

The Minefield of Fee Disputes – It's Not Just About Fees

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Introduction

Fee disputes pose a minefield for attorneys. Cautiously stepping through disputes may maximize your ability to retain or recover fees, while avoiding a malpractice claim or State Bar complaint.

Inevitably, some clients refuse to pay or dispute an attorney's fee. Sometimes clients do not review bills for accuracy and do not understand the work being performed. They allow expenses to pile up, and panic when attorney's fees and costs suddenly exceed their ability to pay. Clients unsuccessful in litigation are less willing to pay outstanding fees and costs. However, attorneys also contribute to the confusion by insufficiently communicating with clients about case progress, costs, and billing practices, leaving them frustrated and asking legitimate questions. In more egregious situations, the lawyer's work falls below the client's reasonable expectations and the fee is undeserved, or the bills unfair. Learning to manage these disputes prevents difficulties later and may preserve the client relationship.

Routinely, where an attorney pursues fees, clients respond by alleging malpractice. Professional liability insurers require reporting of malpractice claims, some *any time* an attorney pursues fees against a client because the risk of malpractice claims increase. Even a legitimate dispute may increase insurance premiums. Fee disputes interfere with the practice, generate no income, and produce needless stress and risk. Unhappy clients may damage an attorney's reputation and any future relationship.

Attorneys who earned fees fairly, need not automatically refund them or write down time to avoid the dispute. Instead, they should recognize that a fee dispute is a minefield that must be handled promptly, cautiously, with grace and civility. Based upon review of hundreds of fee disputes, either arbitrated or mediated, this article identifies mines that litter the landscape of fee disputes and recommends methods of navigating them.

Be Wary of Conflicts

Fee disputes may create sufficient conflicts to mandate withdrawal from an ongoing matter. Attorneys need not withdraw every time a dispute arises. The best practice, where the attorney seeks unpaid fees, is to continue

representation, and to not commence a dispute until it concludes. As long as the relationship has not turned acrimonious and the attorney can fully and fairly continue to represent the client, representation may continue. However, where the attorney cannot afford to continue without resolution, and fees must be resolved through Mandatory Fee Arbitration or the relationship has denigrated to the point where it has become “unreasonably difficult...to carry out employment effectively,” the attorney should move to withdraw under California Rules of Professional Conduct, Rule 3-700 (C) (1) (d).

Is There a Valid Fee Agreement?

When a fee dispute arises, an attorney first must check the file to ensure there is a valid, enforceable fee agreement. A minefield exists where the attorney failed to obtain a written fee agreement signed by and delivered to the client, or where the agreement fails to comply with the law. Business & Prof. Code § 6147 (b) and (c) renders an agreement voidable, at the option of the client, where it fails to comply with statutory requirements. (*Gutierrez v. Girardi* (2011) 194 Cal. App. 4th 925.) Pursuant to *Bus. & Prof. Code* § 6148, failing to satisfy the requirements of a valid agreement limits the attorney to a “reasonable fee” not more than was agreed upon, but possibly less. The agreement must also be “fair, reasonable and fully explained to the client”. See *Alderman v. Hamilton* (1988) 205 Cal. App. 3d 1033; Former Rule of Professional Conduct 2-107.

Were Your Fees Fair and Accurate?

Check the bills. Carefully. What is present, and lacking may give potentially explosive ammunition to the client. The managing attorney and attorneys working on the matter should review the bill for accuracy, sufficient detail, identification of timekeepers and ensure that it complies with *Bus. & Prof. Code* §§ 6147 and 6148 for content and frequency of billing. Assume that every entry later must be explained to an arbitrator or judge. Be sure it passes the “red-faced” test. Areas of concern include charges reflecting associate training, multiple, unnecessary court appearances or double billing for appearances, “block-billing,” vague entries for research, meetings, layered staffing and the like. Write off questionable items to avoid later explanations.

Be Responsive to the Client’s Concerns

Once the client questions the bill the fuse has been lit. Respond to the client’s concerns promptly and fully. Most fee disputes emanate from a lack of communication with the client rather than the billing, itself. Personally go through the bill with the client; do not delegate this to accounting staff or junior attorneys. Openly share information rather than create hostility. Do not charge time for the meeting, and memorialize discussion points after the meeting so there is a record of the conversation.

Give Up a Little?

In addition to writing off anything that does not belong on the bill, offer to write down an additional small percentage as a show of good faith. Often, giving a discount goes a long way to making clients feel that they got a fair deal. What might have been a mine the client was willing to trigger begins to fizzle out. Attorneys know the “cost” of legal work is esoteric, and a write down does not equal “lost money”. Consider some “No Charge” entries before bill goes out. It fosters trust and confidence with the client.

Be An Open Book: After All Your Client Owns the Book

Attorneys often hold clients’ files “hostage” for unpaid fees. California prohibits “file liens” on fees. So share everything that is not work product quickly in a fee dispute to ensure the client feels the relationship is an “open book”. If the representation is completed, or the client demands it, return the *original* of anything that is not work product, but keep a copy of everything for your own files. For purposes of MFA, you must provide what you think will not only support your point of view, but also answers questions posed by the client. If you think something is ambiguous, share it; don’t hide it. If you think something is bad for your position, consider writing that portion off before the arbitration to negate it as an issue.

Provide All Mandatory Fee Arbitration Information

Ensure the client knows about MFA by providing the statutorily mandated Notice Form to the client and explain the process fairly and with integrity. It’s the law. Moreover, it will make the client feel that you understand their rights, and are willing to cooperate. Refer the client to the State Bar’s MFA website, and the local bar association’s so they can start whatever process they deem appropriate. Let them know that while you feel the fee is fair and reasonable, you understand that sometimes there are disputes and you are happy to mediate or arbitrate.

Act Professionally at the Hearing

Show up on time at the hearing. Don’t send a junior attorney or billing personnel. Don’t be overly friendly with the arbitrator, or create a sense of collegiality. Because attorneys serve as arbitrators, clients often believe lawyers are “in cahoots.” Don’t be stoic and unfriendly with the (former) client. A hostile environment is a mine waiting to explode. Properly prepare your presentation for a fair outcome. Listen and be responsive. Treat the case seriously. Have copies of the invoices for everyone to follow and be prepared to give explanations of

billings. Show respect to the client, even if they are being unfair, overreaching or just “nutty.” Know that even in a MFA, while the arbitrator(s) cannot provide malpractice relief, they may consider the impact of any malpractice on the value of the services and fees charged.

The Devil is in the Details

Regardless, whether the outcome is reimbursement to the client or a determination that they must pay the entire bill, be sure the arbitrator or mediator sufficiently establishes the obligations of the parties for payment, timing, and other matters in writing. The State Bar of California has power to enforce a MFA award against an attorney who owes the client a refund but does not pay. Bus. & Prof. Code § 6203(d). This can include ordering an attorney’s license “inactive” until the debt is paid.

Conclusion

No matter the outcome of the hearing, a good 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. Be a professional, from beginning to end.

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