

## **MEDIATING FEE DISPUTES GRACEFULLY**

By Malcolm Sher

Sometimes clients will fail to pay or dispute your bill because they are disappointed at the outcome of litigation, or, whilst your work was properly performed, your billing methods are unfair or lack transparency, leaving your client unable to understand the bill, frustrated and legitimately asking questions. In the worst situations, the work may have fallen below the client's reasonable expectations or the standard of care and the fee was undeserved. Getting into a fee dispute with a client can be a bit like walking through a minefield. Stepping cautiously, may not only maximize your ability to recover fees due, but may also avoid a malpractice claim or worse, a State Bar complaint. Both the California State Bar and Contra Costa Mandatory Fee Arbitration Programs provide for mediation as well as arbitration of fee disputes. It may be in your best interests to offer to mediate a fee dispute with the client before resorting to either litigation or mandatory fee arbitration. This article provides a roadmap to mediate fee disputes gracefully.

### **Initial Response and the Long Range Picture**

When a fee dispute arises, your initial response is critical to the outcome. So, think first; don't just react! First, if you're still working on one or more matters, you may be able wait for the conclusion of the matter(s), unless the relationship has become so acrimonious that it has become "unreasonably difficult...to carry out employment effectively," requiring you to withdraw from representation under California Rules of Professional Conduct, Rule 3-700 (C) (1) (d). In a litigation matter, withdrawal may require a motion, which, depending how close the case is to a trial, might be denied if prejudice would result to the client.

Second, fee disputes can be expensive, especially if you need to report the dispute to your professional liability insurer because the client has alleged malpractice, something that will occur in almost every fee dispute situation. Since most E&O policies are written on a "claims made" basis, if you are coming up for your E&O policy renewal, you'll need to report any claim of alleged malpractice before the policy expires. That can increase your premiums or impact coverage, even if your fees are ultimately adjudged fair.

Third, how will the dispute interfere with your ongoing practice? Fee disputes do not generate income, and instead, generate stress. Moreover, successful law practices depend on relationship building. An unhappy client is a pipeline to other clients, can damage relationships, and no longer is a source of income.

### **Do You Have a Valid Fee Agreement?**

Fourth, with very limited exceptions, B&PC § 6147 (b) and (c) requires you to have a written fee agreement, signed by and delivered to the client. Even if you do have one, if it

fails to comply with the statutory requirements, the agreement is rendered voidable at the option of the client and you may be entitled to only a *quantum meruit* or “reasonable fee.” Read the statute and if you have not strictly complied, you’re already about to step on a mine!

### **Are your Fees Fair and Accurate?**

Sixth, the managing attorney should carefully check the bills for accuracy, content, frequency and overall compliance with B&PC §§ 6147 and 6148. Areas of concern include charges reflecting associate training, multiple, unnecessary court appearances, “block billing,” vague entries for “research,” meetings or layered staffing. If bills don’t pass the “red face” test, consider writing time off or down, rather than having to explain, justify or rationalize it.

### **Be Responsive to the Client’s Concerns**

Seventh, respond to the client’s concerns promptly and fully by offering to meet with the client in your offices, making clear that there will be no charge for the meeting. Personally go through the bill with the client; don’t delegate this to staff or junior associates. Listening and watching the client’s “body language,” you will be able to size up the client’s attitude. At the meeting, try to resolve the dispute, but regardless, memorialize the conversation. If the meeting proves unsuccessful, immediately offer formal mediation, either with a private mediator, experienced in mediating fee disputes, or through the Contra Costa Bar Association’s Mandatory Fee Arbitration program, recognizing that if mediation fails, mandatory arbitration is still available, usually without an additional filing fee.

### **Preparing for the Mediation Session**

Eighth, before attending the mediation session, counsel yourself, meaning prepare yourself as you would any client for mediation. Discuss the dispute with other members of the firm. Come up with a consensus about how much you’re willing to give up at the mediation, either as a write-off, or even by way of a refund, if that makes sense and will resolve the dispute, but remain flexible.

Ninth, show up on time. Don’t send another junior lawyer. The mediator, who works for both sides, won’t be impressed by what might look like disrespect to him or her and to the client.

Tenth, if there is a joint session, let the client get it all out. Hear the client politely... without a patronizing half-smile! For clients, “perception is reality.” Look the client in the eyes, whilst not rolling yours, and courteously respond to the client’s concerns, even if you disagree. In private caucus with the mediator, ask yourself if someone else might see the dispute differently. Did you or an associate, working at a lower rate, take an unusually long time on a given task? Can you justify what might appear as an associate’s “learning curve”?

Clients don't want to pay for training! Welcome the mediator's guidance. You and a mediator experienced in this field, know that the "cost" of legal work is somewhat esoteric, and a write-down or write-off does not equal "lost money" to you, but may show understanding and good faith to a client. Don't necessarily capitulate; just use common sense, courtesy and "business judgment," always appreciating the risk of an adverse outcome to you and your firm.

### **Conclusion**

Regardless of the outcome, a gracious attorney will look the client in the eye, shake hands, express regret over the fee dispute and acknowledge it was an honor to have served as their attorney.

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