

THE LITIGATION LIMITED GUIDE TO LAW FIRM OVERBILLING

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by Litigation Limited

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INTRODUCTION | THE UNKILLABLE BILLABLE

It seems that scarcely a week goes by without an article appearing in a newspaper, journal or blog that proclaims the death of the billable hour. And while pundits have been predicting its demise for several decades, the billable hour remains the currency of the legal profession and seems likely to continue in that role for the foreseeable future.

Although it is much-maligned, the billable hour can provide an incredibly accurate valuation of services provided by a law firm, **but only when billing statements accurately describe the lawyers' work and time in sufficient detail to allow critical review and response by an informed and involved client**. Thus, much like a patient is ultimately responsible for managing his or her own health, it's the client's job - like it or not - to keep a careful watch on outside counsel and billable hour inflation. (Many clients are shocked to learn that there are virtually no laws or regulations governing how lawyers may bill clients, and that the only rules are those that the client chooses to implement and enforce).

That's not to suggest that lawyers should be absolved of their considerable legal, ethical and professional responsibilities to bill time in a reasonable and accurate manner - far from it. But the business of law takes place in the real world, where the unrelenting pressure on lawyers to meet unreasonable billable hour quotas (and thereby increase profits-per-partner for the law firm) almost always takes precedence over the client's interest in reducing billable hours.

It should therefore come as little surprise that two-thirds of lawyers admit that "bill padding" occurs at their firms, and that more than half of all lawyers perform work not because the client or case demands it, but because the lawyer needs to bill more hours. Thus, clients cannot bury their heads in the sand and rely on law firms to police themselves.

But before you can solve a problem, you need to know that it's there, which is why Litigation Limited has assembled this Guide to Law Firm Overbilling. While this list is far from exhaustive - entire volumes have been written about the billable hour and its potential for abuse - our guide will help you determine whether you're one of the ninety percent of clients who has an overbilling problem.

We hope you'll make Litigation Limited a part of the solution.

OVERBILLING FOR FUN AND PROFIT

ONE | BLOCK BILLING

Approximately 90 percent of law firm clients who are billed on an hourly basis are “block billed.” Block billing is an accounting technique whereby lawyers aggregate multiple smaller tasks into a single “block” entry, for which a single time value is assigned. In theory, the total time charged equals the sum of the duration of each discrete task. For example, after spending five minutes on a phone call, 35 minutes revising a junior associate’s draft motion and three minutes dashing off a brief e-mail to the client, the attorney should bill the client for seven-tenths of an hour. Unfortunately, in far too many cases, the final block-billed entry for these tasks will end up looking something like this:

Phone call with plaintiff's counsel; e-mail to client; revise draft motion to dismiss.

1.0 hours

See what happened? The client has been billed for a full hour, rather than seven tenths of an hour, which is the actual amount of time spent on the client's behalf. The client is essentially paying the lawyer a gratuity of three-tenths of an hour.

Perhaps you're thinking: What's the big deal... a tenth of an hour here, a few tenths of an hour there? (After all, that's what the lawyer is thinking. Or rather, that's what the lawyer is hoping you are thinking.)

It's a huge deal.

Block billing is big business for law firms - and a massive expense for those clients who are block-billed. According to the California State Bar, **block billing causes lawyers to inflate the total hours billed to the client by 10-30 percent.**¹ In fact, many courts believe that block billing inflation is actually much worse, and will slash lawyers' block-billed time by more than half.²

Simply adding the smallest unit of billable time (0.1 hour) onto a lawyer's daily timesheet results in an extra \$15,000-25,000 in unearned fees in a single year, depending upon the lawyer's billing rate.³ Now consider that, at least according to the California State Bar and nearly every state and federal court in the country, **most lawyers' daily time submissions contain anywhere from thirty minutes to three hours of time billed to clients that was not actually worked.** For the average senior lawyer, that translates to more than a quarter million dollars per year in fees for work that never happened.

So how many of these unearned fees are being billed to your company?

Unfortunately, it's easier to recognize that you have an overbilling problem than it is to figure out how extensive that problem is. By design, block billing makes it nearly impossible for clients to determine whether they are being fairly billed, which prompted the United States Court of Appeals to express "a concern about the use of block billing..." since "billing practices that camouflage the work a lawyer does naturally and quite correctly raise suspicions about whether all of the work claimed was actually accomplished or whether it was necessary."⁴

Another court observed that block billing allows lawyers to "claim compensation for rather minor tasks which, if reported individually, would not be compensable" and precludes the client "from determining whether individual tasks were expeditiously performed within a reasonable period of time because it is impossible to separate into components the services which have been lumped together."⁵ In other words, block billing allows law firms to overbill clients on a massive scale, while at the same time making it nearly impossible for those clients to discover whether they are being ripped off.⁶

Nope, we can't see any reason why law firms would insist on block billing their clients.

TWO | THE HOARDERS

Another problem clients aren't often aware of is billable hour "hoarding." When the economy slows down and billable hours are at a premium, work tends to be retained and billed by more expensive senior attorneys. Thus, we find partners doing associate work, associates doing paralegal work, and paralegals doing secretarial work. (In other words, the higher-ups on the law firm food chain get to "eat" first, to ensure that they meet their billable hour quotas, and the left-over work get passed down the line).

The problem arises when hourly rates are not discounted to reflect that the senior person is actually doing lower-level work. But senior partners should not bill partner rates for associate-level tasks and lawyers should never bill for paralegal work. As one court eloquently phrased it, "Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn."⁷ Thus, clients must not only be concerned with the amount of time spent on particular tasks, but need to be careful that those tasks are being handled and billed at the appropriate level.

Moreover, despite universal warnings from state and federal courts to end the practice, many law firms remain determined to pass on the costs of firm overhead to clients by transforming secretarial or support work into billable work. But firms should never charge clients for secretarial work, clerical work or word processing.⁸ This also means that clients must be especially attentive when scrutinizing billing entries from paralegals, who are often saddled with secretarial work that is then billed out to the client at hourly paralegal rates.⁹ According to the

U.S. Supreme Court, "purely clerical or secretarial tasks should not be billed at a paralegal rate regardless of who performs them."¹⁰

THREE | VAGUE BILLING ENTRIES

Lawyers also disguise billable hour inflation by using deliberately vague, confusing or downright meaningless time entries. (It's ironic that the only time lawyers become economical with their words is when they're supposed be telling the client what they're paying for.) Here's a typically vague entry that fails to provide the necessary information to the client:

Legal research.

2.5 hours

When conducting "legal research," it is the lawyer's burden to describe and explain the necessity of such research. Once again, the Supreme Court provides guidance that typically goes unheeded by law firms: "at [the very] least counsel should identify the general subject matter of his time expenditures."¹¹ Similarly, clients are often billed for a "telephone conference" or "review documents" without any context, so that the client cannot determine whether the work was necessary, efficient, or assigned at the proper level.¹²

Furthermore, vague entries like "legal research" or "review documents" are often used to round out block billing entries, as a sort of catch-all that provides the lawyer with a layer of plausible deniability should the billing entry ever be questioned. (After all, who can really say how much time the lawyer spent locked in his office reading over cases, other than the lawyer himself? Better to be accused of inefficiency than outright fraud.) As a result, clients are often presented with block-billed entries that look like this:

Review correspondence re: discovery continuance; phone call to potential witness; meeting with senior partner re: strategy; legal research re: discovery issues.

3.3 hours

At first glance, this may appear to be a perfectly reasonable time entry, and for all we know it is an accurate record of this associate's time. On the other hand, inflated and unearned hours could be lurking within this billing entry, although the use of block billing makes it difficult to tell.

Fortunately, this billing entry can be cross-referenced with the senior partner's time entry from the same day to estimate that the strategy meeting took around 30 minutes. (Keep in mind that

inter-office conferences are themselves a red flag for overbilling, but we'll leave that for another day). As far as the phone call and letter, few phone calls take more than a couple minutes and the same is true for reviewing routine correspondence.¹³ Nothing in these descriptions indicates that either the phone call or the correspondence would have required more than a few minutes to complete (i.e., the statement that there was only a "phone call" to the witness rather than an "interview" suggests that a lengthy conversation did not ensue). From these reasonable inferences, we can conclude that the "legal research re: discovery issues" took **at least** 2.3 hours, and probably closer to 2.7 hours.

Although the lawyers in this example have not made it easy for us, at least we have some idea how long this "legal research" took - and more importantly, how much it cost - though we still require more information to truly evaluate the whether the work was necessary and reasonable. For instance, what are these "discovery issues" all about? Are the lawyers planning to file a discovery motion for some reason, and if so, does the client know about it? Or did the senior lawyer ask the junior lawyer to research an issue that could have been answered by a quick glance at a practice guide instead of a full-blown research project? And what if, as is often the case, the junior lawyer had also block-billed several hours of related "legal research" on the previous and following days? Perhaps a few hours of research was necessary, but day after day of "research" with no clearly articulated goal or client approval might not be warranted.

Ultimately, there's just not enough information here to ascertain whether the billed work is advancing the client's interests, or if billable tasks are being manufactured (or needlessly drawn out) for the sake of the firm's bottom line. As always, the client must walk a fine line between allowing the lawyers to exercise their professional judgment on the one hand, and abdicating all responsibility for managing the litigation and controlling fees on the other. (We told you this stuff wasn't simple).

Let's look at one more:

Case administration.

1.0 hours

On its face, this billing entry should be rejected by the client because "case administration" could mean practically anything - and therefore it means nothing. It's not a tough call to make. But this entry becomes more troubling and suggestive of billing fraud when it is considered in the context of other billing entries from this partner, who charges more than \$600 per hour. Whatever it means, "case administration" does not appear to include brief telephone calls, internal conferences, checking the case docket, or responding to occasional correspondence, because each of these tasks were described and charged separately elsewhere in the bill. Even worse,

this partner "administered" the case for an hour or more every day for many months, even during a lengthy stay of proceedings when the case effectively lay dormant. Thus, each of these entries is highly suspect and probably evidences significant billing fraud.

FOUR | HOUR AND HALF-HOUR INCREMENTAL BILLING

When lawyers bill by the hour, they should never use increments greater than one-tenth of an hour.¹⁴ Yet it appears that anywhere from five to ten percent of lawyers bill clients in unacceptably large chunks of time - usually in one hour or half-hour increments. This is neither honest nor reasonable, and constitutes outright billing fraud, as courts have held that "professional persons who charge their clients fees in excess of \$80.00 per hour, based upon time spent, cannot, in all honesty and reasonableness, charge their clients for increments in excess of one tenth of an hour."¹⁵ By way of illustration, let's take a look at some billing entries from a \$750 per hour partner:

Day One: Reviewing client documents and interfacing with opposing counsel (1.0 hours)

Day Two: Discussions with client and preparation of complaint (3.0 hours)

Day Three: Review and complete outline (2.0 hours)

Day Four: Met with associate regarding complaint (1.0 hours)

Notice how each of these entries, which were charged to the client on consecutive days, are billed in precise sixty minute increments? (In case you're thinking this might be a coincidence or statistical aberration, consider that this lawyer charged around one hundred time entries for the same client over a period of two years, and all of them end in a "point zero"). While we don't know what this lawyer's other billing statements look like, it's a safe bet that each of his clients - or at least, those clients who fail to review their outside counsel's invoices - were also billed in one hour increments, no matter how minimal the work actually performed.

What's truly shocking is that the majority of these excessive billers are senior and managing partners, and presumably the "name" and relationship lawyers most trusted by clients. Yet these trusted advisors insist on gouging their clients by using excessive time increments, **and they continue to get away with it year after year.**

Here's where in-house counsel or other corporate officers must be especially cautious. Aside from the obvious impact on the company's bottom line, recent court decisions suggest that willful ignorance of blatant billing abuses by outside counsel - such as approving suspect time entries from a \$750 per hour lawyer who bills exclusively in one hour increments - might actually implicate the corporate officer or in-house counsel in the law firm's billing fraud and expose the corporation to shareholder liability.¹⁶

In other words, it might be time for some uncomfortable - but necessary - discussions with your lawyers about their billing practices.

FIVE | THE DANGERS OF TASK BILLING

So what's a client to do? The most obvious solution is task billing, which requires lawyers to specify the amount of time spent on each discrete task. Thus, a block billed entry might look like this:

<p>Review complaint; prepare answer; client conference.</p> <p style="text-align: right;">2.0 hours</p>

The same entry, if task-billed, would read as follows:

<p>Review complaint (.5 hours); prepare answer (1.3 hours); client conference (.2 hours)</p> <p style="text-align: right;">2.0 hours</p>
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Task billing is preferred by insurance carriers and large corporate defendants, whose large portfolio of cases provides reams of longitudinal data showing that over time, task billing inevitably results in significantly fewer hours billed. Task billing allows clients to track legal spend much more precisely, and facilitates evaluation of lawyer or law firm efficiency.

So the obvious solution is to eliminate block billing, and replace it with task billing, right?

Alas, it's not quite so simple. (You knew we were going to say that, didn't you?)

While task billing is preferable to block billing in almost every way, it does come with its own set of pitfalls that can make the unwary client misty-eyed for the days when lawyers merely tacked on an extra 20 or 30 through block billing. That's because the devious lawyer can make a killing by exploiting loopholes in task billing. (Fortunately, we're going to tell you how to close those loopholes. You're welcome).

This time we're going to use a purely hypothetical example, both for dramatic purposes and to make the calculations easier to follow.¹⁷ This little morality play follows Our Partner, who overbills The Client in a matter of minutes, in his quest to obtain a deposition notice from Evil Plaintiff's Counsel. Here's the billing entry that Our Partner ultimately submitted to The Client:

Phone call to client (0.1 hours); e-mail to opposing counsel (0.1 hours);
 review notice of deposition (0.2 hours); tel. conference with client re:
 deposition notice (0.2 hours); review correspondence (0.1 hours);
 e-mail to associate re: objection to deposition notice (0.1 hours)
 Total: 0.8 hours

All in all, it looks like a pretty busy morning for Our Partner. But let's take a closer look at what really happened in the office, in real time, as opposed to what Our Partner reported on the invoice:

- 10:00 a.m.** - Our Partner calls The Client, who is still trapped in a morning meeting, and leaves a 30 second voicemail indicating that the opposing side still has not served the deposition notice that everyone is waiting on. Our Partner promises to follow-up with Evil Plaintiff's Counsel right away.
- 10:01 a.m.** - Our Partner drafts a two line e-mail: "*Dear Evil Plaintiff's Counsel: our office still has not received the deposition notice you claimed had been served earlier this week. Can you please send me over another courtesy copy?*" Our Partner is not a very fast typist, so we'll say that this e-mail takes him a full two minutes to write, re-write, and send.
- 10:03 a.m.** - Fortunately, Evil Plaintiff's Counsel is sitting at her computer, and she immediately responds with a PDF copy of the deposition notice. Our Partner forwards the e-mail and attachment to his secretary to be printed out, who eventually brings him copy for review. He begins looking it over. (It's not very long or complicated, just the same sort of form document that lawyers generate and review every day). He alternates between looking over the deposition notice and refreshing ESPN.com.
- 10:10 a.m.** - The Client calls back in response to Our Partner's voice message. After exchanging some niceties, Our Partner triumphantly informs The Client that the deposition notice has finally arrived! They spend a few minutes discussing whether the proposed deposition date is convenient for The Client, consider some alternate dates that might work and agree that Evil Plaintiff's Counsel can be a real pain. The call lasts until 10:17 or so.
- 10:17 a.m.** - Our Partner notices that while he was on the phone with The Client, another e-mail has arrived from Evil Plaintiff's Counsel. It says "*Dear Our Partner: if the deposition date does not work for you or your client, let me know as soon as possible, since I need to make travel arrangements. Thanks, Evil Plaintiff's Counsel.*"

- **10:18 a.m.** - Our Partner forwards the deposition notice to His Associate with a message that reads "*Please handle.*"

The result? Our Partner, who has clearly spent no more than eighteen minutes (or precisely 0.3 total hours) working on this matter, ended up billing the client for eight tenths of an hour by "gaming" the task billing system. (If you've ever wondered how lawyers manage to bill more than twenty-four hours in one day, this is one way it can happen).

Wasn't task billing supposed to be the easy answer to all our overbilling problems?

It's important for clients to keep in mind that task billing is not a panacea for all legal billing woes. It's merely tool that - so long as the client remains informed, involved and regularly reviews invoices with a critical eye - will ultimately lead to significantly lower billable hours. That being said, the purpose of task billing is most assuredly not to allow a lawyer to assess a minimum charge for every task, no matter how small, and lawyers must never use accounting tricks to bill the client for more time than was actually spent working on the client's behalf.

Thus, in the foregoing example, an acceptable billing entry might have been:

Review and respond to correspondence from plaintiff's counsel re: deposition notice and scheduling (0.1 hour); review deposition notice and conference with client re: same (0.2 hour)

or perhaps this:

Correspond with plaintiff re deposition (0.1 hour); review deposition notice (0.1 hour); conference with client re: deposition notice (0.1 hour).

As these corrected entries indicate, task billing does not mean that every action a lawyer takes must be separated out and assigned a discrete time value. When the lawyer spends a few seconds or minutes on several small but related tasks, those should be described and billed as a single time entry of one-tenth or two-tenths of an hour, especially where to do otherwise would cause the client to be billed for more time than the lawyer actually worked. In this way, the client is provided with sufficient - but not unnecessary - detail regarding the lawyer's activities, and the lawyer is not required to record an unreasonable number of separate time entries.

CONCLUSION | THE LITIGATION LIMITED SOLUTION

When two-thirds of attorneys admit that their firms engage in bill padding, one-third of attorneys admit to double-billing clients, and more than half of lawyers admit to performing unnecessary work just to bill more hours, it's clear that clients can ill afford to take a hands-off approach when it comes to evaluating legal bills and managing outside counsel.¹⁸

Obviously, the elimination of block billing is a vital first step towards putting the brakes on billable hour inflation. Every client should implement outside counsel guidelines that prohibit block billing, vague entries, rounding-up time, and inefficient staffing. Litigation Limited helps clients develop and deploy customized billing guidelines that are tailored to that client's specific needs. Once those guidelines are in place the client has to commit to consistently monitoring compliance with the billing rules and, if necessary, challenge improper or questionable entries. Here again, Litigation Limited can help by reviewing billing statements on a short-term or ongoing basis, or train clients in the arcane art of reviewing legal bills.

That being said, it's our experience that the most effective way to reduce billable hours over the long term is to demonstrate to outside counsel they're dealing with a client who actually **pays attention**. (After all, there's a reason why placing surveillance cameras in public housing significantly reduces crime rates - people tend to behave differently when they know they're being watched.)¹⁹

The same principle applies to law firms as well: an engaged client who demands efficiency and demonstrates a willingness to question improper time entries is almost certain to be billed more accurately and with less billable hour inflation than a hands-off client who allows the firm to bill as it sees fit.

Contact Litigation Limited today to discuss how we can help solve your billable hour problem.

ABOUT LITIGATION LIMITED

Litigation Limited helps clients devise and implement outside counsel guidelines to eliminate block billing and other unethical billing practices; reviews monthly law firm invoices on a short-term or ongoing basis to identify, eliminate and prevent billable hour inflation; evaluates law firm efficiency and quality of work; and trains our clients in the "art" of bill review. Our team consists of trial lawyers and litigators with decades of experience at global law firms and Fortune 500 corporations.

Visit our website at www.litigationlimited.com, e-mail us at info@litigationlimited.com, or call our office at **424.738.0050**.

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¹ California State Bar Committee on Mandatory Fee Arbitration, *Detecting Attorney Bill Padding*, Arbitration Advisory 2003-01 (Jan. 29, 2003); see also *Darling Int'l, Inc. v. Baywood Partners, Inc.*, 2007 WL 4532233 at * 9 (N.D. Cal. 2007) (as a percentage penalty for block billing, most courts make a reduction ranging from 5% to 30%, consistent with the California State Bar's committee's findings).

² *Ceglia v. Zuckerberg & Facebook* (W.D.N.Y. 2012) Case No. No. 10-CV-00569A(F); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998).

³ Based upon the average nationwide billing rate for partners and senior counsel at law firms, which currently exceeds \$660 per hour. Mary Smith Judd, *The sky still hasn't fallen on the hourly rate model*, Daily Report Online (Mar. 5, 2012) <http://www.dailyreportonline.com/Editorial/News/singleEdit.asp?l=100431100392>, accessed on March 16, 2012.

⁴ *Robinson v. City of Edmund*, 160 F.3d 1275 (10th Cir. 1998).

⁵ *In re Leonard Jed Company*, 103 B.R. 706 (Bankr. D. Md. 1989).

⁶ The reasons for block billing inflation are myriad, and too numerous to be addressed in this article. A few thoughts, however: Studies indicate that 66 percent of lawyers admit that their daily time entries contain errors. MacEwen and Stanton, "Billable Hours", *Adam Smith Esq.* (2012). Why? Many lawyers do not keep contemporaneous time records but instead "reconstruct" their work at the end of the day, the following day, at the end of the week, or even more infrequently. This inevitably results in wholesale guesses about the amount of time spent on each matter, since in hindsight even honest lawyers tend to overestimate the amount of time they spend on specific tasks. Of course, both honest and less-than-honest lawyers face unrealistic pressures to bill hours at most law firms, and tacking on a few extra tenths of a hour here and there can mean the difference between a high-paying job with benefits or unemployment.

⁷ *Urisic v Bethlehem Mines*, 710 F.2d 670 (3rd Cir.1983); see also *Metro Data Systems, Inc. v Duranao Systems, Inc.*, 597 F.Supp. 244 (D.Ariz.1984) (court refused compensation for lawyers performing services that could have been performed by a paralegal).

⁸ *American Booksellers Ass'n., Inc. v. Hudnut*, 650 F.Supp. 324, 330 (S.D. Ind. 1986) (calendar, docketing and word processing are firm overhead charges).

⁹ *Keith v. Volpe*, 644 F.Supp. 1312, 1323 (C.D. Cal. 1986) (rejecting hourly time billed by attorneys and paralegals for secretarial and clerical work such as "pick-up copies", "tag exhibits", "organize files", "reproduce documents" and "distribute memo.") This is becoming a widespread problem, because law firms have increased the attorney to secretary ratio in the past decade so that now it is not atypical for one secretary to be assigned to four, five or more attorneys, meaning that lawyers are often assigning paralegals to do secretarial work since there are fewer secretaries.

¹⁰ *Missouri v. Jenkins*, 491 U.S. 274 (1989).

¹¹ *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

¹² *Wilder v. Bernstein*, 1988 WL 323492, at *6 (S.D.N.Y. 1998) ("entries that fail to identify the subject matter of the documents reviewed or the topic of the conversation in a telephone conference [are] unacceptable.")

¹³ In fact, case law suggests that unless the billing attorney provides a reasonable countervailing explanation, it is assumed that block-billed phone calls or reviewing regular correspondence take no more than a tenth of an hour. "It does not take more than a few seconds to read most routine correspondence. If a timekeeper reads a group of documents in a minute or two and then records a minimum time for each document, this may ultimately increase the time by several hours." *Detecting Attorney Bill Padding*, California State Bar Arbitration Advisory.

¹⁴ *Glover v. Heart of America Mgmt. Co.*, 1999 WL 540895 at *7, fn 8 (D. Kan 1999) (quarter hour billing... has been virtually extinct for some time").

¹⁵ *In re Tom Carter Enterprises, Inc.*, 55 B.R. 548, 549 (Bankr. C.D. Cal. 1985).

¹⁶ A corporate client has "a duty to exercise ordinary care and diligence to discover [attorney billing] fraud, even though a confidential relationship exists." *Falanga v. Kirschner & Venker, PC*, 286 Ga. App. 92, 648 S.E.2d 690 (2007). Thus, even though a law firm and corporate client were "in a confidential relationship" the client was not "excused... from exercising ordinary care by reviewing [the lawyer's] bills." *Id.*

¹⁷ With the exception of this hypothetical example, all of the preceding sample billing entries are drawn from real-life client bills, though of course any identifying and confidential information has been changed or redacted.

¹⁸ William G. Ross, Professor of Law, Samford University, *Attorney Billing Ethics Survey* (2006-2007).

¹⁹ Barron, "Civil Liberties Group Worries as City's Electronic Eyes Multiply," *New York Times* (Dec. 14, 2006) (cameras result in 35% crime reduction); Santiago, "Surveillance Cameras at Newark Public Housing Credited with Reducing Crime," *Newark Star-Ledger* (Sept. 13, 2009) (cameras result in 80% crime reduction).