Securing Your Fee On Withdrawal

By Michael R. Caryl

Introduction

A substantial part of my law practice deals with fee disputes between lawyers and lawyers, and lawyers and clients. Not surprisingly, these can be among the more acrimonious categories of litigation. It is certainly understandable where a client has fired his or her attorney and truly believes that the lawyer has overcharged, failed to deliver, or has in some other way harmed the client. When a client seeks to renegotiate or reduce an attorney's fee entitlement, particularly where the attorney has done a superb job, this is often grounds for heartburn and perhaps more on the lawyer's part.

However, it never fails to amaze me, in the cases I handle involving lawyer-lawyer fee disputes, the hard feelings, rationalizations and downright reinterpretation of the facts that goes on by one or both of the attorneys to these kinds of disputes.

When a lawyer gets involved in litigation or arbitration with another lawyer over his own fees, that lawyer loses the objectivity and perhaps even the professionalism that one might expect if the lawyer were merely representing another lay client. In addition to being acrimonious, these disputes are expensive, and the outcome uncertain.

Prudent lawyers will want to do all that is possible to avoid finding themselves in this situation. These disputes generally arise in situations where attorneys agree to share a case, where one attorney agrees to substitute for another or where the first attorney is compelled to withdraw because he has become a witness. While there are certainly many imaginable circumstances where this might come up, the most obvious that comes to mind is the case where lawyer one must get out of a bad faith case in order to testify about the underlying facts that constituted the bad faith in the first place.

Primer on the Rules Regarding Contingency Fees.

The law is not very favorable to a lawyer who is terminated or has to get out of a case, insofar as the withdrawing attorney's entitlement to fees. First of all, "it is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however, arbitrary, discharge his attorney." Wright v. Johansson, 132 Wash. 682, 692, 233 P. 16 (1925). A client may discharge his attorney and terminate the attorney-client relationship 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).

The Supreme Court long ago stated:

The rule is that, where the compensation of an attorney is to be paid to him contingent on the successful prosecution of a suit and he is discharged or prevented from performing the service, the measure of damages is not the contingent fee agreed upon, but the reasonable compensation for the services actually rendered.

Ramey v. Graves, 112 Wash. 88, 91, 191 P. 801 (1920). This rule from a dusty old case is still the law in Washington. See Barr v. Day, 124 Wn.2d 318, 979 P.2d 912 (1994).

This is where quantum meruit comes in. Quantum meruit, a concept deriving from the principles of unjust enrichment, basically means the reasonable value of the services rendered. A terminated lawyer, terminated for cause or without cause (such as in the case where he or she must become a witness,) is relegated to the realm of quantum meruit.

The only exception to this rule is where the lawyer has substantially performed his or her contingency. Taylor v. Shigaki, 84 Wn. App. 723 (1997). However, where you must get out of the case early, you have clearly not substantially performed.

In Kimball v. P.U.D., supra, the court determined that the absence of time records was not fatal to a quantum meruit determination. However, the rule is generally different in cases involving lodestar determinations of reasonable attorneys' fees.1 Additionally, without contemporaneous time records, establishing what you did and when may be difficult.

In several cases that I have ultimately prevailed on under the doctrine of substantial performance, it was fortunate for my clients because their time records left a lot to be desired. It is unlikely that, in a quantum meruit determination, a trial judge is going to take your argument seriously that you put in substantially more time than your time records showed.

Lawyers who trust professional colleagues to do the right thing when they pass on a case are not stupid or incompetent. Trust is a character trait to be admired. Unfortunately, however, such trust is not always rewarded, particularly where substantial amounts of money are at stake.

Avoiding This Nightmare

Of course, there is a simple way of avoiding this type of unpleasant and taxing fee dispute. Arrange for a written agreement that provides a mechanism for dividing the fees with your successor lawyer. The goodwill that arises in the passing of this case will never be better than it is at the time that the case is passed to your successor.

What should this agreement contain? First of all, I believe that a succeeded attorney has a fiduciary duty to make sure that the successor attorney does not enter into a new contingency fee agreement that is more onerous to the client than the original. If you agreed to a one-third or a 40% contingency with your client, the successor lawyer should abide by that agreement. All of the other terms and conditions of the contract should remain the same. The only difference is that there will be a corollary to that contract whereby the successor lawyer takes over, and the two attorneys agree on the mechanism for dividing the fees at the end. The

agreement to divide fees should be contained in a writing approved by the client.

How should the attorneys' fees be divided at the end? Of course, you could agree with your successor to negotiate in good faith a fair division of the fees at the end of the case, based upon the relative contributions. Where attorneys get along well and respect each other, this undoubtedly will work and in general, this is the way in which I divide fees in cases where I must get out of the case, or where I associate another lawyer to assist me.

However, if you want to take this approach, it does you no good if your successor attorney turns on you at the end and becomes extremely unreasonable. In such a case, there must be a simple and cost effective remedy for the determination of the dispute. My suggestion is that a specific arbitration provision be put in the agreement and that the arbitrator be named. I would specifically provide for the terms and conditions of the arbitration, making them summary and speedy, so that extended litigation does not result. I have served both as counsel in such arbitrations and as arbitrator, and I recommend it.

What if you are loath to buy into a potential arbitration? A more objective manner of dividing the fees can certainly be devised. If you are an attorney who keeps contemporaneous time records, as I do, you can simply agree to a prorating of hours or a weighted division, such as the succeeded lawyer's time being valued at 1.25 times that of the successor attorney. This alternative is not perfect, because it depends upon the accuracy/honesty of the timekeeping by the successor attorney. If the successor attorney is anticipating insisting on a substantially disparate fee division, there certainly is an economic incentive to fudge on the timekeeping.

A third alternative is a solidly objective division of the fees, where the lawyers agree on an estimation of the total time and effort of the succeeding attorney as compared with the time and effort spent by the predecessor attorney, at the time of transfer of the case, and simply dividing the fees on a percentage basis. For instance, if both lawyers agree that about half of the total work is complete at transition, the agreement can provide for an equal fee split.

One might ask if RPC 1.5(e) comes into play here. For those of you who are not ethics wonks, RPC 1.5(e) is the rule that governs division of contingent fees between lawyers who are not in the same firm. That rule provides that the division of the fees must be in proportion to the services provided by each lawyer, or in the alternative, with the written consent of the client, and joint responsibility remains with both attorneys, an unequal fee division can be made.

I take the position that this rule does not apply to the successor-succeeded attorney relationship, but only to ones where the two attorneys undertake to take the case from the outset. However, where you as the succeeded attorney remain responsible (in the malpractice context), and the client has agreed to the fee arrangement, I do not see that you would run afoul of RPC 1.5(e).

Conclusion

There are certainly other imaginable means of providing for the division of contingency fees where lawyers must get out of cases through no fault of their own. This is limited only by the creativity of the attorneys involved. However, it is my abiding conviction, after having been involved in many of these types of disputes, that it is absolutely essential to get a written agreement that protects you as the succeeded attorney in the event that the relationship goes sideways at the end of the case.

In representing both clients and attorneys in fee disputes, I am repeatedly amazed and chagrined at the enormous hard feelings and nastiness that attend these types of disputes. As we all grow older, we rightfully feel that life is not long enough to endure this sort of abuse. Under the circumstances, it is incumbent upon you to protect yourself from that event, and to get an agreement which is either objective or a methodology for resolving any potential dispute that is summary and inexpensive.

Michael Caryl is a civil trial lawyer of some thirty-one years experience. His practice is largely contingency fee. A substantial minority of his practice involves fee disputes and ethics issues in the fee arena, where he represents both lawyers and clients. He also frequently serves as arbitrator, mediator and expert witness in this arcane area.

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