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Lessons in Private Practice:

Fee Agreement and Billing Practice Basics

By Michael Caryl

[This article will be presented in two installments, the first addressing best practices in full disclosure of fees and billing practices at intake, while the second installment in next month's issue will address how best to approach drafting and presenting written fee agreements to the client.]

Fee Agreement Woes

The oral fee agreement. My lawyer-client, a 50-year-pin member of the Washington bar, prided himself on never having had a written fee agreement with a client. When he first came to me, he was the third lawyer to represent a wife in a complicated and nasty dissolution, where the marital estate was many millions.

After he settled her case favorably, she turned on him, refusing to pay his fees, claiming he had orally agreed to handle her claim pro bono. I had to successfully prove he had an oral, hourly fee agreement and then foreclose his claim of attorney's lien to get him paid.

The ignorance of RPC 1.5(e). Another lawyer-client came to me with a dispute with an associated lawyer over the division of a contingency fee that exceeded $2 million, where the associated lawyer wanted about half.

The lawyers worked together for six months with no arrangement to share fees. Once the case settled, it took a very costly lawsuit and nearly a trial to resolve that lawyer-client's fee dispute.

The belated written fee agreement. A third client was initially retained in a highly litigated and belligerent boundary dispute. My lawyer-client fully discussed fee arrangements with his clients at intake, but despite numerous efforts, he failed to get a written fee agreement in place until shortly before the trial. He settled the case, then the clients refused to pay his fees.

We sued his clients for the fees and had to defend malpractice counterclaims in a two-week trial. At trial, he won the malpractice claims and virtually all of the fees we sued for, plus prejudgment interest, but the trial court struck his written fee agreement on the grounds he had renegotiated fee arrangements with an existing client. As a result, he lost his entitlement to an award of prevailing party attorney's fees provided for in the written agreement.

RPC 1.5(e) redux. In this case, my client had associated a lawyer outside his firm to work with him on a substantial workplace personal injury case involving severe and permanent injuries. Again, there was no agreement on sharing the contingency fee. The associated lawyer also wanted half of the fee. I had to quash an attorney's lien and then begin the defense of a lawsuit before I was able to get the case settled.

There are two things that each of these vignettes has in common: no enforceable written fee

agreement and substantial attorney's fees to litigate these disputes. I could probably tell a dozen or more similar stories.

The lesson was obvious: Lawyers often do an exceptionally poor job in meeting their obligations to clients under RPC 1.5(b) in discussing and documenting fee arrangements with both clients and other lawyers. In my view, maybe half of all fee disputes could have been avoided with solid written fee agreements and the ability to prove that the lawyers conducted a full disclosure of fee arrangements and billing practices with clients and associated counsel.

This article focuses on the basics of required disclosures about fees and billing practices and sound practices regarding written fee agreements. While many readers might assume this article is too basic for them, the four lawyers mentioned in the vignettes above had an average of 37 years of practice.

Fee Arrangements with Other Lawyers

When you associate with another lawyer outside your firm and plan to share fees, is there a "comfort zone" solution to address fee sharing: "We are all friends/colleagues/acquaintances and can't we do the 'fair and honorable thing' when the time comes?" Or do you recognize the need for a written agreement, but copy one you got from another lawyer without really thinking it through? When was the last time you did any research just to see if there were any rules, ethics opinions or case law that address this situation?

Disputes between lawyers fighting over the division of fees in a contingency case are not only fairly common, they can be uncommonly rancorous. I have been involved in about a dozen such fee disputes. Such disputes usually can be avoided altogether or won in litigation if, at the beginning of the legal representation relationship, lawyers utilize a solid, well-thought-out, fee-sharing agreement and RPC 1.5(e) is strictly followed. Remember, under RPC 1.5(e), no such fee-sharing agreement with another lawyer is enforceable unless the client has approved the specific sharing arrangement in a signed writing.

None of us can really litigate cost effectively with a client or another lawyer over a smaller amount of unpaid lawyer's fees. Getting it right from the outset can avoid the costs of litigating fee disputes and the negative emotions and nastiness of such litigation. And, if litigation is unavoidable, getting your fee arrangements right can greatly increase the odds of winning.

Oral Fee Agreements - Not!

In my 37 years of civil litigation practice in Washington, I have watched the growth of lay clients' sophistication with legal matters and their greater tendency toward aggressiveness with their lawyers. Both before and after disputed-fee cases became the focus of my practice, I have watched lay clients challenge and abuse their lawyers over failings in fee agreements and fee arrangements once the case was over.

Often, these clients find other lawyers who can exploit lawyer faults in using oral fee arrangements to the original lawyer's ultimate detriment. Isn't it too late in the day for us to rely on an oral fee agreement with little or no actual discussion of full fee arrangements and billing practices?

Remember, the client who does not want a written agreement is a client to avoid. That client has an agenda, down the road, that you want no part of. An oral fee agreement is not worth the paper it is not written on! One of my old law partners had a rule that goes like this: "My feet don't come off the

desk until the fee agreement is signed."

I have four rules for fee agreements and billing arrangements that in my humble opinion are absolute:[1]

1. The fee arrangement must be in writing.[2]

2. The fee arrangements must be fully discussed orally before any written fee agreement is presented.

3. The written fee agreement must track the oral discussion over fees.

4. Execution of the written fee agreement must take place more or less contemporaneously with the intake (courts consider anything later than a few weeks to fail this requirement). If the written agreement is not executed more or less contemporaneously with the beginning of the engagement, the belated written agreement may well be voided as a renegotiation in violation of fiduciary duties.[3]

My own rules (Nos. 2–4) are based on a lawyer's fiduciary duties. At the intake interview, the lawyer does not yet owe fiduciary duties to the prospective client. Once the relationship arises and the lawyer agrees to take the case, then fiduciary duties to the client arise under the Rules of Professional Conduct and the law interpreting them.

One of those duties is the duty of highest loyalty and fidelity. This has been interpreted to mean that the lawyer must put the client's personal interests ahead of the lawyer's.

The RPC 1.5(b) Discussion with New Clients

Poll any dozen lawyers about how they handle fee arrangements in their intake interviews with new clients and the differences would exceed the similarities. Perhaps three lawyers in 12 would admit they hate doing it and they get it over with quickly. This means presenting the written fee agreement to the client and wrangling out a signature while discouraging questions and being done with it. One or two will hand the client a fee agreement at the end of the interview, ask the client to read it and return the signed copy to their legal assistant once signed.

One or two lawyers of the dozen will acknowledge taking pride in going over the fee agreement paragraph by paragraph, explaining and anticipating questions and discussing relevant billing practices. The rest will do something else in between.

For those who don't even use written agreements, the fee discussion is usually very sketchy. Some lawyers leave their clients with a handout on billing practices, while the concept of billing may never be discussed at all by others. This approach is terribly unwise.[4]

When you decide to take the case and it appears the client will hire you, you must turn the conversation squarely to fees and fee arrangements. Once you shake hands with that client and agree to take the case, even before any fee agreement is ever signed, you have undertaken the full panoply of fiduciary duties to that client. Anything you fail to discuss may come back to bite you later on.

Unthinking Use of Other Form Fee Agreements - Not!

I have given many CLE presentations on this subject. One occasional criticism of my presentations on feedback forms is that I do not supply the attendees with form fee agreements or engagement letters. The simple answer to this criticism is that "one size fits all" types of fee agreements do not prevent problems, they create problems.

When lawyers consult with me to review their form fee agreements, I am often stunned by what I see - agreements with two or more wholly unethical or unenforceable provisions, while lacking in essentials. When asked where he got his form, one lawyer-client recently told me "at a 1987 CLE seminar."

Every lawyer should fully think through the fee arrangements he or she wants with the client, and then develop a specific fee agreement form that meets his or her own needs. Mindless use of others' form fee agreements will eventually burn the lawyer using it.

A tailored fee agreement that meets the specific needs of the kind of case you are handling is essential. For instance, your own form contingency fee agreement for personal injury cases or employment cases is fine, so long as you drafted it to ensure it contains everything you want in it to ultimately enforce against the client.

In hourly cases, you need to determine what specifically you want the client bound to, and then draft it. I have my own specific tailored form engagement letter agreements: one for handling a disputed-fee case and one where I serve as an expert witness.

There are two general approaches to written fee agreements: everything including the kitchen sink and minimalist. Where do you fit along that continuum?

Lawyers who hate to discuss fee arrangements with clients usually prefer short, simple, form agreements because the client is less likely to ask questions. In my view, favoring a short agreement with a client to avoid answering questions is a rather backward way of approaching client service and seems tailor-made to invite disputes later on.

Fee agreements drafted by lawyers will always be construed against the lawyer, not only because of the old contract rule of construction, but also by virtue of the lawyer's specific duties under RPC 1.5(b) to fully disclose the contents of the fee arrangement and billing practices.

First, determine what you want to accomplish with the fee agreement. If it is merely to cover the major points of the fee arrangement and billing practices, a simple one- to two-page contract will do. If you want to protect yourself from your own client down the road and spell out remedies, then a more comprehensive fee agreement is appropriate. Again, being in the business of fee dispute resolution, I tend to be very complete, to cover what happens in specific circumstances, and to clarify what the remedies are.

I had occasion to review one Seattle law firm's contingency fee agreement a few years ago. It was a masterpiece of completeness and covered many contingencies I had never considered. I doubt this firm has had many fee dispute problems.

No one way is correct. Just make a choice and go with it, but only after thinking it through. If you need help, get competent advice on your agreements.

[In next month's installment, we will cover what should go into the written fee agreement, considerations for using specific fee provisions, and the use of smart mechanics for tying the client

to the specific provisions in the written fee agreement so that it is fully enforceable.]

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1 None of the Rules of Professional Conduct absolutely mandates this. You will probably not be disciplined if you ignore my four rules. But the point of this article is to avoid fee disputes with clients and other lawyers.

2 Contingent fee agreements must be in writing or there is no right to a contingency fee. RPC 1.5(c)(1). Flat fee agreements not only must be in writing, but must have certain required language. RPC 1.5(f)(2). Other fee agreements are not ethically required to be in writing, but full disclosure of fee arrangements and billing practices must be fully disclosed. See RPC 1.5(b). A fee charged under a fee agreement where the client was not given a reasonable and fair disclosure of material elements of the fee agreement and the lawyer's billing practices may be determined to be unreasonable under RPC 1.5(a).

3 *See, e.g., Ward v. Richards & Rossano*, 51 Wn. App. 423, 754 P.2d 120 (1988); *Perez v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983).

4 One typical client dodge later on is, "He/she never once discussed that with me at any time."

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