**CONSISTENCY IN ACCOUNTING AND LEGAL DISCOURSES:  
THE OVERTIME CASES**

***Anthony H. Catanach Jr. and J. Edward Ketz***

***Grumpy Old Accountants, October 2011***

For several years battles have raged in several courtrooms concerning whether accounting firms have a legal obligation to pay junior accountants overtime. We are sympathetic to the position of the accounting firms, but worry about the soundness of their legal reasoning and conclusions. Do accounting firms have to be consistent in different domains? For example, does the logic in legal briefs and oral arguments have to be congruent with ethical principles and auditing standards?

There are a number of accounting overtime cases, including Campbell and Sobek v. PwC (California) and Litchfield v. KPMG (Washington). Essentially the facts in these cases are the same. Plaintiffs are unlicensed employees of a Big Four firm in the attestation unit or division who serve as associates or senior associates. They worked long hours but were not paid overtime; the plaintiffs seek damages in the amount of the unpaid overtime work.

On September 20, in Ho v. Ernst & Young, the court partially certified a class of junior tax accountants at E&Y in California. These overtime cases now include other areas of accounting besides attestation.

Details of these cases can be found at: Orey’s BusinessWeek article “[Wage Wars](http://www.businessweek.com/magazine/content/07_40/b4052001.htm),” Francine McKenna’s “[PwC Hit with Overtime Lawsuit Wave](http://retheauditors.com/2007/10/25/pwc-hit-with-overtime-lawsuit-wave/)” and “[Auditors Want Overtime: California Lawsuit Against PwC Could Change Model](file:///C:\Users\Owner\AppData\Local\Microsoft\Windows\Temporary%20Internet%20Files\Content.Outlook\C26W4D00\francine%20mckenna%20california%20overtime),” Caleb Newquist’s “[Plaintiffs File Brief in Overtime Lawsuits Against PricewaterhouseCoopers](http://www.huffingtonpost.com/caleb-newquist/plaintiffs-file-brief-in_b_456151.html),” and Kim Lacata’s “[Another Accounting Firm Hit With Overtime Suit](http://flsa.blogspot.com/2007/11/another-accounting-firm-hit-with.html).” Similar suits were filed in [Canada](http://steeplemedia.com/blogs/krupo/archive/2008/04/28/three-of-canada-s-big-four-ca-firms-to-pay-overtime.aspx) as well, where three of the four large accounting firms settled.

We are sympathetic to the position of the large accounting firms because these firms generally have been open and honest with potential recruits. While they do promise busy periods involving long hours with no overtime pay, they historically have held out the prospect of other rewards (e.g., bonuses, extra vacation time, etc.). If these cases pivoted about contracts, they would be a slam dunk in favor of the large accounting firms. Recruits cannot claim they did not know what awaited them.

Further, if the plaintiffs prevail, it is easy to conclude that the Big Four will most likely change the pay model in the future. The base compensation will be significantly reduced so that the base pay plus estimated overtime will equal the current levels. If the plaintiffs prevail, they and their attorneys will be the only ones to benefit.

Be that as it may, we have read some of the legal filings and are disturbed by the defense counsel arguments. [Federal and state labor laws require overtime pay, but allow for various exemptions](http://www.flsa.com/coverage.html). One exemption is for “professionals,” but unlicensed accountants may not be viewed as “professional.” Only licensed CPAs can perform audits, so the license appears to be a demarcation whether this exemption can be applied.

Defense attorneys in many of these cases utilize the administrative exemption, which essentially states the firm does not have to pay overtime if the employees have duties and responsibilities that require them to exercise discretion and independent judgment. This is a peculiar thing to argue for a junior accountant working on an attest function, because he or she does not have the authority to issue an audit opinion. How much discretion and judgment can these individuals exercise without simultaneously having the authority to form and write audit opinions?

The Code of Professional Conduct [Rule 201](http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_200.aspx) states that a member shall “exercise due professional care in the performance of professional services.” If the accounting partners and managers have to monitor the work of the associates, then their knowledge and wisdom seemingly is insufficient to form audit judgments.

[Standard No. 10](http://pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_10.aspx) by the PCAOB bolsters this perspective. This standard requires the auditor to supervise team members. By this the PCAOB means that the auditor must inform team members about the objective of their work and how and when the audit procedures will be carried out; further, the auditor must review the work of team members to insure that the procedures were carried out and that the audit objectives were achieved.

Francine McKenna wonders out loud whether the auditors are willing to “[Say Anything](http://retheauditors.com/2011/06/20/say-anything-the-big-4-defense-of-overtime-exemptions/)” in court to win a case. While we are tempted to agree, for now we shall just say that the firms are inconsistent. They say one thing in their legal discourses and the opposite in their accounting discourses. Of course, there is always the issue of magnitude. Unlicensed associates employ some degree of discretion and judgment in their work, but is this large enough to qualify for the administrative exemption from the Fair Labor Standards Act and similar state statutes but small enough not to run aground against Rule 201 and Standard No. 10? We doubt it.

Finally, we’ve talked with former students and often they say the work tends to be routine and at times even robotic. If that is so, then how much discretion and judgment are they exercising?

*This essay reflects the opinion of the authors and not necessarily the opinions of The Pennsylvania State University, The American College, or Villanova University.*