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A Fresh Look at Attorney-Client Fee Disputes

by Michael R. Caryl

You've just hung up the telephone. Your client is angry, upset, disappointed, unreasonable, confused. You are left with his words buzzing in your ear: He is not going to pay your last bill, or thinks your fee is too high for the result achieved, or has decided to replace you with another lawyer. What once seemed like a good relationship and fee prospect is suddenly in jeopardy. You have answered his questions honestly and tried to soothe him, but you're still powerless to prevent your client from becoming your adversary.

This unfortunate circumstance confronts all of us at least once in our careers. Before you take action, you need to know what the client's rights are, as well as your own.

This article offers some commonsense advice on how to get paid, using a positive, cooperative attitude toward your client. It is based on 25 years of experience extracting fees from more than a few disgruntled and recalcitrant clients. Included are some suggestions on how to put your best foot forward in court or arbitration. In this client-friendly environment, a positive strategy can help you recover a fee you can live with.

Build Your Record Before the Termination or Fee Dispute Begins

Not all problem clients terminate their lawyers, but the client who fires you is likely to send early signals of disgruntlement. Similar warning signs tend to predate a fee dispute. Engaging the grievances expressed by the problem client with professional concern can civilize the ordeal and even preempt a termination or dispute.

Every act, omission, and communication with or about the client will enter the lore of the dispute. Your client's next lawyer may use any phone call, letter, memo, or meeting as an exhibit or subject of testimony for deciding your entitlement to a fee. A nasty letter responding to verbal accusations will reflect poorly on you a year later, in court or arbitration, when stripped of its context. Draft every communication with the assumption that it will be an exhibit in a later fee-dispute forum. Deprive your disgruntled client of the centerpiece of his case against you.

You have the opportunity to create documents that reflect well on your character and the value of your services to the client. Your client's first expression of doubt about your tactics or judgment is a red flag calling for a clear, cordial communication expressing your position. I usually use letters that delineate my advice in a polite and professional tone to foreclose suggestions of inappropriate behavior in a later dispute. If the client's questioning continues, your vested interest in exhibiting your professionalism only escalates.

When to Get Out First

During my early years in practice, I almost never fired a client. I fought to keep unfriendly and unworkable relationships just so I would not lose the fee. In the past five years, I have fired twice as many clients as I did in the first 15. Nonetheless, I have hung on too long to a few clients when I should have known better.

Many lawyers are loath to drop a case, even if the client's conduct or attitude spells trouble. A lawyer working on a contingent-fee basis may have to eat her startup fees if she fires a client. Even lawyers who work on an hourly basis may be reluctant to turn away a paying client, especially when trying to build a client base. Some lawyers worry that firing clients may hurt their reputation or reduce chances for referrals.

Taking control and terminating a relationship that is going awry may end up saving you heartache and headache. Withdrawal is cheaper and easier than dealing with bar complaints, fee disputes, and malpractice allegations of a problem client gone bad. Even if the client does not threaten your professional practice, a toxic relationship can assault your dignity, distract you from other clients, and deplete your work of pride and pleasure. Exorcising these specters can be worth losing a fee.

Learning to read the telltale signs of a problem client will help you trust your instincts to walk away early. If you have a busy practice, politely withdrawing your representation can lighten your load. Although withdrawing usually eliminates entitlement to a contingent fee, you still may recover in quantum meruit under a theory of constructive termination, if the client's conduct has made a productive attorney-client relationship impossible.

So You're Going to Be Fired

Termination isn't likely to happen often. Our behavior and practice can influence how often it occurs, but even the best lawyers cannot prevent it completely. The law does not discourage the client from firing you. It has happened to me a half-dozen times.

A client has an unmitigated right to fire the attorney at any time "either for good or fancied cause, . . . or wantonly and without cause whatever." Kimball v. P.U.D., 64 Wn.2d 252, 257, 391 P.2d 205 (1964). Even a contingent-fee arrangement does not stand in the way of an untimely discharge by the client. Counsel can do absolutely nothing to prevent the termination, nor should he try. A client hellbent on firing you either knows he can, or can easily learn that he can, merely by calling any other lawyer. In this arena, the law tilts in favor of the client.

Treat the client who fires you with the same courtesy and cooperation you would show if withdrawing voluntarily from the representation. Assume that the client is right in firing you. While you don't have to take abuse, this is not the time to counterattack. Assure the client that you will fully cooperate in transitioning to her new lawyer. You may suggest that she ask the new lawyer to counsel her about a stipulation to the amount of your fee, so you can avoid filing an attorney's lien. If you must file an attorney's lien to protect your fee entitlement, let her know beforehand so she does not end up feeling ambushed.

Being fired by a client gets easier with experience. It teaches you how to preempt a future untimely termination and when to get out first. Learning how to take termination gracefully improves your chances at a positive fee recovery.

Walking Away from Your Fee
The paramount question is whether to pursue your fee at all. Your errors-and-omissions insurer has probably warned you that suing your client for a fee may well result in a counterclaim for malpractice. Walking away from your fee is an option worth considering any time you anticipate a contentious fee dispute.

First, how much is at stake? The size of your potential loss will depend on how far you were into the representation when it ended. If you have wholly accomplished what you were hired to do, then giving up your fee entirely makes no sense and only encourages future abuse by clients. If there is actual or apparent validity to the client's complaints, though, you may want to walk away from even a substantial fee. Reflect honestly on whether the relationship with this client had been good until recently. Was there any disagreement with your client that opposing counsel could portray as a rift? Any cross words with the client or legal advice that she did not appreciate may return to embarrass you or, worse, serve as the basis for a complaint. If there are any problems that you would rather not confront—for example, you actually did make a mistake that has harmed the client--you should consider walking away from the fee.

Informal Fee Resolution
I urge a face-to-face meeting with the client as soon as he raises any questions about your fee. Listening to the client's side, and expressing concern for the client's views, may mollify a hostile client. Plain talk can iron out misunderstandings.

An early meeting may set the stage for an amicable compromise in which your fee is reduced in exchange for prompt and certain payment—an optimal solution. It preserves the good will you have with the client and locks out additional costs or risks. The high price of litigation doesn't just buy you a chance at recovering some of your fees; it also results in a client with hard feelings who may file a bar complaint against you or badmouth you to other clients and business referral sources.

As long as this window to dialogue is open, don't dig in your heels. As an arbitrator, I have seen lawyers act like stereotypically greedy attorneys. Stridency corners the client into a more hostile stance over fees. Courtesy, restraint, and a reasonable demeanor go a long way to facilitate an amicable resolution.

When All Else Fails—Fee-Determination Forums
Because of the fiduciary aspects of the attorney-client relationship, collecting attorneys' fees from a client is unlike any other collection activity. The fiduciary duty is, by and large, a one-way street. The attorney must respect and observe all aspects of his fiduciary duty, while at the same time the client is seeking to eliminate any fee entitlement. The lawyer's single greatest temptation is to engage in the same tactics as the soon-to-be ex-client, and in so doing, risking the breach of that fiduciary duty.

Interfering with the client's ability to obtain a new lawyer, charging unreasonable fees, or using unfair means to get paid gives rise to fiduciary-breach claims. A lawyer's breach of a fiduciary duty to a client may result in partial or total denial, if the lawyer has already been paid, or disgorgement of attorneys' fees. *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). In *Cotton v. Kronenbury*, 111 Wn. App. 258, 44 P.3d 878 (2002), Division 1 upheld the entire forfeiture of an attorney's fee where the terms of his fee agreement breached fiduciary duties to the client.

No matter which forum is chosen in a fee dispute, you are much more likely to receive the fee you have earned through an attitude of reasonable generosity than through adversary litigiousness. Wearing the white hat puts you in the position of avoiding the kind of "compromises" in a fee-dispute resolution that we all dread. Reasoned professionalism rises above the level of a petty or vindictive client and puts you in a position to point out the client's extremism. A record favorable to the lawyer leverages a favorable fee result.

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Civil Action on the Contract

The fiduciary duties of the attorney-client relationship alter the lawyer's common-law rights in the underlying contract. Most courts will give the client the benefit of the doubt unless he comes across as dishonest or unreasonable. Judges tend to find a basis for compromise, even if the fee claimed was earned. The outcome is not easy to predict.

While the hourly rate constitutes an enforceable basis for collection in an hourly fee agreement, the fiduciary nature of the attorney-client relationship and RPC 1.5 require the total charge to be reasonable. The reasonableness of the charge depends on the hourly rate and the number of hours, given the undertaking—if in fact those hours were incurred at all. RPC 1.5 (a) and (b). RPC 1.5 contains a list of eight considerations the court must assess.

In contingent-fee arrangements, the client who terminates an agreement before the attorney renders substantial performance is not technically in breach of contract and cannot be compelled to pay damages. *Barr v. Day*, 124 Wn.2d 318, 979 P.2d 912 (1994); *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982). The attorney and client cannot contract around this rule. *Hamlin v. Case and Case*, 188 Wn. 150, 161 P.2d 1287 (1936). If you are fired short of substantial performance, there is no entitlement to the contingent fee.

The contingent-fee attorney still has an equitable remedy in quantum meruit for the reasonable value of the services. *Ramey v. Graves*, 112 Wn. 88, 91, 191 Pac. 801 (1920). The attorney seeking fees has the burden of proving what is reasonable compensation, based on equitable considerations such as the amount of the client's recovery, the number of hours spent, and the risks involved. The lawyer's normal hourly rate (the rate he gets on the open market) may not be determined to be the reasonable rate, although it is certainly evidence. Nor will the total number of hours expended be binding as far as this determination. The services must be shown to be appropriate and reasonable in extent.

Kimball v. P.U.D. says the absence of time records is not fatal to a *quantum meruit* recovery. The attorney may rely on circumstantial evidence tending to show time and effort expended, including the state of the file, settlement offers made, and the extent of trial preparation. However, the trial court will certainly give the client the benefit of the doubt in totaling hours where there are no time records.

Your rights to your contingent fee under a written contract change dramatically upon the rendering of substantial performance. Substantial performance ripens the client's duty to pay the agreed contingent; nonpayment gives rise to damages measured by the contingent agreement. *Taylor v. Shigaki*, 84 Wn. App. 723, 729-30, 930 P.2d 340 (1997). Substantial performance usually means obtaining a settlement

offer which is within the client's stated goals, or obtaining a policy-limits offer. *Taylor* also demonstrates that obtaining a very substantial offer of settlement may constitute substantial performance, such that the contingent fee is determined to have been earned. Prevailing under the substantial-performance exception appears to require that the attorney obtain a firm settlement offer and that the client have a bad-faith motive in discharging his attorney to cheat him of his contingent fee. The purpose of awarding the expectation interest to an attorney discharged after substantial performance "is to prevent clients from firing their attorneys immediately prior to the occurrence of the contingent in order to avoid the contingent fee." Barr, 128 Wn.2d at 328.

Statutory Resolution Under RCW 2.44.040
A little-known statute, RCW 2.44.040 et seq., provides another remedy. Upon motion by a terminated attorney, the trial court shall compel the party to pay the attorney before allowing that party to substitute counsel. In *State v. Moore*, 34 Wn.2d 351, 208 P.2d 1207 (1949), the court held that where the client seeks to remove an attorney and substitute another under this statute, the court may determine the appropriate fee for the withdrawing attorney. If you are fired in litigation, you should ask the court for a summary determination on the issue of fees whenever the client terminates you or forces you to withdraw before entry of judgment. Moore indicates that the court can even enter judgment in favor of the lawyer against the client for the fees determined.

Voluntary WSBA Fee Arbitration
The WSBA has a fee-arbitration panel for the voluntary resolution of fee disputes, but I have not had experience with this procedure. A proposed court rule circulated several years ago would have made this process mandatory. That proposed court rule was abandoned in the face of significant member opposition. (See below for information about the fee-arbitration panel.)

Voluntary arbitration has no procedural rules to my knowledge, other than the right of either side to veto the procedure. But if the client does agree to this form of arbitration under Chapter 7.04 RCW, the award is binding, except in cases of fraud, statutorily recognized bias, or other very limited grounds. Compromise is the likely resolution. For smaller fee disputes, it may well be the forum of choice.

Filing and Foreclosing an Attorney's Lien
The attorney's lien is a right of action under RCW 60.40.010 *et seq.* that protects a lawyer's fee entitlement. The attorney's lien attaches to a res that your services were intended to bring about—money in the hands of the adverse party to the suit, money in your hands belonging to the client, or a portion of the judgment. If there is no res to which the fee can attach, there is really no place for the lien. The requirement of a res generally limits the use of a lien to plaintiffs' lawyers involved in litigation. An attorney's lien never attaches to real property. *Ross v. Scannell.*

Though there are no legal formalities to an attorney's lien, in your lien you should identify the following: yourself as counsel, the client, the agreement under which your client accrued the fee obligation, the res or fund to which the lien attaches and in whose hands the fund resides, and the amount claimed. Prepare the lien in the pleadings format for the court that has jurisdiction over the res. A copy should be served not only on the client, but on the owners or holder of the ultimate obligation or indebtedness to the client. If an insurer is involved, the insurer should be given notice. Proof of service is essential.

Even if you filed your lien with the court, you still may prefer to instigate a lawsuit on the contract instead of foreclosing the lien. A common-law contract action will allow you to submit testimony on the quality of the services performed, or present an expert on legal ethics and fee agreements. Discovery is available. Another alternative to foreclosure is to send the client a final bill or accounting, which triggers the client's rights to an RCW 4.24.005 hearing, if the matter is a tort action.

Foreclosure of your lien is the better route of choice if your goal is to obtain a quick and summary determination, or if you have accomplished what you were hired to do and the client is simply trying to defeat part or all of your fee. Moving to foreclose your lien creates no new cause of action, and there are no filing and service fees or specific discovery rights. Nonetheless, the court may grant some discovery.

To foreclose the lien, prepare a short motion, an argument of the law, and an affidavit summarizing all the pertinent facts, including your fee agreement, any estimates or other fee-related correspondence with the client, an itemized summary of your services and results, and the client's explanation for refusing to pay or demanding a fee reduction. If the client challenges your hourly or contingent-fee rate or the number of hours, you should consider obtaining an affidavit from an expert to establish that your fee is reasonable and appropriate. The final fee award will probably derive from conflicting affidavits rather than a full adversarial trial.

Upon motion of either party, the court may either summarily determine the facts on which the claim of lien is founded upon affidavits and briefing alone, or refer the case out for a factual determination. RCW 60.40.030. If your local rules permit, you would probably prefer that the court resolve the fee dispute on the affidavits alone. Oral argument gives the client an opportunity to criticize you in open court, and to invoke concepts of "equity."

In a Tort Action, an RCW 4.24.005 Hearing
RCW 4.24.005 enables a tort claimant charged with a final billing or accounting of attorney's fees to petition the court to determine whether the fees are reasonable. To trigger the inquiry, the client must file a petition no later than 45 days after the client receives a final billing or accounting. The lawyer cannot veto this remedy.

Although one can imagine clients exploiting this statute to unilaterally abrogate the contract and evade the bargained-for fee as soon as the lawyer has performed, I am the only Washington lawyer I know of who has ever litigated an RCW 4.24.005 motion. In fact, I have tried two of them. I know of only a few other lawyers where the client even made the petition, and those cases all settled. Still, every contingent-fee tort lawyer should be aware of this statute.

Upon a timely petition, the statute directs the court to weigh 10 factors in determining reasonableness. Only one of these considerations is the terms of the fee agreement. The statute does not prioritize any of the factors, giving the judge wide latitude in determining what is fair and reasonable. It is advisable to put a paragraph in your contingent-fee agreement informing the client of this remedy, because the ninth factor under this statute is whether the client was aware of his right to make an RCW 4.24.005 petition.

You are in a better position if you can change the issue from whether the fee was excessive to what was bargained for and whether it was earned. Argue that the only reasonable fee

under all the circumstances is the contingent fee. If you have several hundred hours in the case, it is a compelling argument; if you have only 10 hours, it will be an uphill battle.

Choosing a Forum
A prompt hearing almost always benefits the lawyer. Whenever possible, the lawyer should push for quick remedies rather than the unlimited discovery and slow resolution of a common-law contract suit. If the case is not over and the client has new counsel, then the quickest and simplest route to the fee may be an RCW 2.44. 040 motion. If there is a res such as insurance coverage or a bond, attaching and foreclosing a lien will enable a prompt hearing and a quick determination. You may also benefit if your client pursues an RCW 4.24.005 hearing with its summary procedures. However, if you are defense counsel or are not involved in litigation for the client at all, you are probably relegated to an action on the contract.

Seeking the client's agreement to a voluntary WSBA-sponsored arbitration may be wise if the amount in controversy is very small, or if a fee determination is simple, or if you want to handle the matter pro se.

Conclusion
Termination of the relationship and/or fee disputes can be avoided by better client relations, fuller communication, and the obvious—treating the client with dignity and fairness—even when his own conduct might not otherwise warrant it. Answer all questions, even accusatory or sarcastic ones. Treat each communication as if it will be evidence later. If the relationship has badly deteriorated, consider withdrawing first. If the client beats you to the punch, deal with termination gracefully.

Cooperate with the client and new counsel. Determine how best to protect your fee, if possible; then seek an amicable compromise, and file your lien only if nothing amicable can be arranged. Choose the forum that is best suited to your immediate needs; then move ahead promptly toward a resolution. At all times, be courteous and cooperative, while giving your former client the smallest possible target. At all times, wear the white hat. In so doing, you will position yourself for the best possible outcome in this client-friendly environment.

WSBA alternative dispute resolution (ADR) includes two voluntary and confidential programs:

1. Fee Arbitration
Purpose—to determine the fair and reasonable value of a lawyer's legal services for a client.

- If both parties agree to participate, the award is binding.

- Fee to participate is $75 per party; neither party may seek fees for participating in arbitration.

- Disputed funds may be deposited in the non-interest-bearing WSBA Fee Arbitration Trust Account, to be dispersed directly upon receiving the award.

- One lawyer-arbitrator participates in all disputes; two nonlawyer arbitrators are included for amounts in dispute over $5,000. Both lawyers and nonlawyers are approved by the BOG and have appropriate training and experience.

- In 2002, 86 petitions for fee arbitration were filed, and 28 proceeded to an arbitration hearing.

• Of the cases heard in arbitration, 54 percent were for amounts over $5,000 (these are heard by a three-person panel). Amounts have ranged from $200 to $50,000.

2. Mediation
Purpose—to resolve fee disputes, communication problems, or other issues between a client and a lawyer, a lawyer and another lawyer, or a lawyer and others, including professionals such as court reporters and expert witnesses.

• Mediators assist parties in negotiations and facilitate settlement. The result is a structured discussion of the dispute and a mutually agreed-upon outcome.

• Fee to participate is $75 per party.

• In 2002 there were 69 requests for mediation, and in 29 cases the respondent agreed to participate.

• Mediators are approved by the WSBA Board of Governors and have the appropriate training and experience to serve effectively in a facilitative role. Lawyers assigned as mediators are required to have been active members of the WSBA for at least seven years.

Michael R. Caryl joined the WSBA in 1977. He is a member of the Seattle firm Mikkelborg, Broz, Wells and Fryer PLLC. Caryl took Taylor v. Shigaki through trial and appeal. You can contact him at mcaryl@mbwf.com.

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