A Fresh Look at Fee Arrangements

By Michael Caryl

Poll any dozen lawyers about how they handle fee arrangements in their intake interviews with new clients and the differences would overpower the similarities.

Perhaps three would admit they hate doing it and that they get it over with as quickly as possible. This means presenting the fee agreement to the client, wrangling out a signature while discouraging questions and being done with it.

One or two will acknowledge taking pride in going over the fee agreement paragraph by paragraph, explaining and anticipating questions and discussing relevant billing practices. One or two will hand the client a fee agreement at the end of the interview, ask the client to read it and hand the signed copy to their legal assistant.

The rest will do something else in between. Some lawyers leave their clients with a handout on billing practices, while the concept of billing may never be discussed at all by others.

Many lawyers do not know that charging fees and billing practices are governed by the Rules of Professional Conduct. Many lawyers do know that the bar recently revamped the RPCs, but few have even looked at the newly changed rules, let alone studied them.

I gave a presentation at the Law of Lawyering seminar last December entitled, "Avoiding Fee Problems with Clients and Lawyers: Case/Client Selection." It was all about the importance of screening clients and cases to avoid fee disputes. A few in the audience seemed put off by another lawyer telling them what kinds of clients spelled future trouble and how a proactive intake interview could avoid future fee and client problems.

Well, my practice has morphed in the past 12 years from a largely contingent-fee injury practice to one almost entirely dealing with fee disputes with clients on an hourly basis. I see the gouging, greedy lawyers; the clueless, bumbling (when it comes to billing and client relations) lawyers; and the well-meaning ones who just can't get the office practices together to protect themselves from the greedy, manipulative clients.

Some lawyers routinely have clients who don't pay them, and routinely sue them for fees. Other lawyers have trouble retaining clients and engender fee disputes and bar complaints because of poor practices in fee arrangements and billing practices.

Just as client and case selection are critical to a successful and a reduced-stress practice, having a routine for dealing with clients about fees and fee agreements up front and fully disclosing what must be disclosed is essential. Based on several recent cases I have been in lately, I thought that it might be helpful to point out potential practice traps that any of us might fall into.

War Stories

I tried a fee-dispute case last year that went two-plus weeks over what was less than $100,000 in unpaid fees. My lawyer-client was a competent, skilled guy who worked hard for his client and got a good result. He let the client get way behind in payment of fees.

In his intake interview, my lawyer-client clearly spelled out the necessary details of the fee arrangements orally and promised a written fee agreement and explanation of billing practices. But he then worked on the case for more than four months before sending a written fee agreement and the statement of billing practices. Another three months passed before the lawyer twisted the client's arm to sign the fee agreement.

After the case settled, the client refused to pay as billed and the lawyer was left with no alternative but to sue. My lawyer-client won a pyrrhic victory in the ensuing litigation, which lasted two years. The client's lawyer successfully attacked the fee agreement as a breach of fiduciary duty, asserting that it had additional terms that were not contained in the earlier oral agreement. Under the rule of Ward v. Richards & Rossano,[1] a subsequent modification of an earlier fee agreement, without affording the right to independent counsel, is voidable. As a result, the lawyer lost the virtue of the prevailing party attorneys' fees clause. The case is now on appeal.

I have a current client who was represented by a law firm for a very short time. Suffice it to say, the law firm rang up substantial fees, did not endear itself to the client, withdrew and then sued the client for fees. The written fee agreement contained an arbitration clause and the law firm moved to compel arbitration.

I learned that the prior lawyer had simply placed the fee agreement in front of the client, told her to read it without any discussion, and insisted that the agreement be signed before the lawyer would even begin discussing the case. For reasons that make sense to us, the client did not want to arbitrate. Knowing from prior experience about the strong federal and state policies favoring arbitration, it seemed at first that we had a very uphill battle to overturn the arbitration clause.

Then, in my research, I learned about WSBA Informal Opinion # 1670 and ABA Formal Opinion # 02-428. These opinions mandate that before an arbitration clause in a fee agreement is enforceable, the lawyer must fully discuss the concept of arbitration, its pros and cons, the costs, and the extent to which arbitration might favor the law firm. I successfully opposed the motion to compel. The fee agreement also has a prevailing party attorneys' fees clause that also can be stricken for lack of full disclosure.

Is There a Message Here?

This isn't rocket science. The old sloppy ways of dealing with fees, reimbursement of costs, billing practices and the economic side of the attorney-client relationship have to come to an end. In my experience, clients have become more sophisticated and less forgiving of the old ways. The bar and the courts have become more client-oriented and sympathetic, both in terms of going the clients' way in fee disputes and in attorney discipline, are coming to expect more and more of lawyers, and are less likely to let pass

the old ways. I predict that the rules will become more onerous for lawyers and that the days of merely handing a fee agreement to a client to sign are over.

Having an organized and consistent process for discussing fee arrangements at the intake interview and proving that all fee arrangements were discussed and agreed upon is essential to avoiding fee disputes altogether, and if that is not possible, winning them. Hopefully this article will provoke some thought and ultimately lead to a better process for discussing and establishing fee arrangements with your clients.

Michael Caryl has been practicing law in Seattle since 1977. His practice today is largely concentrated in the areas of fee disputes and ethical aspects of attorneys' fees.

[1]51 Wn. App. 423, 754P 2d 120 (1988).

Go Back

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