

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3
4

5 August Term, 2013
6

7 (Argued: April 29, 2014

Decided: August 26, 2014)

8
9 Docket No. 13-2699-cv
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13 MARION S. MISHKIN LAW OFFICE, Plaintiffs' Liaison Counsel: 21 MC 100
14 Bodily Injury, Non-Respiratory, Non-Injection Cases,
15

16 *Appellant,*
17

18 v.
19

20 CHRISTOPHER R. LOPALO, STANLEY KALATHARA, SCOTT EPSTEIN,
21 MICHAEL SCOTT LEVINE, NEIL C. MASCOLO, JR., JEFFREY A. NEMEROV,
22 JEFFREY SINGER, ANDREW J. SMILEY, FRANK A. ANDREA, III,
23 CHRISTOPHER DOWNE, EVAN SACKS, ANDREW RICHARD DIAMOND,
24 MICHAEL SETH LEYDEN, MICHAEL F.X. RYAN, JOEL MYRON LUTWIN,
25 JOHN S. PARK, JOSEPH L. DECOLATOR, LEONARD LINDEN, STEVEN L.
26 BARKAN, JOSEPH EHRLICH, DAVID JAROSLAWICZ, DAVID LAURENCE
27 KREMEN, MICHAEL KREMINS, NOAH H. KUSHLEFSKY,
28

29 *Appellees.*¹
30
31

¹ The Clerk of the Court is directed to correct the caption as above.

1 Before: WALKER, POOLER, and WESLEY, *Circuit Judges*.

2
3 Appeal from the June 11, 2013 order of the United States District Court for
4 the Southern District of New York (Alvin K. Hellerstein, *J.*) denying appellant,
5 the Marion S. Mishkin Law Office, an award of attorneys' fees for services
6 performed as plaintiffs' liaison counsel in the bodily injury, non-respiratory cases
7 arising out of the events of September 11, 2001. Because we find the district court
8 abused its discretion in denying Mishkin any fee for her work without further
9 inquiry, we vacate and remand.

10
11 _____
12 E. CHRISTOPHER MURRAY, Ruskin Moscou
13 Faltischiek, P.C., Uniondale, NY, *for Appellant Marion S.*
14 *Mishkin Law Office.*

15 JOSHUA BARDAVID, New York, NY, *for Appellees*
16 *Frank A. Andrea, III, Michael Scott Levine, Joel Myron*
17 *Lutwin, Neil C. Mascolo, Jr., John S. Park, Jeffrey Singer and*
18 *Andrew J. Smiley .*

19
20 DAVID L. KREMEN, Oshman & Mirisola, LLP, New
21 York, NY *for Appellee Oshman & Mirisola, LLP (incorrectly*
22 *sued as David Laurence Kremen).*
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1 POOLER, *Circuit Judge*:

2 The Marion S. Mishkin Law Office (“Mishkin”) appeals from the June 11,
3 2013 order of the United States District Court for the Southern District of New
4 York (Alvin R. Hellerstein, J.) denying an award of attorneys’ fees for services
5 performed as plaintiffs’ liaison counsel in the bodily injury, non-respiratory cases
6 arising out of the events of September 11, 2001. The district court, while
7 acknowledging Mishkin should receive a fee for her work as liaison counsel,
8 denied her any fee after finding her fee application inflated and unsubstantiated
9 by contemporaneously kept time records. We find the district court abused its
10 discretion in denying Mishkin a fee without further inquiry, and thus we vacate
11 and remand for further proceedings.

12 BACKGROUND

13 The underlying cases in this appeal involve state law claims for non-
14 respiratory injuries suffered while working at the World Trade Center site after
15 the September 11 attacks. Mishkin alleges that at some point prior to 2005 the
16 New York State Supreme Court appointed her as liaison counsel for all plaintiffs
17 in cases where plaintiffs claimed a physical injury while working at the World
18 Trade Center site. However, there is no state court order in the record reflecting

1 such an appointment. In 2005, the underlying cases were removed from state
2 court to the United States District Court for the Southern District of New York.
3 Initially, the cases were included in the class of roughly 10,000 respiratory-related
4 illnesses pending before that court. When the cases were transferred, Mishkin
5 and defendants' liaison counsel wrote to the district court, introducing
6 themselves and proposing a briefing schedule for a remand motion. The district
7 court denied the remand motion on December 4, 2006. In 2006, the district court
8 asked Mishkin to provide a report regarding the non-respiratory plaintiffs, and
9 referred to her as "liaison counsel" in acknowledging that report's receipt.

10 The district court did not enter an order actually appointing Mishkin
11 liaison counsel in federal court until May 21, 2008. Her term was short, as the
12 district court, unhappy with Mishkin's performance, removed her as liaison
13 counsel in an order dated August 28, 2008. On September 12, 2008, the attorneys
14 for the non-respiratory plaintiffs sent a joint letter to the district court urging
15 Mishkin be reinstated as liaison counsel. The letter stated that:

16 The sum and substance of Marion's contribution to the
17 interests of all concerned in this litigation cannot be
18 overstated. Through these past five years, Marion
19 generated hundreds of group-wide status, strategy and
20 summary reports, coordinated group-wide meetings

1 and appeared for our group in all of the court
2 conferences in State and Federal Court, all to keep our
3 group informed of the numerous procedural and
4 substantive intricacies of this litigation. She has
5 regularly furnished us with all of the pertinent court
6 orders and corresponded with us on a continuous basis
7 to promote the group's understanding of the issues and
8 facilitate the group's compliance with the Court's
9 procedures, instructions and deadlines. Marion
10 authored and orally argued nearly all the briefs for our
11 group and engaged in many productive discussions for
12 us with the defense attorneys throughout these years.

13
14 App'x at 50.

15 The district court relented and reappointed Mishkin on April 3, 2009, with
16 the caveat that she must work with a newly appointed co-liaison counsel. The
17 appointment order tasked liaison counsel, in part, with coordinating responses to
18 queries from the district court and defendants, facilitating plaintiffs' compliance
19 with district court orders, maintaining an official service list, "consider[ing]
20 proposals for future case management orders or other case management
21 procedures and issues," and performing other administrative tasks as necessary.

22 App'x at 28-29.

23 On January 23, 2012, Mishkin submitted an application for \$1,868,445 in
24 fees for her work as liaison counsel. The district court denied that application

1 without prejudice to renew. At its hearing on the issue, the district court found
2 Mishkin's application sought fees for work that exceeded her role as liaison
3 counsel. The district court found Mishkin "is entitled to a fee as liaison counsel.
4 But it has to be in relationship to the work that she should be doing as liaison
5 counsel." App'x at 940. The district court also ruled that Mishkin could only
6 claim fees for work done while she was appointed by the district court,
7 excluding her time in state court and any time in federal court when she was not
8 acting by an order of appointment.

9 On April 26, 2013, Mishkin submitted a revised fee application seeking
10 \$418,995 in fees for work done after May 21, 2008 and excluding the period of
11 time the district court had removed her as liaison counsel. Several plaintiffs'
12 counsel—responsible for funding liaison counsel's fees out of the fees they
13 received—filed objections to Mishkin's fee request. The district court held a
14 hearing on the revised fee application on June 10, 2013. As it opened the
15 discussion regarding Mishkin's fee application, the district court noted that
16 Mishkin sought to be paid for 931.1 hours of work, including 179.7 hours spent
17 preparing her fee application. The district court described the hours spent
18 preparing the fee application "extraordinary" and "outrageous," noting that the

1 time comprised “11 to 12 percent of the total time [Mishkin] spent on the case.”

2 App’x at 1384.

3 During the colloquy, Mishkin’s lawyer told the district court the objectors
4 sought

5 . . . to utterly deprive Ms. Mishkin of
6 the fee she is entitled to for doing
7 work that, as I have just expressed to
8 your Honor . . .

9
10 THE COURT: To be clear, Mr. Kublanovsky, she is
11 entitled to a fee.

12
13 MR. KUBLANOVSKY: She is entitled to her fee, your
14 Honor.

15
16 THE COURT: To a fee.

17
18 MR. KUBLANOVSKY: To a fee.

19
20 App’x at 1389.

21 The district court described several services for which Mishkin sought
22 payment that the district court thought exceeded the scope of work set forth in its
23 appointment order. For example, the district court noted Mishkin sought to be
24 reimbursed for reviewing various motions for summary judgment, which the
25 district court described as “well beyond any activity of liaison counsel. It’s
26 makework, that’s what it is.” App’x at 1397-98.

The district court offered to send the matter to a magistrate judge for further consideration, but Mishkin declined. Instead, she asked the court “to award her a reasonable fee in your Honor’s estimation.” App’x at 1406. The district court then denied Mishkin’s application in full, awarding her no fee. The district court found that Mishkin’s time records

are not contemporaneous time records. They are reconstructed records. Ms. Mishkin may have had notations at the time she was performing this work of the fractions of hours that she performed for each category of service. We will not know for sure unless and until there might be discovery of her records. But the impression I have is these are all reconstructions, and that's why it took her so long to prepare the time records. They show a complete misunderstanding of what her work was as liaison counsel.

App'x at 1409-10. Based on its factual findings that Mishkin's time records were not kept contemporaneously, and that her application sought fees for work beyond the scope of its appointment order, the district court awarded her no fee. A final order was entered June 11, 2013. This appeal followed.

DISCUSSION

We review the district court's denial of an application for attorney's fees for abuse of discretion. *Scarangella v. Grp. Health, Inc.*, 731 F.3d 146, 151 (2d Cir.

1 2013). “We review questions of law regarding the appropriate legal standard in
2 granting or denying attorney's fees de novo.” *Id.*

3 Mishkin argues that she need not produce contemporaneous time records
4 to get paid because the underlying cases arise under state law rather than federal
5 law. Under New York state law, Mishkin argues, counsel need not track time
6 contemporaneously for a court to award fees. Our Court has recognized that in
7 cases in which the right to attorneys’ fees is governed by state law, New York's
8 more liberal rule allowing reconstructed records should apply. *Riordan v.*
9 *Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992) (“State law creates the
10 substantive right to attorney’s fees, a right which cannot be deprived by applying
11 the contemporaneous time records rule adopted in this Circuit.” (internal
12 citations omitted)); *see also Schwartz v. Chan*, 142 F. Supp. 2d 325, 331 (E.D.N.Y.
13 2001) (“[U]nder New York law, courts may award attorney's fees based on
14 contemporaneous or reconstructed time records.”).

15 However, state law did not create the substantive right to attorney’s fees—
16 federal law did. We hold that when a district court appoints liaison counsel, that
17 appointment flows from the district court’s inherent authority to manage its own
18 docket and is thus governed by federal, not state, law. *See In re Zyprexa Prods.*

1 *Liab. Litig.*, 594 F.3d 113, 130 (2d Cir. 2010) (MDLs benefit from “a lead counsel or
2 plaintiffs’ steering committee to coordinate and conduct pretrial proceedings on
3 behalf of all plaintiffs in order to avoid what otherwise might well become
4 chaotic.”); *MacAlister v. Guterma*, 263 F.2d 65, 68 (2d Cir. 1958) (Court’s inherent
5 powers allow it to consolidate cases and appoint general counsel to “supervise
6 and coordinate the conduct of plaintiffs’ cases.”); *see also In re Air Crash Disaster at*
7 *Fl. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1012 (5th Cir. 1977) (A district court
8 has inherent authority “to bring management power to bear upon massive and
9 complex litigation to prevent it from monopolizing the services of the court to the
10 exclusion of other litigants.”).

11 As Mishkin’s appointment was made possible by the district court’s
12 inherent powers, and not by operation of state law, it follows that the authority to
13 pay her derives from federal law. Absent the appointment order entered by the
14 district court there is no authority to pay Mishkin. We thus reject her argument
15 that she is entitled to fees for work she performed as liaison counsel prior to her
16 appointment by the district court. Similarly, there are no grounds for collecting a
17 fee to pay liaison counsel from plaintiffs’ attorneys who settled their cases prior
18 to her appointment.

1 The rules that govern the payment of appointed counsel in a case arising
2 under federal law are well established in this Circuit. In *New York State Ass’n for*
3 *Retarded Children, Inc. v. Carey*, our Court crafted a new rule: “any attorney . . .
4 who applies for court-ordered compensation in this Circuit . . . must document
5 the application with contemporaneous time records . . . specify[ing], for each
6 attorney, the date, the hours expended, and the nature of the work done.” 711
7 F.2d 1136, 1148 (2d Cir. 1983). The “[f]ailure to do so results in denial of the
8 motion for fees.” *Riordan*, 977 F.2d at 53. Thus,

9 All applications for attorney's fees, whether submitted
10 by profit-making or non-profit lawyers, for any work
11 done after the date of this opinion should normally be
12 disallowed unless accompanied by contemporaneous
13 time records indicating, for each attorney, the date, the
14 hours expended, and the nature of the work done.

15
16 *Carey*, 711 F.2d at 1154 (numbering omitted). “*Carey* establishes a strict rule from
17 which attorneys may deviate only in the rarest of cases.” *Scott v. City of New York*,
18 626 F.3d 130, 133 (2d Cir. 2010) (“*Scott I*”).

19 Our Court has, however, allowed attorneys who failed to keep
20 contemporaneous time records “to recover limited fees for any
21 contemporaneously documented time that [the attorney] was physically before

1 the district court.” *Scott v. City of New York*, 643 F.3d 56, 58 (2d Cir. 2011) (“*Scott*
2 *II*”). Thus, “entries in official court records (e.g. the docket, minute entries, and
3 transcriptions of proceedings) may serve as reliable documentation of an
4 attorney's compensable hours in court at hearings and at trial and in conferences
5 with the judge or other court personnel.” *Id.* While district courts are “under no
6 obligation to award fees based on such time,” we have held that “such a regime
7 prevents a totally inequitable result . . . while, at the same time, preserving the
8 strong incentive *Carey* creates for lawyers to keep and submit contemporaneous
9 records.” *Id.*

10 We turn, then, to Mishkin’s fee application, mindful that when reviewing
11 voluminous fee applications, it is unrealistic to expect courts to “evaluate and
12 rule on every entry in an application,” *Carey*, 711 F.2d at 1146, and that “[a]
13 request for attorneys' fees should not turn into a second major litigation.”
14 *Buckhannon Bd. & Care Home, Inc. v. W. Va.*, 532 U.S. 598, 609 (2001) (alteration in
15 original) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437, (1983)).

16 The district court’s finding that Mishkin failed to keep contemporaneous
17 time records is clearly erroneous. In response to questioning by the district court,
18 counsel reported that while Mishkin did not track her time on a computer,

1 Mishkin did not reconstruct her time for her fee application. Rather,
2 “[e]verything was time-stamped when she did it. She just had to go back and
3 review. There was no recording made of it such as we would have to print out
4 from a computer program, for example, a time record or an entry-keeping
5 program. But she did have everything time-stamped.” App’x at 1394-95.

6
7 In denying Mishkin a fee, the district court stated:

8
9 The Second Circuit has insisted on contemporaneous
10 time records for anyone seeking to be reimbursed for
11 fees. These are not contemporaneous time records.
12 They are reconstructed records. Ms. Mishkin may have
13 had notations at the time she was performing this work
14 of the fractions of hours that she performed for each
15 category of service. We will not know for sure unless
16 and until there might be discovery of her records. But
17 the impression I have is that these are all
18 reconstructions, and that's why it took her so long to
19 prepare the time records.

20
21 App’x at 1409-10.

22
23 So long as an attorney “made contemporaneous entries as the work was
24 completed, and that [her] billing was based on these contemporaneous records,”
25 *Carey* is satisfied. *Cruz v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 34 F.3d
26 1148, 1160 (2d Cir. 1994); *see also David v. Sullivan*, 777 F.Supp. 212, 223 (E.D.N.Y.
27 1991) (“Attorney affidavits which set forth all charges with the required

1 specificity but which are reconstructions of the contemporaneous records satisfy
2 the rationale underlying *Carey* and suffice to permit recovery of attorneys' fees.");
3 *Lenihan v. City of New York*, 640 F. Supp. 822, 824 (S.D.N.Y. 1986) (typewritten
4 transcription of original records satisfy *Carey*).

5 Here, it is not clear from the record whether or not Mishkin kept
6 contemporaneous time records. Mishkin's attorney told the district court that she
7 tracked her time contemporaneously, and that "she did have everything time-
8 stamped." App'x at 1395. The district court acknowledged that Mishkin "may
9 have had notations at the time of performing her work of the fractions of hours
10 that she performed for each category of service," but went on to state it "w[ould]
11 not know for sure unless and until there might be discovery of her record."
12 App'x at 1409-10. On this evidence, the district court could not make a
13 determination that Mishkin did, or did not, keep contemporaneous records of
14 "the date, the hours expended, and the nature of the work," *Carey*, 711 F.2d at
15 1148. It was clear error to deny Mishkin any fee on the basis of her failure to keep
16 contemporaneous time records without further inquiry into her timekeeping
17 practices. Accordingly, we remand to the district court to determine whether
18 Mishkin kept sufficiently detailed contemporaneous records as to be eligible for a
19 fee award under *Carey*.

1 Even if on remand the court finds that Mishkin did keep
2 contemporaneous records, we note that a computer timekeeping system would
3 have simplified the entire process. Having chosen to keep time in an inefficient
4 manner, Mishkin cannot recoup the costs flowing from her burdensome method
5 of timekeeping. When an attorney chooses to submit reconstructions of
6 contemporaneously kept time records, denying fees for time spent preparing the
7 application is “an appropriate and necessary penalty for omitting to include the
8 time records.” *Lewis v. Coughlin*, 801 F.2d 570, 577 (2d Cir. 1986).

9 We can appreciate the district court’s frustration in being asked to contend
10 with a second unwieldy fee application, one that failed to comply with its earlier
11 directive to not seek fees for services that exceeded the scope of the appointment
12 order, especially after Mishkin pushed for a ruling rather than send the matter to
13 a magistrate judge. However, the district court itself stated several times that
14 Mishkin was due a fee – just not the fee she sought. Equity does not permit the
15 district court to pay her nothing simply because she insisted she was due more.

16 We stress that even if, on remand, the district court determines Mishkin
17 kept contemporaneous time records, it is under no obligation to pay Mishkin
18 what she sought. The district court may undertake a more detailed review of

1 Mishkin’s fee application on remand, or it may send the matter to a magistrate
2 judge for a report and recommendation. In any event, the district court is not
3 obligated to undertake a line-by-line review of Mishkin’s extensive fee
4 application. It may, instead, “exercise its discretion and use a percentage
5 deduction as a practical means of trimming fat.” *McDonald ex rel. Prendergast v.*
6 *Pension Plan of the NYSA–ILA Pension Trust Fund*, 450 F.3d 91, 96 (2d Cir. 2006)
7 (internal quotation marks omitted). Using this form of “rough justice,” district
8 courts in our Circuit regularly employ percentage reductions as an efficient
9 means of reducing excessive fee applications. *See, e.g., Romeo and Juliette Laser*
10 *Hair Removal Inc. v. Assara I LLC.*, No. 08 Civ. 442 (TPG) (FM), 2013 WL 3322249,
11 at *5-8 (S.D.N.Y. July 2, 2013) (reducing fees of principal biller, an associate, by
12 seventy-five percent because her time charges were “grossly excessive relative to
13 the nature of the work performed”); *Days Inn Worldwide, Inc. v. Amar Hotels, Inc.*,
14 No. 05 Civ. 10100 (KMW) (KNF), 2008 WL 2485407, at *10 (S.D.N.Y. June 18, 2008)
15 (reducing attorneys’ fees by seventy-five percent because “a substantial amount
16 of work performed . . . was redundant and unnecessarily duplicative”); *Lide v.*
17 *Abbott House*, No. 05 Civ. 3790 (SAS), 2008 WL 495304, at *1–2 (S.D.N.Y. Feb. 25,
18 2008) (reducing attorney fee award by thirty percent for various reasons,

1 including “excessive and unnecessary hours spent on indisputably
2 straightforward tasks”). The district court may chose whatever option it deems
3 best in reconsidering this matter on remand.

4 Finally, we note the district court, assigned to oversee the flood of litigation
5 that followed the events of September 11, has done an admirable job of managing
6 the legions of attorneys involved with the cases while keeping a careful eye on
7 costs. However, a bit more detail in the order appointing liaison counsel may
8 have helped here. The Manual for Complex Litigation suggests that when
9 appointing liaison counsel, the appointing court should

10 determine the method of compensation, specify the
11 records to be kept, and establish the arrangements for
12 their compensation, including setting up a fund to
13 which designated parties should contribute in specified
14 proportions. Guidelines should cover staffing, hourly
15 rates, and estimated charges for services and expenses.

16 Manual for Complex Litigation (Fourth) § 14.215 (2014). Going forward, district
17 courts would do well to heed these recommendations.

18 CONCLUSION

19 For the reasons given above, we vacate the order of the district court and
20 remand for the district court (1) to determine whether Mishkin kept sufficiently

1 detailed contemporaneous records as to be eligible for a fee award pursuant to
2 *Carey*; and (2) if Mishkin kept such records, for further proceedings consistent
3 with this opinion to determine an appropriate fee for her work.