



presents

Billing and Collecting Client Fees: Ethical Considerations

Avoiding Sanctions and Malpractice Liability

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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12 pm Central

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Ethical Pitfalls in Client Billing and Fee Collection: Avoiding Sanctions and Malpractice

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Overview of Program

In this program, participants will learn about:

- ✓ The professional and ethical rules governing attorney fee arrangements
- ✓ Drafting tips for fee agreements and retainers
- ✓ Types of fee agreements that are permissible
- ✓ Timekeeping, expenses and the billable hour
- ✓ Resolving billing disputes and attorney liens
- ✓ Confidentiality concerns in pursuing fees

The Ethical Landscape

- ABA Model Rule of Professional Conduct, 1.2
- ABA Model Rule of Professional Conduct, 1.4
- ABA Model Rule of Professional Conduct, 1.5(a)
- ABA Model Rule of Professional Conduct, 1.8(a)
- ABA Model Rule of Professional Conduct, 1.8(f) and 5.4
- ABA Model Rule of Professional Conduct, 1.16 (a)(b)(c)(d)
- ABA Model Rule of Professional Conduct, 1.6

The Ethical Landscape

Rule 1.2

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

The Ethical Landscape

Rule 1.4

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Ethical Landscape

Reasonable Fees

Rule 1.5(a)

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

The Ethical Landscape

Rule 1.8(a)

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The Ethical Landscape

Third-Party Payment

Rule 1.8(f)

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

The Ethical Landscape

Third-Party Payment

Rule 5.4

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The Ethical Landscape

Right to Withdraw

Rule 1.16

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

The Ethical Landscape

Right to Withdraw

Rule 1.16

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

The Ethical Landscape

Right to Withdraw

Rule 1.16

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

The Ethical Landscape

Right to Withdraw

Rule 1.16

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

The Ethical Landscape

Confidentiality

Rule 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

The Ethical Landscape

Confidentiality

Rule 1.6

(b) A lawyer *may reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain **death** or **substantial bodily harm**;
- (2) to prevent the client from **committing a crime or fraud** that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's **commission of a crime or fraud in furtherance of which the client has used the lawyer's services**;
- (4) to secure **legal advice about the lawyer's compliance** with these Rules;
- (5) to **establish a claim or defense** on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other **law** or a **court order**.

The Fee Agreement

- Written agreements are preferable:

“A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.”

ABA Model Rule of Professional Conduct, Comment 2.

- In some states, written fee agreements are mandatory
- In most states, contingency fee agreements must be in writing

The Fee Agreement

Typical components:

- The nature and scope of representation
- Any limits on the representation – compensation from third parties
- The basis for the fee, *e.g.*, hourly, contingency, etc.;
- The hourly rate of the attorney and others expected to bill on the file
- Request for a retainer and application of retainer
- Disclosure of any referral fee
- Consequence of late payment – interest charges
- Client's right to terminate the relationship
- Payment after termination
- Attorneys lien on proceeds of litigation or on file contents
- Mediation/arbitration
- State Rules and Codes requiring specific clauses

The Fee Agreement Retainers

Types of retainers:

- Classic
- Security
- Advance

Non-refundable retainers are unethical in many jurisdictions,
but *c.f.* fixed fees.

The Fee Agreement Interest

- Simple interest permissible
- Must not be unconscionable
- Cannot be usurious
- Words like “finance charge,” “late fees” and “penalty payments” may invoke federal and state truth-in-lending laws

The Fee Agreement

Perils of Ignoring the Rules

- The fee agreement may be voided
- Fee may be forfeited
- Quantum measure may still be available

Permissible Fee Agreements

Types of fee agreements:

- ✓ Hourly
- ✓ Contingency
- ✓ Risk sharing
- ✓ Fixed Fee
- ✓ Asset based
- ✓ Value based

Permissible Fee Agreements

Perils

- Must always be reasonable
- Attorney may be stuck if unprofitable
- Must always provide competent counsel
- Settlements cannot be controlled by attorney
- Termination may thwart asset based agreements
- Mid-engagement changes require greater disclosure

Timekeeping, Expenses and the Billable Hour

- Records should be kept contemporaneously
- Minimum time increments should be disclosed
- Bills should adequately describe work performed
- Expenses should be billed without mark-up

Timekeeping, Expenses and the Billable Hour

Consequences of inaccurate timekeeping:

- Regulatory Discipline
- Court sanctions if included in fee petitions
- Claims for breach of fiduciary duty
- Other civil claims – fraud
- Fee forfeiture/disgorgement
- State consumer protection act claims

Timekeeping, Expenses and the Billable Hour

Double-billing is prohibited:



“A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated.”

ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993).

Timekeeping, Expenses and the Billable Hour

Expenses should be billed without mark-up:



“...in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm ... The lawyer’s stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.

ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993).

Resolving Billing Disputes

- ✓ Key to resolving billing disputes is not to have them in the first place!
- ✓ Most disputes arise out of attorney neglect and unresponsiveness
- ✓ Client perceives attorney not working but getting paid

Resolving Billing Disputes Withdrawal

Just cause:

- ✓ Threatened perjury
- ✓ Accusations the lawyer is dishonest
- ✓ Filing of a disciplinary complaint against the lawyer
- ✓ Refusal to pay fees rightfully owed to the lawyer
- ✓ Refusal to communicate with the lawyer
- ✓ A complete breakdown of the lawyer-client relationship
- ✓ Employment of co-counsel with whom the withdrawing lawyer cannot cordially cooperate

Resolving Billing Disputes

Fired = Forfeiture

A clear and serious violation of duty may result in a forfeiture of fees. Factors to consider:

- ✓ The gravity and timing of the violation
- ✓ Willfulness of the violation
- ✓ The violation's effect on the value of the lawyer's work for the client
- ✓ Any other threatened or actual harm to the client
- ✓ The adequacy of other remedies

Restatement (Third) of the Law Governing Lawyers § 37.

Resolving Billing Disputes

Effect of Ethical Violations on Fees

A “serious violation” of the RPC can diminish or eliminate fees.

- *A.I. Credit v. Aguilar*, 113 Cal.App.4th 1072 (2003)
- *Cal Pak v. UPS*, 52 Cal.App.4th 1 (1997)
- *Mardirossian v. Ersoff*, 153 Cal.App.4th 257 (2008)

Serous violations may include:

- Adverse interests
- Conflicts
- Confidentiality

Resolving Billing Disputes Who Should Collect

- Relationship partner
- Someone else at the firm
- Collection agency

Resolving Billing Disputes Confidentiality and Fee Collections

Duty of confidentiality is broad

Disclosure requires:

- Informed consent; or
- Must be impliedly authorized in order to carry out the representation.

Resolving Billing Disputes

Attorney Liens

- Lien on settlement proceeds or judgment
- Lien on file