney General's office and no expert was willing to support the Complainant's position with respect to its claim for attorneys' fees and costs.

Not only is the testimony of the attorneys requesting fees questionable because of its lack of objectivity and knowledge, it is equally unacceptable because of the lack of credibility of the witnesses. Mr. Cohen's misconduct throughout this entire process is well documented. It is Mr. Cohen who failed to honor the settlement agreement in this matter. Mr. Cohen also was the attorney that filed the second amended complaint without leave of the Board and without service

to the Respondent and it was Mr. Cohen that was instrumental in having Mr. Sternstein assigned to this matter. He continued to work with Mr. Sternstein even though he knew or had a duty to know that Mr. Sternstein was not allowed to work on this matter according to the Board's procedural rules. Mr. Cohen then attempted to conceal both his and Mr. Sternstein's misconduct by refusing to answer interrogatories and request for documents that would have shown that he and Mr. Sternstein were acting illegally in having Sternstein appear before the Board in this matter.

Mr. Murphy could not keep from getting himself muddled in the Sternstein quagmire. At deposition, Mr. Murphy was adamant in testifying that he was assigned to this case on October 3 after the Board had informed the Attorney General's office that Mr. Sternstein had been disqualified. (Id. at 229.) This testimony is consistent with information received by the Respondents that the Board informed the Attorney General's office at least two weeks before it issued its Order in this matter on October 17, 2003 and that the Board worked with the Attorney General's office to instruct Mr. Sternstein to prepare an affidavit to cover up the malpractice by both the Board and the Attorney General's office.

However, at hearing, Mr Murphy claims that he reviewed the Board's records in the case and determined that he was mistaken and that Mr. Sternstein was removed by a Board order of October 16, 2003. (Id.) While Mr. Murphy could check the date of the Board Order by reviewing the records on the Board's web site, he could not establish the day he first was informed that Mr. Sternstein was removed. Mr Murphy fails to explain why the Complainant decided to add a third attorney to a simple two day hearing and how he could be so vehement in his statements at deposition that he had been assigned to the case after the Attorney General's office was informed that Mr. Sternstein was disqualified. The explanation least damaging to the Board and the Attorney General's office is that Mr. Murphy totally fabricated all of the hours he billed from October 3, 2003 to October 16, 2003 or he took credit for all of the hours that were worked by Mr. Sternstein during that period because the Complainants feared that the Board would not allow the Complainant to collect fees claimed by an attorney after he had been caught cheating.

In addition, it was Mr. Cohen who continuously filed unnecessary motions and filed other required documents late including the filing of his closing argument late. Mr. Cohen has admitted filing a falsified affidavit with the Board in an attempt to collect costs that were not incurred.(*Id.* at 83-84.). It was also Mr Cohen who allowed Mr. Kallis to testify from prepared notes at hearing until the Respondents caught the witness doing so and demanded that the hearing officer instruct Mr. Cohen to stop. The witness's testimony that was given from prepared notes was never stricken from the record.

At the hearing on legal fees, Mr. Cohen's testimony was even more incriminating. Mr. Cohen offered false testimony concerning the discovery material submitted by the Respondents. Mr. Cohen testified that the Complainant's did not get documents from the Respondents until after deposition and implies that the Respondents did not participate in discovery. (Transcripts at 20, 24, 28 and 29.) Mr Cohen also testified that whatever discovery happened, happened after he was involved in the case. (Id at 26.) This statement is a lie.

In fact, the Respondents had already participated in three discovery periods before the Board allowed Mr. Cohen and the Complainant a fourth discovery period against the objections of the Respondents. The Respondents informed the Board hearing officer and the Complainant that it no longer had documents available because they had discontinued business and sold the assets of the company to an unrelated party. The new owner of the Skokie Valley records had the records destroyed. The Respondents saw no reason to retain the records since it had already participated in discovery three times, had been told by the Complainant that the case was settled and that the principals of the company had not been named individually as Respondents. The Respondents produced all documents available and answered the Complainant's interrogatories and requests to admit.

Despite the false testimony of Mr. Cohen, Mr. Huff never prepared an expert report and instead relied on his reports for the remediation of the site which the Complainants had well before the depositions. The only new document supplied to the Complainant between the time of the deposition and the hearing was a copy of the closing book for the sale of the assets of

Skokie Valley Asphalt. The Respondents originally did not produce this document because it was not in their records and they forgot it existed. They did recover the document from the attorney they used in the sales transaction who was no longer in their employment. They produced the closing book for the Complainant while warning the Complainant that the document was vast and contained very little information pertinent to the case. Mr. Cohen also misrepresents that it was Mr. Sternstein who handled the discovery procedure for the Respondents under Mr. Cohen's supervision and in violation of Board procedural rules.

Mr. Cohen also misrepresents the Complainant's cooperation with Respondents request to produce during the fourth discovery period. Unlike the Complainant, the Respondents had not made any discovery request during the first three discovery schedules. Despite Mr. Cohen's statement at hearing that Complainants made "boxes" of discovery available to the Respondents (Id. At 27-28), the Complainant in fact supplied less than 1,000 pages of discovery. Most of this information was non-responsive.

Even more telling is the Complainants failure to completely respond to interrogatories and request to admit. The Complainants responses were so incomplete that the Respondents asked the Board to intervene to compel response. The Board failed to do so. Among the request for information that the Complainants refused to address in their responses was a standard question on the background of their attorneys. The Complainant did not want to answer these inquiries because it would have forced them to divulge the conflict of interest of Mr. Cohen and Mr. Sternstein. It was only because the Respondents became suspicious of Mr. Cohen's vehement refusal to produce this information that the Respondents did future independent investigation to uncover the Complainant's and the Board's misconduct with respect to Mr. Sternstein's participation.

In its order of September 7, 2006, the Board established a schedule for limited discovery on the issues of cost and legal fees. (Order of September 7, 2006 at 8.). The Complainant failed to file and serve new responses to all of the pending written discovery by September 19, 2005 as ordered by the Board. During a status hearing on October 5, 2006, the Respondents repeatedly

requested that the Complainant comply with the Board's Order and file and serve new responses to all of the pending written discovery that had been requested by the Respondents. The Complainant repeatedly stated to both the Respondents and the Hearing Officer that it had no intention of complying with the Board Order of September 7, 2006 and would not be filing and/or serving new responses to the pending written discovery that had been requested by the Respondents. In its Order of November 2, 2006, the Board continues its consistent practice of not requiring the Complainant to comply with Board orders and rules and stated that the Complainant did not have to comply with the Board Order of September 7, 2006 and did not have to file responses to discovery by the Respondents

At hearing, Mr. Cohen could not testify as to the accuracy of his time entry, admitted that he did not keep time records to the standard of the industry, admitted that he attempted to collect legal fees for clerical duties, was proven to submit falsified time sheet entries and shown to submit perjured affidavits in an attempt to collect cost and expense reimbursement for costs that were not incurred

Mr. Murphy's credibility is even more suspect. Mr. Murphy claims to be unable to produce any actual time sheets for his work on the Skokie Valley case. (Id at 208-209.) He testified that he left the time sheets at the Attorney Generals office and he would not be surprised if they have been destroyed. (Id. at 208.) Mr Murphy also admitted that the notes describing his work that is shown in his affidavit is not necessarily the same as the description entered in his time sheet. (Id. at 209.) Without the underlying time sheets, the documents supporting the fee petition lack foundation and are devoid of any meaningful information to assist in determining the reasonableness of the fees charged, they can not be the basis for determining the reasonableness of legal fees as required by the Kaiser decision. (Kaiser v. MEPC American Properties, Inc. 164 Ill.App.3d 978 (1987) 518 N.E. 2d 424)

Kaiser involved a fact pattern, similar to the one presented by Mr Murphy. In Kaiser, the party claiming fees attempted to reconstruct time record in the form of an appendix which it wished to present as evidentiary support of its fee request. The reconstruction of the time

records was necessary because the original time records had been destroyed. (Kaiser at 980.) The court in Kaiser held that although the court file indicates that the Complainant's attorneys performed legal work for the Complainant, in the absence of contemporaneous time records they could only conclude that the hours reflected were more the product of conjecture as opposed to an accurate computation of the time actually expended. (Id at 982.) Similarly, Mr Murphy's hours lack the foundation needed to allow a determination of the hours worked and therefore, his fees must be denied in their entirety.

Unlike the Complainant, the Respondents did retain a qualified expert opinion witness to assist the Board in evaluating the evidence submitted by the Complainant. The expert opinion witness was Ms. Deborah Stonich who is an attorney admitted to the State Bar of Illinois in 1987. She is currently employed in the Environmental and Mass Tort Claim Unit in the Legal Department at CNA insurance companies, and has been with the company since 1993. She is responsible for litigation management of coverage and defense counsel. One aspect of litigation management includes the review and auditing of attorneys' bills. Since 1993, she has reviewed bills from solo practitioners as well as large law firms, and bills ranging from as little as $200 to in excess of $30,000. She also has worked at law firms wherein she was responsible for billing for the time she worked on client files.

Ms. Stonich has personally hired numerous law firms (e.g., DLA Piper f/k/a Rudnick & Wolf; Laser, Pokorny, Schwartz, Friedman & Economos, etc.) as well as numerous solo practitioners in the areas of estate planning, commercial real estate transactions, federal tax law, condominium law, contract and tort law, and property taxation. In all such cases, In those matters, she reviewed bills and made adjustments where necessary.

Besides relying on her own experience and expertise, Ms. Stonich consulted the following resources when preparing her opinion and report:
American Bar Association's Litigation Code Set
American International Companies Litigation Management Program-Casualty and Professional Liability Cases

The AIG companies Litigation Management Guidelines
American Stores Company Litigation Management and Cost Specifications
Chubb & Son USA Litigation Management Guidelines
Daimler Chrysler Outside Counsel Billing Guidelines & Instructions
Defense Research Institute Recommended Case Handling Guidelines for Law Firms
DuPont Guidelines for Outside Counsel
Florida Department of Financial Services, Division of Risk Management, Bureau of State Employees' Workers Compensation Claims, Defense Attorney Guidelines
Kemper Insurance Companies Claim Litigation Guidelines
Motorola's Law Department Outside Counsel Guidelines
New Jersey Office of the Public Defender's Attorney Guidelines
PACR Inc. Policy Statement, Duties of National Coordinating Counsel for Asbestos Matters
Riverstone Defense Counsel Guidelines
Royal & Sun Alliance USA Litigation Management Guidelines for Claims Defense Counsel
St. Paul/Travelers Billing Guidelines
University of Texas System, Office of General Counsel, Outside Counsel Billing Guidelines
Zurich North America Litigation Management Guidelines for Claims Defense Counsel
(Respondents' Exhibit 102.)

The Complainant's claims for fees and costs are also not supported by sufficient evidence. In her review of the Complainant's request for fees and costs, Ms. Stonich noted the following failures:

"An invoice should itemize each expense separately in chronological order. Each expense entry should include the following information:
the date the expense was incurred;
by whom the expense was incurred;
the nature of the expense; and
the amount charged.

All expenses should be documented by copies of original receipts. Such documentation should be indexed according to the date the expense was incurred and be included in the same order it is listed in the invoice.

In this case, several receipts are grouped together and a cover sheet is attached which summarizes the attached receipts. For example, Mr. Cohen's travel records/receipts are grouped together and attached to a cover sheet which summarizes the expenses chronologically and then by subject matter. Mr. Murphy's travel records/receipts are also organized in this fashion. Three deposition receipts are grouped together and attached by a cover sheet.

Three off-site photocopying receipts are attached to a summary cover sheet. A second set of off-site photocopying receipts as well as three deposition receipts are grouped together and attached to another summary cover sheet. The two groups of receipts, as well as the corresponding summary sheets, are not in chronological order which leads to confusion. The off-site photocopying/deposition summary sheet also references two September 30, 2003 charges for $29.00 and $34.70. These two dollar amounts also are reflected on both summary sheets as one September 30, 2003 charge for $63.80. In light of the conflicting information contained in the affidavits and Microsoft Outlook calendar entries submitted in this matter, one can only question the accuracy of the expense accounting provided." (Id at 3.)

In light of the submission of independent testimony, the lack of impartiality and credibility of the witnesses called by the Complainant and the opinion testimony of an expert in the field, the Complainant has failed to submit any credible evidence or testimony to support its claims for legal fees and costs and as a result the request for fees must be denied.

3. **The Complainant has failed to present sufficient evidence to show the time and labor applied to this matter.**

The petition for fees must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rate charged therefore. (Ealy v. Peddy (1985). 138

Ill.App3d 397, 485 N.E.2d 1182, Fiorito v. Jones (1978), 72 Ill.2d 73, 377 N.E.2d 1019) The petitioner must present detailed records maintained during the course of the litigation containing facts and computations upon which the charges are predicated. (Flynn v. Kucharski (1974), 59 Ill.2d61, 319 N.E.2d 1) If the documents supporting the fee petition lack foundation and are devoid of any meaningful information to assist in determining the reasonableness of the fees charged, they can not be the basis for determining the reasonableness of legal fees. (Kaiser v. MEPC American Properties, Inc. 164 Ill.App.3d 978 (1987) 518 N.E. 2d 424) The courts have no power to award costs and fees on merely equitable grounds. (Vincencio v. Lincoln-Way Builders, Inc. 204 Ill.2d 2959 (2003), 789 N.E.2d 290).

The expert testimony presented at hearing in this matter was very critical of the billing practices of the Complainant's attorneys. Ms. Stonich stated in her report that Mr Cohens time records were unacceptable as evidence to show the time and labor applied in the following categories:

"Billing Increments

> A client should pay for only the actual, reasonable, and necessary time spent completing a task, or series of related tasks. Minimum billing entries should not exceed .10 of an hour. A client should not be expected to accept standard minimum charges for a task or pattern time billing. Examples of pattern or minimum time billing include repeatedly billing a particular amount of time for tasks that are very similar in nature, such as billing .10 of an hour ten separate times to review a group of identical court orders when the actual task took only 5 minutes to complete.

Mr. Cohen's billing is suspect in that there are only 7 out of 126 entries that reflect billing in fractions of an hour. Each of those 7 entries reflects billing for .5 time period. There are no time entries for any other fraction of an hour (e.g., .7, 1.2, 5.4, etc). The fact that the vast majority of Mr. Cohen's time reflects whole hours (e.g., 1.0, 2.0, 14.0, etc.) and the fact that the 7 entries use the same fraction of an hour leads one to question the accuracy of Mr. Cohen's billing entries.

Invoice Format

Legal Fees

Attorneys commonly record all charges for legal services on a daily basis either through an electronic billing system such as AbacusLaw, LawTime, Perfect Practice, etc., or through hand written time sheets. When hand written time sheets are utilized, each task that an attorney accomplishes during a day is entered on to one time sheet, with the result being that a time sheet typically contains task entries for several different files. Handwritten entries that are common to a particular file and that are interspersed on a time sheet then are extracted by clerical staff for entry onto a finalized bill for that file. Finalized invoices typically document each individual task or series of related tasks performed by an attorney. The invoice should be in line-item format and in chronological order.

Entries should not be "block-billed," (i.e., aggregating multiple tasks under a single time charge). The practice prevents the computation of a questioned fee for a single non-reimbursable activity within the block entry. It also allows for inaccurate timekeeping as it allows for the accumulation and recordation of hours at the end of a workday, and also prevents any assessment of whether a particular task was performed in a timely manner. Thus, the time associated with each individual task should be indicated.

An invoice should also contain the following information for each task:

- the task date;
- the timekeeper's initials;
- a task description containing sufficient information to ascertain the nature, purpose, or subject of services performed, and the specific activity or project to which it relates;

Tasks referencing correspondence, pleadings, or other documents should identify the document (i.e., via author, title, date, and/or subject matter of the document).

All meetings and telephone calls should describe the participants and purpose or substance of the meeting or telephone call. If more than one attorney is in attendance at a meeting or telephone call, justification for such attendance should be provided.

All research should be specifically identified, including the issues researched. the actual time required to complete the task, not to exceed minimum tenths (.1) of an hour increments; and the charge for that task.

The invoice also should contain a summary which shows the initials and names of each timekeeper, the timekeeper's status (partner, associate, or paralegal), the timekeeper's hourly rate, the total number of hours billed by each timekeeper, and the total charges for each timekeeper.

Mr. Cohen's bills do not conform to the standard invoice format typically used by law firms. A complete listing of Mr. Cohen's Microsoft Outlook calendar entries with comments regarding the issues with each entry can be found on the attached spreadsheet.

First, Mr. Cohen habitually uses block billing and does not associate a specific time with each individual task. One example is a time entry on December 21-22, 2004 for 1.0 hour which states "Call to Jawgiel re: settlement offer, disc. w/ Client, management, letter". As one is unable to associate a time frame with the telephone call, the intra-office conference, or the letter, it is impossible to assess the necessity and reasonableness of each task listing.

With regard to task dates, although Mr. Cohen's records reflect the date of each task, each time entry begins at 12:00 am and ends at 12:00 am. As a result, there are many tasks that appear to have occurred over a weekend. As Mr. Cohen is employed by the State rather than a law firm, he is not required to have a minimal number of billable hours per year. As a result, time entries covering a weekend are questionable.

With regard to task descriptions, each task must be adequately described with sufficient specificity such that a person unfamiliar with the case can ascertain the task that is being performed and the necessity of the task to the progress of the case. Generic, vague, or ambiguous descriptors are unacceptable. Examples of the foregoing are the following:

| | | |
|---|---|---|
| arrangements with | meeting with | review documents |
| attend deposition | motion work | review/draft discovery |
| attend hearing | pleadings | review/draft pleading |
| attend to discovery | preparation | review file |
| attend to file | prepare brief | telephone call |
| attend to issues | prepare correspondence | telephone call with |
| attend to pleading | prepare discovery | trial arrangements |
| attend to strategy | prepare motion | trial preparation |
| attend hearing/trial | prepare pleading | update strategy |
| case management | receipt of documents | work on discovery |
| closing preparation | receipt of pleadings | work on file |
| conference | research | work on issues |
| conference with | research important issues | work on pleading |
| discovery | review and plan | work on project |
| discussion with | review case and issues | work on strategy |
| meeting | review correspondence | |

Mr. Cohen's time entries throughout his tenure on this case fail to contain an adequate description of his work. First, the majority of the entries contain no legal activity or description of the work performed. For example, a May 5-6, 2003 entry for 4.0 hours states "discovery-paper". Putting aside the concern that Mr. Cohen does not identify the type of discovery involved, one cannot know if Mr. Cohen researched, reviewed, drafted, edited, etc. the discovery. Another example is a July 28-29, 2003 entry for 2 hours entitled "Mo to compel."

Several entries also do not contain the reason for the performance of certain services. For example, an October 16-17, 2003 entry for 4.0 hours states "trial prep rev. bd ridiculous order - joel out meet with RMC & Bernie & Joel - Bernie in Joel (3 hours today)". The entry does not contain the reason for the meeting with RMC, Bernie, and Joel. As a result, one cannot determine if the meeting advanced the case or whether it served an administrative purpose and was thus, not reimbursable. Another example is a September 15-16, 2003 entry for 6.0 hours that contains the phrase "rev. pleadings, disc. etc." Again, putting aside the fact that the documents are not identified, one is unable to discern the reason for the review and thus, whether such review advanced the case.

There also are several entries that contain an inadequate description of the document being addressed. An example is an October 11-12, 2004 entry for 6.0 hours for "Drafting Response". Although a response was drafted, what was the pleading in response to? Drafting a response to a motion for a one-week extension would not be as time-consuming as drafting a response to a motion to for summary judgment. Another example is a September 5-6, 2003 entry for 3.0 hours that contains the phrases "rev. bd order...rev.rel. doc.s etc." Again, neither the Board order or documents are identified.

Mr. Cohen also fails to identify meeting participants. Specifically, his October 8-9, 2003 entry for 6.0 hours simply contained the phrase "disc. issues." Mr. Cohen also failed to identify the purpose for or subject matter of numerous meetings and telephone calls. Two examples are a May 29-30, 2002 entry for 1.0 hour for "Brf. Mtg w/Kelly call to David O'Neil", and a September 29-30, 2003 entry for 7.0 hours that contains the phrase "conf. call w/ kallis and gunnarson".

Finally, there are several entries that contain only generic or general activity descriptions without more. Mr. Cohen's May 2-3, 2003 entry for 4.0 hours entitled "work on discovery", and his October 2-3, 2003 entry for 7.0 hours that contains the phrase "doc rev." are just two examples of generic entries. As a result of the foregoing, one is unable to determine what was actually accomplished and thus, whether the time reflected is reasonable." (Id. at 3 to 5, Transcripts at 265-284.)

In his testimony, Mr. Cohen repeatedly was unable to review his own time sheets and state what work was actually preformed and/or the time that was spent on any given task. (Transcripts at 99 to 155.) In fact, Mr Cohen was unable to review any entry he made on his time sheets were he could state with certainty the task performed, the time spent and the person that performed the task.

In the one instant were there was corroborating evidence to support Mr. Cohen's billable hours, it was shown that Mr. Cohen had, in fact, falsified his time records. In his expense statement, Mr. Cohen included a receipt for parking for November 28th in a garage that is a five-minute walk from his office.(Id at 144.) The receipt showed that Mr. Cohen entered the garage at 7:29 a.m. and left the garage at 18:26 p.m. – a total elapsed time of less than eleven hours (People's Exhibit 102.). However, on his time entry for this sheet, Mr. Cohen recorded eleven hours. (Id. at 144.) Mr Cohen also testified that if he worked from home or out of the office, he made a notation to that effect on his time records. (Id. at 140.) Even if we assumed that Mr. Cohen worked continuously on October 28, 2003 without breaks, non productive time, phone calls or lunch, the documentation shows he over billed his time. There are no dates where the Complainants could offer corresponding evidence to show any of the Complainant's attorneys recorded time is accurate.

In her testimony at hearing, Ms. Stonich stated that the fact that Mr. Cohen's hours billed did not coincide with the hours he was in the garage leads her to question the accuracy of Mr. Cohen's billing. (Id. at 267.) This falsification of records is sanctionable and calls into question all of the records prepared by the Attorney General's office. These documents can not be the basis for determining if the hours billed are reasonable.

If the person who performed the work and made the record can not ascertain what the entry represents, it is inconceivable that an independent party can make a judgment as to whether or not the fees are reasonable. The documents supporting the fee petition lack foundation and are devoid of any meaningful information to assist in determining the reasonableness of the fees charged. Therefore, they can not be the basis for determining the reasonableness of legal fees.

Mr. Murphy admits in his testimony that he did not keep contemporaneous records of his time on this case until the day before the case went to hearing (Id. at 199.). He claims that he was able to calculate all of the time he had spent historically on the case before that time. (Id. at 197.) Again, the Kaiser case supplies guidance.. In Kaiser, the party claiming fees attempted to reconstruct time record in the form of an appendix from the court records of the proceeding.

(Kaiser at 980.) In Kaiser, the reconstruction was more credible than the reconstruction claimed by Mr. Murphy because the Kaiser reconstruction was based on actual records while Mr Murphy relied almost exclusively on his memory. The court in Kaiser held that although the court file indicates that the Complainant's attorneys performed legal work for the Complainant, in the absence of contemporaneous time records they could only conclude that the hours reflected were more the product of conjecture as opposed to an accurate computation of the time actually expended. (Id at 982.) Similarly, Mr Murphy's hours lack the foundation needed to allow a determination of the hours worked and his fees must be denied in their entirety.

Mr Murphy's abbreviated work descriptions do not allow a determination of the work he actually preformed. When called upon to review his own entries he was unable to clarify what work was actually done for any described task (Id at 215-220, 230-232, 239-256.). Again, if the person who performed the work and made the record can not ascertain what the entry represents, it is inconceivable that an independent party can make a judgment as to whether or not the fees are reasonable.

4. **This case does not involve any novel or difficult that questions that would require exceptional skills to perform the legal service properly.**

In its opening statement, the Complainant admits that this is an uncomplicated matter. (Transcripts of November, 2006 Hearing at 13.) In fact, the case was a simple enforcement case which is typical of the work performed by the Attorney General's Environmental Bureau on an ongoing basis. In his testimony, Mr. Cohen , with the assistance of his attorney – Mr. Partee – attempts to exaggerate the complexity of the original hearing to show that the case was novel or difficult. It was neither. Mr. Cohen testifies that the hearing was two days. (Id at 35). In fact the entire hearing, including consideration of preliminary matters took approximately ten hours total. Included in this time was approximately an hour of Mr. Murphy stumbling through the closing book for the sale of the assets of Skokie Valley to try to show that the Respondents had made a huge profit on the sale. The hearing officer finally stopped Mr Murphy from continuing

this aimless exercise and the Respondent Larry Frederick then volunteered the fact that the Respondents had sold the company for a net profit of about $150,000. (Trial at 480.)

Mr. Cohen also tries to show the case was complex because it involved 50 exhibits. (Transcripts at 35.). In fact, 42 of the Exhibits were presented by the Complainant (Id.) and of those, the majority were simple, one-page DMR reports that had been prepared by the Respondents and were put into evidence to show minor violations of total suspended solid standards. In his testimony at hearing, Mr Huff testified that the total suspended solids violations were not the result of the Respondents activities or the Respondents site and that the IEPA had stopped enforcing violations of total suspended solid violations like the violations sited against the Respondents in this case because the standard had been set too stringently in the regulations and in fact had been adjusted before the hearing in this matter was conducted. (Trial at 414-415) The remaining number of exhibits would not support the Complainant's position that this was a complex case.

This matter involved routine legal issues and questions that did not require exceptional skills on the part of the Complainant's attorney. The billing rate of the attorneys in this matter should not be as high as other cases in which the Board may have allowed reimbursement when those cases required additional legal skills and any claims for increased hours based on the complexity of the issues should be denied.

5. **The acceptance of the particular employment in this matter did not preclude the lawyer from other employment.**

Both attorneys testified that they were not precluded from other employment as a result of their involvement in this matter. Mr. Cohen stated that he was in the middle of a big trial when he was working on this case.(Id. at 44.) Mr, Murphy stated that he was working on thirty or forty other cases at the time he worked on the Skokie Valley case and also had management responsibilities in the office at that time. (Id. at 199.) Neither attorney was able to testify that he had to refuse other assignments to litigate this matter.

Based on the testimony of their own witnesses, the Complainant can not support a claim for an increased hourly fee because there attorneys were precluded from other employment. The lack of this factor makes it impossible for the Complainants to justify a claim for the highest hourly fee ever allowed by the Board.

6. **The Complainant has failed to establish the fee customarily charged in the locality for similar legal services.**

As previously stated the fee customarily charge for similar legal services would need to be established through expert opinion testimony. To determine the fee customarily charges, the Complainant's expert opinion witness would need to show what fees had previous been rewarded by the Board in cases of similar difficulty and with attorneys of similar skills and experience. In Kannewurf v. Johns, 260 Ill.App.3d 66,74, 18 Ill.Dec.381,386, 632 N.E.2d 711,716 (5th Dist. 1994), the court stated when determining a rational hourly fee a court is to consider the following factors: the nature and difficulty of the case, the attorneys skills and standing, the degree of responsibility, the usual and customary charge and the benefit to the client. The Complainant presented no such testimony. Instead, the Complainant relied on the testimony of its two suspect witnesses to attempt to establish the reasonable fee. The witnesses failed miserably.

Mr Cohen testified that his research related to Board's award of attorneys' fees amounted to finding one case were the Board allowed $150.00 per hour as a reasonable rate. (Id. at 58.). Mr Cohen did not offer testimony concerning the nature and difficulty of the case, the attorneys skills and standing, the degree of responsibility, the usual and customary charge and the benefit to the client in the case in which the Board awarded the $150.00 hourly rate and did not attempt to compare that case to the matter before the Board. Without this analysis, Mr. Cohen self proclaimed research is meaningless in establishing the fee customarily charged in the locality for similar legal services

Ms. Stonich addressed this issue in her expert opinion report:

"Mr. Cohen, in the Attorney Fees and Costs Petition, charged $150.00/hour for his services and characterizes the rate as a "reasonable hourly rate". He provides no explanation or justification as to how he arrived at this rate, nor does he cite to any statute, regulation, case, or rule that addresses the issue. Unlike other entities such as the New Jersey Department of the Public Defender which publishes rates for its pool attorneys, the Attorney General itself does not have guidelines or a policy position addressing the hourly rate that it may seek for reimbursement.

In the absence of such documentation, the Attorney General's Office can only make a claim for monies that it actually expends in prosecuting cases. In other words, any reimbursement should be based on the salary that it pays to its attorneys. To find otherwise would provide the Attorney General's Office with a windfall rather than compensation for amounts actually spent in prosecuting a case." (Id. at 6. Transcripts at 286-287.)

Mr Cohen was allowed to establish the hourly billing rate. However, in testimony, the Complainant's witness Mr. Cohen stated that he had no experience with any billing guidelines (Transcripts at 77.) He also testified that the Attorney General's office had no policies that he new of. (Id. at 78.) Mr. Murphy also failed to offer any testimony with respect to the basis for the hourly rate adopted by the Complainant. The Complainant has failed to establish a foundation for the rate it billed its attorneys' hours. Because, the courts have no power to award costs and fees on merely equitable grounds (Vincencio v. Lincoln-Way Builders, Inc. 204 Ill.2d 2959 (2003), 789 N.E.2d 290), there is no foundation available for establishing a billable rate and consequently the attorneys' fees can not be determined or paid.

7. **The results obtained do not justify the costs and fees claimed by the Complainant.**

The Callahan decision clearly states that this factor must be established to properly determine the reasonable value of an attorney's services. However, the Complainant failed to produce either the client or an expert opinion witness to argue this point. Instead, the Complainant relied on the hearsay testimony of their heavily prejudiced and tainted attorneys. In

response to the leading question from Mr Partee of "was this an important case to the Complainant?", Mr. Cohen boldly stated "Yes, it was an important case". (Id at 39.). Mr. Cohen then goes on to make statements that could only be proffered by an expert, even though Mr. Partee never disclosed Mr. Cohen as a potential expert, opinion witness and never qualified Mr. Cohen as an expert. Mr. Cohen lacks even a fundamental understanding of the issues argued at hearing. Mr. Cohen makes ridiculous statements that the case is important because it deals with water pollution (Id at 39.) and goes on to offer the following thought provoking testimony:

"This case when you are dealing with NPDES permits, it's a national program, with all the regulations related. Its part of the Clean Water Act and the Illinois EPA is a delegated agency to enforce the NPDES program on behalf of the federal government. Water pollution, of course, is serious in terms of health and safety of the public, the People of the state of Illinois and in Illinois. It's a constitutional right of the People to have a healthy and safe environment" (Id. at 41-42.)

In effect, Mr Cohen testified that he did not have a clue. Beyond these statements, the Complainant was unable to identify any other person willing to say that the results obtained justify the costs and fees claimed by the Complainant. Most likely because the results do not justify the cost and fees claimed by the Complainant.

Ms. Stonich opined on this issue as follows:

"In light of the fact that this was a two-day trial, it appears that Mr. Cohen spent an excessive and unnecessary amount of time on this case. Mr. Cohen's time becomes even more of a concern as his resume indicates that he graduated law school in 1987 and has garnered extensive litigation experience during his time in private practice and during his 7 years with the Cook County State's Attorney's Office, his 1 year with the Kane County State's Attorney's Office, and his 6 years with the Attorney General's Office." (Id. at 7. Transcripts at 287-290.)

In **Sampson v. Miglin**, 279 Ill.App.3d 270 (1996), 664 N.E. 2d 281, the court address this issue by comparing the legal fees and cost claimed against the total amount of the judgment (Sampson at 285.) In Sampson, court found that the attorneys' fees and cost represented less than 30% of the total reward and therefore found that the award of fees was not so excessive to

amount to an abuse of discretion (Id.) In this matter the claims for legal fees and costs by the Complainant were in excess of $136,000 on a judgment that was unexpectedly and unreasonably high at $153,000. The request for fees are 89% of the actual judgment and well in excess of any reasonable judgment. These percentages are well in excess of the 30% established by the Sampson court. Clearly, the results obtained do not justify the costs and fees claimed by the Complainant.

It would be a dangerous precedence for the Board to allow the Attorney General's office to continue to assign inexhaustible resources to potentially reimbursable cases without allowing for some guidance as to the potential for judgment damages. Indeed, the settlement of this case was reversed and further hindered by the fact that Mr Cohen and Mr. Sternstein were able to use the potential for collection of unreasonable legal fees as a basis for demanding increased settlement amounts. The judgment of $153,000, even if justifiable, can not be the reasonable justification for the costs and fees of $136,00o claimed by the Complainant.

8. **The were no time limitations imposed by the client or by the circumstances except for the time constraints that the Complainant and its attorneys imposed on themselves.**

At hearing, Mr. Cohen tries to argue that the Complainant's attorneys had time constraints in preparing for hearing (Id. at 28-32). As with most of Mr. Cohen's testimony, this testimony is a mischaracterization of the facts. Mr. Cohen claims that the fact that Mr. Sternstien was removed from the case before hearing, caused time constraints. Mr Sternstein's ethical breach and eventual removal was fully the fault of the Complainant and the Board. Any effort by the Complainant to claim hardship and claim higher fees because they were caught cheating is incredulous. This argument also ignores the testimony of Mr. Murphy in his deposition that the Board actually gave the Complainant at least two weeks advanced notice of its October 17 Order to partially disallow Mr. Sternstein. This advance notice to the Board actually gave the Complainant a large advantage over the Respondents in preparing their case for hearing.

Mr Cohen also claims that a number of motions were filed in the case shortly before hearing. (Id. at 29,30,33,34.) These motions were, in fact, motions in limine which are routinely filed prior to hearing and trials. These motions were addressed in pre-hearing hearings without written response by the Complainants and seemingly without any real preparation of any kind by the Complainants. The hearing officer denied the motions in limine without argument from the Complainant and without much consideration and explanation. The Complainants did not spend any time on this matter and it did not represent a time limitation.

Mr. Cohen also misrepresents the Respondent's response to document requests during discovery in his testimony (Id. at 32-33). The only documents that were produced after the responses to discovery were initially produced by the Respondents was a closing book for the asset sale of Skokie Valley. It was supplied late because the Respondents did not have it in their files and forgot it existed. They recovered from their accountant, even though they were of the opinion that it did not contain any information that was responsive to the Complainant's request for documents. It was delivered to the Complainant about a month before the hearing date and at the time it was produced, the Respondents informed the Complainant why the book was produced late and that the book probably did not contain much relevant information. It is difficult to foresee how this action could cause time constraints for the Complainant in preparing their case.

Testimony by Mr. Cohen that Mr. Huff's reports were not produced until right before trial (Id. at 32-33.) are absolute perjury. Mr. Huff never prepared an expert report and testified primarily as a fact witness. All of the engineering reports and files that Mr. Huff had relevant to this matter were produced during discovery and/or at his deposition (Huff Deposition transcript of August 29, 2003 at 6,7 et. al.) Any argument that the late production of Mr. Huff's report created a time constraint for the Complainant is pure fabrication and should be sanctioned.

Mr. Murphy also claims that their were time constraints but his testimony shows that the constraints were self imposed and are more a product of the Complainant's attorney lack of skills and productivity than the actions of the Respondents. Mr Murphy was assigned to the case after

the Attorney General's office realized they had been caught violating the Board's procedural rules by assigning Mr, Sternstein to the case.(Id at 193.) Mr. Murphy also claims that significant records were produced shortly before hearings.(Id.)

The only record produced by the Respondents after the discovery period were the closing book for the sale of the assets of Skokie Valley asphalt to Curran Construction. The documents were not in the possession of the Respondents and took time to produce. The Complainant was informed that the closing book contained very little relevant information. Any attorney with experience with corporate asset sales would have reached that conclusion almost immediately upon a quick review of the books. Instead, Mr Murphy spent an undocumented number of wasteful hours under the assumptions that the Respondents had delayed producing the closing book in an attempt to conceal useful information. At hearing, Mr. Murphy spent almost an hour examining the Respondent Larry Frederick to try to derive information from the closing book. Eventually, the hearing officer put an end to the examination.

Any claim by the Complainant that the production of the closing book caused a time constraint is without basis. Even if the Respondents had been able to produce the book with the remainder of the discovery material, attorney Murphy would not have been able to review the materials until he was assigned to the case. Any time constraints were caused by mismanagement and misconduct by the Attorney General's office.

9. **The nature and length of the professional relationship with the client are the basis for a lower fee than the fee claimed by the Complainant.**

Mr. Cohen testified that he was paid a salary by the Attorney General's office. While the Complainant failed to supply documentation as to Mr. Cohen's salary, the less than credible Mr. Cohen claimed that his salary was in the range of $52,000 to $60,000 per year (Id..at 178.). While lower than the hourly fee claimed by the Complainant this is the only fee the Complainant could possibly support. The lower fee is understandable in light of he fact that the rate is more secure than an hourly rate charged by outside counsel. The professional relationship that the

attorneys seeking fees has with its client allow the attorneys to avoid malpractice insurance and lessens the risk of dismissal during periods when their services are not available or when results are not up to the clients expectations. It is indeed the rate that the attorneys have agreed to accept and the client has agreed to pay.

Both Mr. Murphy and Mr Cohen testified that they did not make use of any clerical support staff in the prosecution of this case. (Id at 102-105,117,125, 220-222.). There overhead and burden are fixed and are allocated whether or not the attorneys are able to pass their legal fees onto a respondent under section 42 or some other means. Therefore these expenses should not by passed on to the Respondents.

Based on this analysis the Complainants could have justified and hourly fee divided by the number of hours that an assistant attorney general works. The only testimony offered concerning the hours worked by an assistant attorney general was offered by Mr. Murphy who stated that the 143 hours that he billed to this case during the month of October of 2003 was about one-third of the actual hours he work.(Id at 211.) In addition Mr Murphy handled his administrative duties and managed an additional thirty or forty cases (Id. at 199.) Assuming that Mr Murphy spent only one hour a month on his other cases and ignoring the countless hours he must have spent on his administrative responsibilities, Mr Murphy's hours fo the month would be about 470 hours. Over a year this total would be in excess of 5600 hours.

Dividing Mr. Cohen's annual salary by Mr. Murphy's representation of the hours worked by an assistant attorney general, the Complainant could have justified a billing rate of $9.50 per hour. However, the Complainant failed to put forth this foundation for an hourly rate and does not allow the decision maker any basis on which to decide a reasonable fee rate. Because, the courts have no power to award costs and fees on merely equitable grounds (Vincencio v. Lincoln-Way Builders, Inc. 204 Ill.2d 2959 (2003), 789 N.E.2d 290) the Board has no right to assume any fee rate and can not order the Respondents to reimburse the Complainant for legal fees.

10. **The experience, reputation and ability of the lawyer or lawyers performing the services are the basis for nonpayment of legal fees to the Complainant.**

The attorneys seeking fees make a number of statement that call into question their abilities. In his direct testimony, Mr. Cohen admits that "written closing arguments were very difficult for [him] to prepare" (Id. at 37.) This statement is quite telling for a ten hour hearing with six counts and a standard number of witnesses and exhibits.

The attorneys for the Complainant selected their fee based on the highest hourly rate ever allowed by the Board. This fee was selected without any comparison of the reputation and abilities of the lawyers who worked on the previous case and the attorneys for the Complainant in this matter. Without an analyses and comparison of the skills and reputation of the attorneys demanding fees, the Complainants lack the necessary basis to make the hourly rate request.

In his testimony, Mr. Cohen claims that he had only had about six jury trials before this proceeding and he also testified that he had two or three administrative hearings (Id. at 72.) even though in his deposition he testified that he actually only had one administrative hearing similar to this type of hearing before this case (Id. at 76.). He had never practiced before the Board prior to this case. (Id.) However, even with this limited experience, he attempts to claim the highest hourly rate ever allowed by the Board.

Similarly, Mr Murphy testified that he had never first chaired a jury trial (Id at 208.) and had only been involved in about four trials before Skokie Valley (Id at 207.) Mr Murphy did not have any hearing experience in front of the Board. (Id at 227.) Again, this level of experience makes it difficult to justify an unsubstantiated claim for the highest hourly rate ever granted by the Board

In her report and testimony, Ms. Stonich raises a number of concerns about the reputation and abilities of the attorneys performing the services. Ms Stonich noted the following discrepancies:

"In his September 16, 2004 affidavit which was attached to the Attorney Fees and Costs Petition, Mr. Cohen attests that he spent 527 hours in prosecuting this case. Mr. Cohen's actual Microsoft Outlook calendar entries indicate that he actually spent 593 hours working on this case. The 61.5 hour discrepancy is due to the fact that Mr. Cohen's affidavit does not contain a November 5-6, 2003 time entry for 1.0 hour, a December 10-11, 2003 time entry for 3.5 hours, and 19 additional entries after September 15-16, 2004.

The task descriptions contained in Mr. Cohen's affidavit also differ from the task descriptions in his Microsoft Outlook calendar entries. One example is a December 14-15, 2003 time entry. Although the entry in Mr. Cohen's affidavit reads, "rev trial transcript for closing arg", the corresponding Microsoft Outlook calendar entry reads, "Rev transc."(Id. at 6)

This information indicates that the evidence submitted by Mr. Cohen in support of his hourly fee are not contemporaneous records kept in the course of litigation as required and as claimed by Mr. Cohen.

Ms. Stonich also noted other problems with the Complainant's attorneys' time records which cause basis for questioning their character and their reputation and abilities as lawyers. With respect to excessive billing, Ms. Stonich included the following analyses:
"An attorney should be reimbursed for any reasonable and necessary time spent in completing a task. In this case there have been several tasks that involved an excessive amount of time. Examples are as follows:

| Total Time | Dates |
|---|---|
| 19 hours for deposition preparation (Fredericks) | 7/29-30/03, 7/30-31, 03, 8/4-5/03, 8/5-6/03, 8/6-7/03 |
| 23 hours for deposition preparation (Huff and/or Kallis) | 8/21-22/03, 8/25-26/03, 8/28-29/03, 8/29-30/04 |

| | |
|---|---|
| 104.5 hours of trial preparation | 9/29-30/03, 10/2-3/03, 10/7-8/03, 10/8-9/03, 10/15-16/03, 10/16-17/03, 10/22-23/03, 10/23-24/03, 10/24-25/03, 10/25-26/03, 10/26-27/03, 10/28-29/03, 10/29-30/03, 10/30-31/03, 10/31-11/1/03 |
| 91 hours for closing argument | 12/10-11/03, 12/18-19/03, 12/20-21/03, 12/21-22/03, 12/22-23/03, 1/11-12/04, 1/12-13/04, 1/13-14/04, 1/14-15/04, 1/15-16/04, 4/12-13/05 |
| 86 hours for closing rebuttal | 4/6-7/04, 4/8-9/04, 4/9-10/04, 4/10-11/04, 4/11-12/04, 4/13-14/04, 4/14-15/04, 1/15-16/04 |

In addition to the foregoing, there are several instances where Mr. Cohen spent an excessive and highly questionable amount of time when billing for a particular task on a particular day. For example, Mr. Cohen spent 14 hours on April 10-11, 2004 and 12 hours on April 11-12, 2004 on a closing rebuttal. In my experience, even the highest billers at the largest law firms are unable to bill that amount of time in one day. In fact, several corporations such as Daimler Chrysler examine and monitor daily billing that exceeds a set number of hours (e.g., in a day).

My concern is further heightened by the fact that Joel Sternstein and Bernard Murphy also spent 224.5 hours and 143.5 hours, respectively, on this matter, and that the time of all three attorneys is characterized as being a "conservative estimate of the time spent in prosecuting this case...." (Attorney Fee and Cost Petition, p. 2, Transcripts at 296-298.)

11. **The attorneys fees in this matter were fixed and should be passed through to the Respondents by the Complainant accordingly.**

One of the source of the discrepancies in the hours that the attorneys are trying to claim as opposed to the value of the services rendered is in the fact that the attorneys are compensated by a fixed salary as opposed to an hourly, incentive-based rate. The result of the fixed salary structure is that the attorneys lack incentive to work productively, efficiently or in the best interest of the party that will be paying their fee. The attempt to convert the Complainant's

bureaucratic based salaries into fees that are subject to review by a client results in extreme over billing and out-right fraud.

In her expert report Ms. Stonich noted some of the problems caused by the attorneys, who work on a fixed fee basis trying to convert to an billable rate. Ms. Stonich stated "[a]ny case should be economically and effectively staffed, so that there is minimal or no duplication of efforts and tasks are assigned to staff at the appropriate level of expertise and appropriate billing rate. A balance must be struck between the efficiency of a more experienced attorney and the advantages of having a task performed by a junior attorney or paralegal. To achieve the best efficiency and value, the roles and responsibilities of staff members should be clearly defined and appropriate to each individual's qualifications, level of experience, and billing rate. The goal is to minimize the number of attorneys and paralegals necessary to effectively complete specific tasks.

Counsel should delegate work to subordinates wherever possible to achieve efficiency and cost-effectiveness without compromising quality. An attorney should not bill for paralegal work. Rather, if no paralegal is available, the attorney should bill at a lower paralegal rate. An attorney also should not bill for clerical/secretarial work as such work is considered overhead. Some examples of paralegal tasks are the preparation of subpoenas for deposition or record requests, requests to produce, form interrogatories, or other basic forms; the summarization of answers to interrogatories or deposition transcripts, etc. Clerical/secretarial tasks include, but are not limited to, mail receipt and distribution; document assemblage, stamping/tabbing, and preparation for mailing; copying, faxing; transcription; file establishment, organization, and maintenance; the drafting of notices of filing, notices of deposition, notices of motions, etc.; the preparation of form enclosure letters; calendaring and scheduling appointments, conferences, depositions, meetings; making travel and meeting arrangements, etc.

All litigation guidelines expect that one attorney will have primary responsibility for a case, and that only one attorney will be needed to attend trials, court appearances, meetings, depositions, witness interviews, etc. A team approach should only be employed in rare

situations. It also is assumed that an attorney assigned to the file will handle it to conclusion. If it becomes necessary to replace an attorney, a firm typically is expected to bear the cost of substituting staff until that member is as familiar with the file his predecessor, and so that the client will not have to reimburse the firm additional fees or expenses arising out of a case reassignment.

In addition to Mr. Sternstein and Mr. Murphy, I have been informed that Kelly Cartwright, Brad Halloren, Ellen O'Laughlin also worked on this case. The Attorney General's Office has not submitted legal bills for the three attorneys. As a result, it is impossible to accurately determine what amount of Mr. Cohen's time was duplicative of time incurred by the other attorneys on this case. It is clear from a review of Mr. Sternstein's and Mr. Murphy's time in conjunction with Mr. Cohen's billing records, however, that there was a great deal of duplication of effort between those attorneys. For example, Mr. Cohen billed 2.0 hours and Mr. Sternstein billed 0.5 hours for a December 23, 2002 status hearing; Mr. Cohen billed 7 hours and Mr. Sternstein billed 4 hours on October 2, 2003 for trial preparation of a witness, and Mr. Cohen billed 4.0 hours, Mr. Sternstein billed .5 hours, and Mr. Murphy billed 7 hours for an October 7, 2003 hearing.

Time entries such as the foregoing, show the variations in the amount of time billed by each attorney for a particular task and thus, lead one to question the accuracy of Mr. Cohen's time entries. There are also several instances where there is a variation in dates for a specific task which also leads one to question the accuracy of Mr. Cohen's billing entries. For example, Mr. Cohen billed 4.0 hours on July 29-30, 2003 and Mr. Sternstein billed 0.5 hours on July 27, 2003 for a status hearing. It is highly doubtful that there were two status hearings in such rapid succession.

It also appears that Mr. Cohen is billing for tasks that could be accomplished by a paralegal or clerical staff. For example, a January 17-18, 2003 time entry for 2.0 hours, and an April 18-19, 2003 time entry for 3.0 hours contain the phrase to "prep for filing." Although the entries are vague in that "prep" is not defined, drafting a notice of filing typically can be handled

by a paralegal and making copies of a motion or pleading for filing can be handled by clerical staff.

Finally, on June 19-20, 2002, Mr. Cohen spent 8 hours to "[start] to review big old file". If any other attorney already spent time working on the case and Mr. Cohen's review was necessitated by a personnel change, the Attorney General's Office should not charge for the time. (Id. at 7-8. Transcripts at 291-294.)

The people fo the state of Illinois may be comfortable paying their employees for other inefficient and unproductive activities because the fee is fixed, the services are assured and the rate paid to the attorneys is lower than the rate that would be paid to attorneys in outside practice. However, every hour paid by the people of the state of Illinois can not be converted into an hour of billable time that should be tolerated by a client paying on an hourly fee basis. Again, Ms Stonich notes some of these problems in her expert, opinion report. One of the problems involves billing for intra-office meetings. Ms Stonich notes:

"Intra-office conferencing should be limited to specific value-added benefit to the defense/prosecution of a file. Although some companies will not pay for intra-office conferences, conferences to discuss substantive legal issues or strategic procedural aspects of the case that result in a more effective defense or prosecution may be reimbursable provided that there is a description of the subject matter or purpose of the meeting sufficient to demonstrate its relevance and value to the case. When limited intra-office conferencing is allowed, only the assigned attorney's time is reimbursable, and not the time of any other attendees.

Intra-office conferences of an administrative (e.g., for file/task assignment), coordinative, instructional, educational, or supervisory (e.g., status conferences) rather than substantive nature should not be billed. Intra-office conferences that appear excessive, unreasonable, and unnecessary also are not reimbursable.

In this case, Mr. Cohen documented several interoffice conferences, but did not provide an adequate description of the conferences. As a result, one is unable to determine if the conferences served a specific purpose or otherwise advanced the case. Examples are an April 16-17, 2003 entry for 4.0 hours for a "mtg w/ Joel" and a April 19-20, 2005 entry for 1.0 hours for a "Mtg. re: Board Order, w/ management, Mike Partee." (Id. at 8)

Another problem noted by Ms. Stonich involved charges for legal research. Ms Stonich's report the following statement questioning the validity of the charges involving legal research being assigned to the Respondents:

"Billing guidelines vary on the issue of legal research. In some cases, legal research must be pre-approved by a client. In other cases, a limited amount of legal research is permitted up to a certain time limit (e.g., 1, 3, 5 or 8 hours). All research in excess of such time caps must then be approved by the client.

Charges for routine or elementary legal research of issues commonly known among reasonably experienced attorneys in the jurisdiction (e.g., procedural issues, court rules, etc.) are not reimbursable. Clients are also not expected to reimburse a firm for research of issues which should be in the firm's research database due to the firm's expertise in an area of law relating to the case at issue. Any updated portion of previously researched topics may be billed. It also is expected, except in certain instances where it will be more cost effective for higher level personnel to undertake legal research, that associates or paralegals will conduct the research.

When research is allowed, an invoice must identify all legal research, including the issues researched. Copies of any research, legal memoranda, or legal notes as well as copies of any motions, pleadings, or briefs produced as a result of the research, should be submitted with the invoice or made available for the client's review.

There are several entries in this case for legal research. However, there is no description of the legal research, so it is impossible to determine if the research involved novel questions of

law rather than routine matters. Examples are a July 8-9, 2003 entry for 3.0 hours to "Research/draft motion to compel" and a September 8-9, 2004 entry for 4.0 hours for "Mot to strike RMS, research, drafting, discussions." (Id. at 8-9.)

In his testimony, Mr Cohen admits to billing for inter-office conferences (Transcripts at 97.), time spent reviewing the file because of substitution of counsel(Id. at 98-102.), billing for work performed that was clerical in nature as opposed to legal (Id. at 102-105, 117, 125.), proof reading, redrafting and editing (Id. at 148.) and bringing other attorneys up to speed on the case (Id. at 138-140.) None of this time should be billed to the Respondents. Unfortunately the Complainant's records that are the basis for its fees for legal fees and cost are not sufficient to allow a party to determine what tasks and what hours pertain to these non-billable tasks. Mr. Cohen himself admits that his time records are so devoid of required details that there is no way to determine how much time is spent of billable and non-billable tasks. (Id. at 150.)

12. **The Complainant and its attorney has failed to comply with the requirements of Supreme Court Rule 1.5(b) which require a lawyer who has not regularly represented a client to communicate to the client, before or within a reasonable time after commencing the representation, the basis or rate of the fee shall be communicated to the client and therefore is not entitled to recover fees and costs.**

In her expert opinion report, Ms. Stonich stated that the "goal of any practicing attorney or law firm should be to optimize legal performance in the most cost effective, reasonable, and necessary manner. Standardized billing and accounting procedures are paramount to maintaining uniform and equitable billing practices." (Respondents' Exhibit 102 at 2.). Ms Stonich testified that standard practice to submit bills to a client on a monthly basis. In some cases, a client and attorney may agree to an alternate billing cycle (e.g., on a quarterly basis).

Ms Stonich states that the attorneys within the Attorney General's Office should have reflected their time on a monthly or quarterly basis, and in a standard billing format as a case progresses. Such a billing practices and documentation is necessary if the Attorney General's

Office pursues a respondent for fees and costs in order to provide the proper and necessary justification for such reimbursement. (Id. At 3.)

In this case, the attorneys for the Complainant failed to maintain adequate time records. Mitchell L. Cohen reflected his time from June 11, 2002 to May 19, 2005 via Microsoft Outlook calendar entries. Each calendar entry represents a 24 hour time period. Mr. Cohen's time is also reflected on a handwritten sheet simply showing the total number of hours associated with each month. This handwritten compilation also was submitted in typewritten form. The formatting of Mr. Cohen's time in this manner leads one to believe that Mr. Cohen did not keep a contemporaneous record of his time, but documented his time after the conclusion of the case. (Id.)

Because the attorneys did not keep adequate time records, they could not and did not communicate to the Respondents the basis for their fees. It is apparent from their testimony that the attorneys did not determine their hourly billing rate until after their work was concluded. As a result, they could not communicate their rate to the Respondents in a reasonable time after commencing their duties in this case. The attorneys for the Complainants testified that they were aware throughout the course of this litigation that they would be seeking legal fees and that the Respondents would be the parties responsible for seeking those fees. Indeed, during the litigation, the Complainant would use the fact that they would be able to collect legal fees if the case were determined by the Board, as a negotiating point. However, at no time did the Complainant or their attorneys comply with the requirements of Supreme Court Rule 1.5(b) and communicate to the Respondents, before or within a reasonable time after commencing the representation, the basis or rate of the fee shall be communicated to the client and therefore is not entitled to recover fees and costs.

The Respondents were totally blind sided by the request for fees and costs demanded by the Complainants. The Respondents had no basis for knowing that the Complainants's attorney were of the opinion that they were entitled to the highest hourly rate ever awarded by the Board or that the Complainant's attorney would be so inefficient and nonproductive, and expect to get

paid for clerical work, redrafting to correct their own mistakes and other nonstandard practices. It is exactly this type of ambush billing that Supreme Court Rule 1.5(b) is designed to avoid. The Complainant's attorneys knew or had a duty to know of their requirements under Rule 1.5(b) but failed to adhere to the rule. As a result, the Respondents were injured. The Complainants should not be allowed to collect fees under these circumstances.

13. **When held to the same legal standards, the Complainant's claims for reimbursement for fees and expenses equally under documented, unjustified and should not be charged to or paid by the Respondents.**

Just as an attorney needs to document his legal fees with enough detail to allow a third party to make a determination if the fees are reasonable, the attorney also has a duty to supply detailed information on charges for fees and expenses to determine if the expenses were actually incurred and reasonably necessary for the advancement of the case. In this matter the Complainant and it's attorneys failed to meet this burden.

In her report, Ms. Stonich noted the following short comings in the Complainant's claims for es and costs in various categories:

Travel Time

Non-productive travel time typically is not reimbursable. In some cases, it is reimbursable at a lower rate (e.g. 50% of the timekeeper's hourly rate. An attorney may be reimbursed at the regular hourly rate if legal work is conducted during travel time. In this case, Mr. Cohen billed for his automobile travel time even though he could not work on the case. Mr. Cohen billed 2.0 hours for travel from his home to Libertyville on October 29-30, 2004, and 3.0 hours on October 31-November 1, 2004 for the return trip. There is no explanation as to why he billed 1.5 hours for travel on October 30-31, 2006 even though he stayed in a hotel in Libertyville that night. In any event, such time should not be reimbursable at a $150/hour rate as Mr. Cohen did not work on the case while traveling.

Legal Expenses/Costs

Mr. Cohen's April 13, 2004 and September 16, 2004 Affidavits

On April 13, 2004, Mr. Cohen executed an affidavit attesting that the State of Illinois incurred $5,574.84 in costs. He executed a second affidavit on September 16, 2004 wherein he attested that the State incurred $3,482.84 in costs. In that affidavit, Mr. Cohen noted that he discovered an error made regarding the cost of deposition transcripts. Specifically, the first affidavit shows $3,887.65 in deposition costs while the second affidavit shows $1,796.65 in deposition costs. The conflicting information contained in the affidavits as well as Mr. Cohen's admission regarding the error again leads one to question the accuracy of all bills provided.

Photocopies

Law firms should have the ability to make copies in-house. A review of the litigation guidelines from other entities indicates that, in many cases, photocopying is considered an overhead expense that is not reimbursable. In other cases, photocopies are to be billed at actual cost with a cap (usually $.10/page, but in no event, over $.15/page) on such costs, and per page charges are prohibited. In those instances where a per page charge is allowed, however, the charge generally should not exceed $.10/page, and in some rare instances, $.15/page. If billed, internal photocopy costs should be itemized on an invoice as follows:
the date the expense was incurred;
the number of pages photocopied;
the charge per page; and
the total charge.

If there is a need for outside copying, justification for the use of an outside firm must be provided. Also, any outside copying costs exceeding $.10/page are generally reimbursed only when the cost cannot be controlled (e.g., certified copies from the courthouse). Outside copy costs should be separately noted on the invoice with the corresponding receipts attached to the invoice. The receipts should contain the information delineated above.

In this case, there was no in-house copying. Rather, the Attorney General's Office utilized Kinko's, Inc. The receipts were not submitted in conjunction with a monthly statement but were submitted separately. A September 30, 2003 receipt indicates that Kinko's provided specialized copy and printing services that typically could not be provided on an in-house basis. It is not clear, however, why the Attorney General's Office utilized Kinko's for all copying. Kinko's October 6, 2003, and October 16, 2003 invoices show charges ranging from $.10 to $.19/page.

There is no indication as to why it was necessary to have those copies made at Kinko's rather than within the Attorney General's Office. The Attorney Generals' Office should have sufficient staff and copying equipment to make standardized copies in-house.

Travel Expenses

Clients typically are not expected to reimburse an attorney for mileage, tolls, ground transportation, parking, lodging, meals, or any other costs associated with local travel as local travel is considered the firm's service area. Attorneys can expect to be reimbursed for such charges, however, for non-local travel. There is a variation among entities as to what constitutes local travel. Some entities simply define it as out-of-town travel while others define it as either a radius of 50 or 75 mile.

If travel is non-local, only reasonable accommodations and meal expenses will be reimbursed. Also, personal expenses attendant to lodging generally are not reimbursable. Any reimbursable expenses must be must be itemized and should be supported by receipts.

A review of Mr. Cohen's travel voucher indicates that he charged $15.00 for parking on October 28, 2003, a day before he traveled to Libertyville for the trial. He also charged for $28.80 for his round trip mileage from his residence to Libertyville (80 miles total, or 40 miles each way @ $.36/mile), $8.64 for mileage in the area of Libertyville (a total of 24 miles @ $.36/mile), and $.80 for tolls. He also charged a total of $77.00 for his meals ($28.00 on October

28, 2003, $28.00 on October 29, 2003, and $21.00 on October 31, 2003), and $175.38 for lodging (2 nights at $87.69/night).

Unlike Mr. Cohen, Mr. Murphy did not charge for his mileage. He did, however, charge for his hotel, per diem meals (with the exception that $21.00 rather than $28.00 was charged on October 29, 2003), $1.20 in tolls, and $8.30 for three phone calls to his home.

In this case, travel to Libertyville is local travel as it is 40 miles from both Mr. Cohen's home and the Attorney General's office, and is within the Chicagoland metropolitan area. As a result, there is no justification for any of the charges and, in particular, for the hotel and meal charges.

Even if this matter were to be considered non-local, however, attorneys do not charge for meals on a per diem basis, but for actual and reasonable meal costs. Also, Mr. Cohen should not have charged for parking on October 28, 2003 as that cost was a commuting expense from his home to the office. Mr. Murphy should not have submitted his travel expenses as it is expected that one attorney should attend trial. He also should not have billed for his personal calls to his home. Receipts also should have been submitted for the toll charges. (Id. at 10. Transcripts at 284 -285)

In his testimony, Mr. Cohen makes unsupported statements that the Complainant did not charge for all expenses incurred. (Id at 59-61.) Not only is this irrelevant in showing that the cost charged to the Respondents are justified, it, in fact, highlights the fact that the Complainant and its attorney failed to keep accurate records by which a reasonable person can determine the costs that should be paid. In addition, Mr Cohen falsely testified that the Complainant did not include long distance telephone calls when these charges were indeed included in the both of the conflicting affidavits submitted by Mr, Cohen. Again, any testimony by Mr. Cohen is suspect and should be given minimum consideration.

Mr. Cohen also testified that he submitted two affidavits in this matter related to costs and fees. In both affidavits Mr. Cohen swore that the affidavits were true and accurate and signed the affidavits. (Id. at 83-84.) However, the two affidavits claimed different amounts for the actual cost and expenses claimed by the Complainant and neither affidavit was withdrawn from consideration (Id at 84,) Obviously, Mr. Cohen submitted false information in at least one, and possibly both, of the two affidavits. This is perjury and is sanctionable. Again, the Complainants are relying solely on the testimony of Mr. Cohen – whose credibility is non-existent – to support their claim for reimbursement instead of relying on expert testimony, independent documentation or supporting information from third parties. The only documentation presented by the Complainants are the conflicting affidavits executed by Mr. Cohen which included allegedly supporting documentation. The affidavits need to be discarded as unreliable. The Respondents should not forced to pay for costs and fees that can not be supported. If the documents supporting the fee petition lack foundation and are devoid of any meaningful information to assist in determining the reasonableness of the fees charged, they can not be the basis for determining the reasonableness of costs and fees.

14. **The Respondents are entitled to offset under Section 42 of the Act.**

In the Opinion and Order of September 2, 2004, the Board failed to consider offsets for the Complainant in determining the penalty imposed. The record indicates that the Respondents spent in excess of $150,000.00 in addressing the release to the Avon Ditch. The Respondents have in fact spent additional funds since the time of the hearing and the amount is now in excess of $200,000.00.

The expert testimony at hearing showed that the release was not the result of the Respondents operation and, in fact, was from free product located under the Respondents' site as a result of the operations from the previous owner and operator. (Id. at 363-368.) The Respondents were not responsible for addressing the release or the source of the contamination. The Respondents - and not the state of Illinois, IEPA, IDNR , city of Grayslake or USEPA – was the only party to take the voluntary action to address the problem. Through the testimony of

the Complainant's witness and the expert opinion testimony of Mr. James Huff, P. E., it was unrefuted that the actions taken by the Respondents was effective and as a result of their action, no environmental impact resulted from the release to the ditch.

The Respondents have a common law right to an offset to the penalty imposed based on the expenditure and effort it made to mitigate and alleviate the problem. No such offset was considered in the Board's previous opinions and orders. It must be considered at this juncture of the proceeding.

The expenditures by the Respondents in addressing and eliminating the release to the Avon Ditch is well in excess of the amount claimed by the Complainant for attorneys' fees. At an absolute minimum, the attorneys' fees and costs should be reduced to zero as a result of the offset. However, as argued in this filing, the Complainants actual justifiable attorneys' fees and cost are well below the amount delineated in their petition and may be zero. Consequently, the excess of the offset is even greater.

The Board can and should consider in the opinion and order for the issue of attorneys' fees and costs further offsets for the Respondents' efforts to address the oil sheen on Avon Creek. The total penalty in this mater should be reduced by the amount of the total expenditure by the Respondents in addressing the problem.

## CONCLUSION

In the conclusion of her expert, opinion report, Ms. Stonich laid out the general practice in the legal community for payment of non-conforming invoices such as the request for reimbursement presented by the Complainant to the Board. Ms Stonich states:

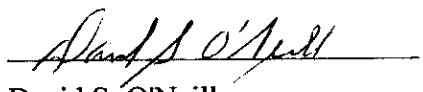
"The Attorney General, in the complaint, requested fees and costs. As the Attorney General's Office knew that it would be asking for reimbursement of its fees and costs in this case, and as it routinely asks for such reimbursement when filing a complaint, it is on notice that

it is obligated to keep concise, accurate, and contemporaneous billing records. There is therefore no explanation or reason why the Attorney General's Office can not maintain billing records that conform to those routinely kept by other attorneys and law firms. In light of the fact that attorneys and law firms use standard billing practices and formats, it also is not unreasonable for Respondents to expect the Attorney General's Office to do likewise. When a questions or issues arise with a bill, an attorney or firm should be given an opportunity to provide more information so as to remedy the issue. In the event that the attorney is unable to remedy a billing issue, however, it is not unusual for a client to withhold payment on the billing entry at issue." (Id. at 10.)

The Respondents are of the opinion that the State of Illinois and the Illinois Attorney General's Office should be held to the same standards as the general legal community. There is no question that the Complainant's request for legal fees and costs would be refused by a competent court because the Complainants failed to supplied detailed information necessary to allow a reasonable person to determine fo the fees are reasonable. It is also clear that the Complainant and it's attorneys have failed to establish the reasonable hourly rate at which they should be allowed to bill. As a result, the Respondents should not be instructed to reimburse the Complainant for attorneys' fees and costs.

Wherefore, the Respondents respectfully request the Board to deny the Complainant's Request for legal fees and costs in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Respondents' Post Hearing Closing Arguments on the Issue of the Complainant's Request for Attorneys' Fees and Costs by hand delivery on January 19, 2007, upon the following party:

Mr. Michael Partee, Esq.
Environmental Bureau
Assistant Attorney General
Illinois Attorney General's Office
188 W. Randolph, 20th Floor
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David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 19TH day of January, 2007

Notary Public

OFFICIAL SEAL
MICHAEL B JAWGIEL
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/28/07