Lessons in Private Practice:

Avoiding the Problem Client and Case

By Michael Caryl

I am in the business of disputed attorney's fees — mostly between lawyers and their clients. My first such dispute came in almost 17 years ago. Search your memory and call up your worst nightmare client. If you are too inexperienced to have had such a client, read the case of *Taylor v. Shigaki*[1] to see what my poor lawyer-client put up with before he was fired.

Imagine a client who won't pay your fees, is nasty and critical, harasses you on a weekly — if not daily — basis, and causes no end of trouble with your staff. Finally, imagine spending 24 months litigating over your unpaid fees and every one of that client's gripes.

What is worse than working for an ungrateful client and not getting paid? The simple answer is getting embroiled in nasty, expensive and uncertain fee litigation with that client, and have that become yet another albatross tied around your neck while you are trying to make a living practicing law.

Five years ago this summer, I tried a two-plus-week fee dispute trial in Superior Court where I sued my lawyer-client's ex-client for fees. The ex-client countersued for legal malpractice, breach of fiduciary duty and most of the typical client defenses to fees, as well as a few new ones.

The case was long, nasty and expensive, but to a large extent successful; the positive result was affirmed on appeal. The trial judge actually found that this client went into the lawyer-client relationship with no intention to pay the lawyer. While we won almost everything, we did not win fee-shifting attorney's fees. For my lawyer-client, paying more than he won in fees and costs made the entire process an exercise only.

Later that same summer of 2006, while I was on federal jury duty, I had some time to ruminate on the etiology of fee disputes. I came to realize that many, if not most, attorney-client disputes were preventable with prior planning, forethought and the exercise of "sound" judgment at the intake interview.

It occurred to me that the most important lessons from my recent trial and many others over the prior 10 years came down to poor client selection, failure to say no early, poor case selection, poor fee arrangement discussions, and poorly drafted written agreements or no written agreement at all. Careful, common-sense screening of cases and clients, coupled with well-outlined fee-agreement processes and billing practices, can avoid most fee issues. Where a dispute can't be avoided, you have positioned yourself to have a solid chance of prevailing.

Spotting Problem Clients

Problem clients — they are always demanding, often critical, and usually require lots of hand-holding. They want quick results while frequently complaining about fees or — worse — slow paying or not paying at all.

If we learn nothing else in private practice with the passage of time, we should learn to spot these clients and their cases and avoid them, letting them become someone else's problem client. If you have been practicing 30 years and you still have more than your share of these, it may be too late for you. If you have been practicing less than five or 10 years and these clients are still distressingly common, it is about time you thought about making some changes.

Albert Einstein defined insanity as doing the same thing over and over again and expecting different results. He also said, "We cannot solve our problems with the same kind of thinking we used when we created them."

All of us — 40-year practitioners as well as first-year lawyers — need to adjust our thinking on the cases and clients we take, and when we take a

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A guardian ad litem (GAL) is an adult who is appointed by the court to represent the best interests of an individual for a specific purpose for a specific period of time. Under the direction of the court, a GAL performs an investigation and prepares a report for the court of the GAL's findings and recommendations. To become a GAL, an individual must complete an approved training program, provide background information to the court(s) in which the GAL wishes to serve, and meet all eligibility requirements set by local court rule or policy. GALs are often appointed to represent incapacitated persons in Title 11 guardianships. They can be paid for their services, or serve as volunteer GALs. Paid GALs can be employed by a county (perhaps family court services) but more often are individuals who do GAL work as part- or full-time self-employment. Each superior court maintains a list, or registry, of individuals who are qualified to serve as GALs. Appointments are made by agreement or by rotation from the GAL registry. The GAL's responsibilities and duties are set forth by statute, court rule, and the order appointing the GAL.

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case, take steps to immunize ourselves from potential disputes down the road. Wouldn't it be great if we could come up with a simple process for identifying problem clients and cases from the outset? Well, we can.

Earmarks of the Problem Client

Personality

I have represented many lawyers with problem clients. These personality traits tend to be most common:

- Victim mentality;
- Zealot personality;
- Absolute certainty of his/her version of the facts; client's truth (usually opinion) is the only truth;
- Very excitable and demonstrative at initial intake interview;
- Strong personality, tends to take over any conversation entirely;
- Tends to demonize the opponent (you might become the next demon);
- The issue, as claimed by the client, is the principle of the thing, not the money;
- One with very high expectations for the "winning" end result, *e.g.*, "it's a near slam dunk."

Fee Arrangements

These situations often characterize problem clients:

- Aggressively seek to renegotiate fee arrangements;
- Don't want to sign written fee agreements (their mantra is, "Can't we trust each other?");

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• Want their fees covered by another person or the opponent, or one who has a pre-paid legal insurance program covering limited fees;

• Challenge the manner in which you will charge them, *e.g.*, hourly, monthly billings, interest on unpaid balances, etc.;

• Insist on re-writing your standard fee agreement or engagement letter.

The Lure of Loyalty or Altruism

Loyalty and altruism are good traits, in lawyers and anyone else. But taking a case out of loyalty or altruism, because of a prior relationship with the client or a feeling that the client has been damaged, is ordinarily unwise.

Pick and choose your pro bono cases wisely. Taking a case for a former client who cannot really pay now, and admits it, is simply a bad idea. Clients who don't pay or pay little, value your work accordingly. You may lose your shirt trying to be helpful, only to have no choice but to later withdraw.

Spotting the Red Flag Cases

The following types of cases are heavily associated with client dissatisfaction and, ultimately, fee disputes:

• Divorce/family law;

• Boundary or easement or homeowner association litigation;

• Harassment/nuisance;

• Slander/defamation;

• Cases involving severe personality clashes between the putative parties (*e.g.*, neighbors in boundary disputes or harassment by a co-worker);

• Collection actions with complicated facts;

• Statutory or regulatory violations (*e.g.*, violation of state or federal disclosure laws such as FOIA, zoning/land-use or others with little or no pecuniary damage);

• Any case that rides largely or totally on the credibility of the client.

Damages and Collectability

Clients often come to us and ask us to take a case where there is no front-end ability to assess damages. If all else with the case seems okay, taking the case on an hourly basis to explore the issue of damages can be fine. But when the client insists on contingency-fee arrangements where there is no way to predict an award of damages, a lawyer taking that case on risks a rather serious self-inflicted wound.

It is best not to learn from hindsight that the case was a loser on fees. If the predictable end result is modest, then the client needs to be told this, at the outset of the attorney-client relationship, and this must be discussed in terms of the estimated fees to get that result. As a rule, avoid contingency-fee cases where the probability of getting paid is low.

Collectability is another issue. Bringing a claim that is fully insured is one thing. If the defendant is reputedly well-heeled, there's no problem, but do a pre-filing asset check anyway. Still, what assurances do you have that assets will be there as you close in on a judgment? And taking a case on contingency with no idea of whether the defendant is judgment-proof is not just foolish — it is damn foolish.

Trust Your Gut

All of us have gut feelings about clients. Your intuition, vibes and feelings about a client or case are critically important in deciding whether to take the client and his/her case. My lawyer-client in my 2006 trial discussed above has said repeatedly that he had bad vibes about these clients at or near the start, but that he ignored those feelings, until events prevented his withdrawal.

Learn to recognize and honor your gut feelings or vibes. If you have an uncertain, but uncomfortable, gut feeling about a particular potential or recently selected client, just let him or her go — let him or her become someone else's problem-client.

What if You Take This Client Anyway?

Let's say you ignore or miss many of the warning signs above and take one of these clients anyway. What can you expect? A client who:

• Tells you what to do and when to do it;

• Harasses your staff;

• Calls you at the office all the time, calls you on your cell phone and drops in routinely and unannounced;

• Sends frequent emotional emails;

• Acts out emotionally when he/she does not get their way;

• Delays payments, challenges hours, seeks discounts on bills, objects to interest charges after not paying your bills, and criticizes your work product, often as a ruse to induce fee reductions;

• Has personality and tactics that interfere with your overall practice, peace of mind and personal life.

This kind of client is not very likely to voluntarily pay for "showing you how to do your job." This client, in all likelihood, will bring you to a point where you have no choice but to choose between firing the client and maybe not getting paid, or staying in for continued suffering, only to be chiseled on fees in the end, and threatened with bar complaints and malpractice. If you do stay in, be prepared to sue for unpaid fees, and defend malpractice allegations and accusations of fiduciary duty breaches. That's when the real nightmares begin.

Taking bad cases and serving problem and highly unreasonable clients can tax the ability of even the most diligent, sincere and professional of us to maintain our equanimity and get the job done well. Poor cases threaten our livelihood. Problem clients can make our professional (and personal) lives miserable, and even bring out the worst in us.

There is a simple solution. Remember Nancy Reagan — "Just Say No!" If you are organized and really motivated, in a one-hour interview you can usually identify the problem client or the poor case. Then in about 10 minutes, you can politely move that client and his or her case down the road. Like Nike, "Just do it!" If you don't, you will wish you had. ■

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[1] 84 Wn. App. 723 (1997).