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

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:
Mark J. Fucile, Partner, Fucile & Reising, Portland, Ore.
Michael P. Downey, Partner, Hinshaw & Culbertson, St. Louis
Gerald G. Knapton, Partner, Ropers Majeski Kohn & Bentley, Los Angeles

Wednesday, July 29, 2009
The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

The audio portion of this conference will be accessible by telephone only. Please refer to the dial in instructions emailed to registrants to access the audio portion of the conference.

CLICK ON EACH FILE IN THE LEFT HAND COLUMN TO SEE INDIVIDUAL PRESENTATIONS.

If no column is present: click Bookmarks or Pages on the left side of the window.
If no icons are present: Click View, select Navigational Panels, and chose either Bookmarks or Pages.

If you need assistance or to register for the audio portion, please call Strafford customer service at 800-926-7926 ext. 10
Ethical Pitfalls in Client Billing and Fee Collection

Mark J. Fucile, *Fucile & Reising*, Portland, Oregon

Michael P. Downey, *Hinshaw & Culbertson*, St. Louis

Gerald G. Knapton, *Ropers Majeski Kohn & Bentley*, Los Angeles

*For Educational Purposes Only.*
Overview of Program

- Setting the Stage
  - Fee agreements and charging interest
  - Timekeeping and expenses
  - Billing forms

- Common ethical challenges and best practices for law firms
  - Resolving billing disputes
  - Withdrawal from representation
  - Pursuing fees: lawsuits, collection agencies and confidentiality issues
Fee agreements

"Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding."

- Model Rule 1.5 cmt [2]
Writing Requirements

- Engagement letters
  - New York requires for many engagements
  - Other states require for specific types of representations (e.g., limited representations)

- Fee agreements
  - Generally required for contingency fee arrangements
  - Required for most matters in many other states (e.g., Wisconsin)
Fee Agreements

- Sample retainer agreements
  - California State Bar   http://www.calbar.ca.gov
    - look in attorney resources or search: Sample Written Fee Agreements (PDF and Word formats)

- The first two agreements forms are designed for use in non-contingent fee arrangements. They cover:
  - litigation on an hourly basis, and
  - non-litigation on an hourly basis.

- The third form is for a contingency fee matter.

- Finally, there are "Other Clauses of Interest in Fee Agreements" which list optional clauses for specific circumstances.
Agreement Customization

- Put in *examples* with dollar amounts to illustrate how the language will work to deal with common circumstances:
  - Example 3. If the arbitrator awards a net of $600,000 and also awards $100,000 in net attorneys fees AND this total of $700,000 is then agreed to be paid in 3 monthly installments of $233.3k per month, then 1/3 of the added $60k due as added attorney's fees will be paid to Lawyers in installments of $20k (1/3) each month when received.
– Example 10. Settlement AFTER judgment.
  ▪ Client can accept less than face amount of judgment, and if so, then Lawyers agree to accept a 15% dilution from their additional fees that would otherwise be payable based on the composition of the judgment.
  ▪ Assume the same numbers as in #3 above, Client will have paid an agreed-upon sum and another $60k will be due ($60k minus 15% ($9k) = $51k) for a total further payment of $51 to Lawyers.
The headline: "Unhappy Lawyer Loses Potential $2,065,535 [50%] Contingency Fee Award Based On Noncompliance With California Business & Professions Code Section 6147. Quantum meruit award is for $364,110."

A retainer agreement did not have the required words and the fee agreement was voided. The truly heroic attorney was entitled to a reasonable fee based on these ten factors:

- "In calculating a reasonable attorney's fee, the following [nine] factors should be considered: (1) The amount of the fee in proportion to the value of the services performed. (2) The novelty and difficulty of the questions involved and the skill necessary to perform the legal services properly. (3) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. (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 attorney performing the services. (8) The time and labor required. (9) The informed consent of the client to the fee." The trial court further instructed the jury as follows: "After considering the nine factors that I have given you, you shall determine the amount of a reasonable attorney's fee based upon hours you determine were worked by Plaintiff Clark Fergus and the hourly rate that you determine to be reasonable for his work."

Interest Charges

- Standard retainer language: "If a billing statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of .833% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid."
Simple Interest

- Interest may not be compounded without compliance with the California Civil Code. It is legally and ethically proper to charge interest on fees. Please keep in mind that interest, if charged, must be reasonable so as not to violate either the prohibition against unconscionable fees nor the usury provisions of the California Constitution. It must be simple interest, made a part of the agreement, and separately stated as an increment on the monthly or other periodic billing. Generally, interest should begin running only after a certain specified period, i.e., thirty, sixty or ninety days after the billing invoice is rendered, if not paid within that time.
Choose words with care

- If the Retainer Agreement uses the terms "finance charges," "late fees," "penalty payment" or anything other than simple interest, this may create problems with the Federal Truth In Lending Law and the California Unruh Act.
Timekeeping and Expenses

Two Fundamental Watchwords:

♦ **Accuracy** in recording and reporting

♦ **Consistency** with the engagement agreement
Accuracy

In re Dann, 960 P.2d 416 (Wash. 1998)
♦ Initials switched on billings from lower to higher rate lawyer

In re Haskell, 962 P.2d 813 (Wash. 1998)
♦ First class airfare reported as coach
Consistency

*In re Marshall*, 157 P.3d 859 (Wash. 2007)

♦ Contract lawyer time improperly included when not within the fee agreement
Consequences

✦ 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
✦ Criminal charges
"A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

Model Rule 1.5(a)
"We have stated before and state again: 'a fee agreement between lawyer and client is not an ordinary business contract.' Although the lawyer is certainly free to consider his own interests, the primary concerns are those of the client. Fees must be reasonably proportional to the services rendered and to the situation presented."

In re Dorothy (SD 2000); accord In re Swartz (Ariz. 1984)
Types of Fees

- Time-Based (Hourly)
- Contingency/Risk-Sharing
- Fixed Fee
- Asset-Based
- Value-Based
Time-Based (Hourly) Billing

- Must bill accurate passage of time
- Can round up to lowest increment
- Typical problems:
  - Billing multiple times for same minutes
  - Automatic minimums (e.g., phone calls)
  - Recycled work
"It wouldn't be fair to charge two clients the same if one client's work took much longer."
"A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

Model Rule 1.5
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.
Alternative Billing Anticipated

- Time & labor, novelty & difficulty of question, skill required
- *Preclusion from other employment*
- Fee customarily charged
- Amount involved and results obtained
- Time limitations from client/circumstances
- Nature and length of lawyer-client relationship
- Experience, reputation, ability of lawyer
- *Whether fixed or contingent*
Alternative Billing Alters Relationship

- No longer largely based on time or labor involved
  - "Running clock" syndrome
- May become win-win relationship
Dangers of Alternative Billing
Rates Must Still Be Reasonable

- *In re Swartz* (Ariz. 1984) – disallowed 1/3 contingency fee where "[t]here was, in short, no contingency, no difficult problem and little work. There was also no result for the client."
May Be Stuck if Unprofitable

- "The element of risk . . . is an element of contingency fee arrangements. . . . Having contracted with [client] on a contingency fee basis, [the law firm] cannot now walk away from the contract because the case may not generate the return it expected at the . . . . Contrary to [the law firm's] suggestion, profitably is not a "basic assumption" of a contingency fee contract. . . . As with all contingency fee arrangements, [the law firm] knowingly assumed the risk that its arrangement . . . would not match its initial prediction of costs and returns." Haines v. Liggett Group (DNJ 1993)
Must Provide Competent Counsel

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.1
- "An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest." Model Rule 1.5 cmt [5]
Fee Arrangements Cannot Control Case

- *Compton v. Kittleson* (AK 2007) invalidated hybrid arrangement that thwarted settlement. Fee arrangement was a 33% contingency that could convert retroactively to $175/hr if client stopped case or settled.

- "[As limited by law and scope of representation], 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." Model Rule 1.2
Changing Rates

- Lawyer agrees to represent Client on time-based (hourly) basis
- As fees mount, Lawyer and Client agree to convert matter to contingency arrangement.
- Does this raise particular ethical concerns?
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.
Do Same Concerns Apply to Increases in Rates?

- Does provision in Engagement Letter help: "The hourly rates are adjusted periodically (usually in January of each year)."
Retainers

- **Classic retainer** – pay for availability
  - Lawyer's money once performance commences
- **Security retainer** – secure payment of fee (like security deposit on apartment)
  - May deduct fees and seek replenishment
  - May hold to secure final payment
- **Advance payment "retainer"**
  - Money given to lawyer now for future services
  - Very limited and regulated in some states (e.g., Illinois)
Who Owns the Money?

- May be attorney's money
  - Classic retainer
  - Advance payment retainer
- May remain client's money
  - Security retainer
Non-Refundable Retainers

- Unethical in many jurisdictions
- Often confused with advance payment retainers or fixed fees
Third-Party Payers

- 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.

- 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.
Resolving Disputes
Withdrawal – Model Rule 1.16

- **1.16(b):** Failure to pay as grounds
- **1.16(c):** Court permission requirement
- **1.16(d):** Protecting the client upon withdrawal
Model Rule 1.16(b)(5)

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

"(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;"
Model Rule 1.16(c)

"(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."
"(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."
Frequent Flashpoints

♦ "File" or "retaining" liens under state law
♦ What is "the file" and who gets it?
♦ Who pays for copies?
♦ Cooperation with new counsel
♦ Unearned advance fee deposits and "flat" fees
♦ Threats of suit for fee collection and counter-threats of malpractice claims
"Assisting the Client upon Withdrawal
"[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15."
Consequences

♦ May be ordered to stay on the case
♦ Regulatory discipline
♦ Breach of fiduciary duty claims
♦ Increasing probability of malpractice claims/counterclaims
Resources

♦ ABA and state bar web sites

♦ Internal ethics/claims counsel or the equivalent

♦ Outside ethics/claims counsel
Collecting After Resistance

• Can the client pay
• Should the client pay
  • Will there be a counterclaim
  • *What is the risk, what is the reward?*

• Preserving confidences
Amount of Fees

- Governed (or capped) by agreement
- May be able to recover reasonable value of services
  - *Restatement (Third) of the Law Governing Lawyers* § 40:
    - "If a client-lawyer relationship ends before the lawyer has completed the services due for a matter and the lawyer's fee has not been forfeited, . . . a lawyer who has been discharged or withdraws may recover the lesser of the fair value of the lawyer's services . . . and the ratable proportion of the compensation provided by any otherwise enforceable contract between lawyer and client for the services performed."
Abandoning Case

- A lawyer who without just causes abandons a client may forfeit a right to recover
What Is 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
"A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." Restatement (Third) of the Law Governing Lawyer § 37
Effect of Ethical Violations on Fees

- A "serious violation" of the RPC can diminish or eliminate fees.
  - Cal Pak v. UPS, 52 Cal.App.4th 1 (1997)

- Effective as of the date of the violation
  - Typical
    - Adverse Interests (RPC 3-300)
    - Conflicts (RPC 3-310 (C))
    - Confidentiality (RPC 3-100)
Who Should Collect

- Relationship partner
- Someone else at firm
- Collection agency

- Beware Fair Debt Collection Practices Act violations
Attorney Liens

- Lien on matter
- Lien on file
Resolving Billing Disputes

- Language in retainer agreement
- Arbitration (MUST follow the law?)
  - Modify/change material term?
  - Rules
    - JAMS
    - AAA
    - Code
  - Appeal within arbitration system
  - Discovery allowed or limited
  - Who determines the scope
Still More Concerns

- Statute of Limitations
- Right to jury trial
- Form of the bills impact
- Laffey Matrix Rates
- AIPLA Economic Surveys
- Having a signed copy of the retainer!
Continue to represent the client?

- Ethical Conflict?
  - Fee dispute by itself is NOT enough
  - "Sufficiently contentious or adversarial?"
  - Must perform w/ competence
  - Can't "sue & stay"

- LACBA Ethics Opinions
  - Opinion 521 (May 21, 2007)
  - Opinion 476 (If sue must get out)
  - Opinion 212 (Withdraw from all)
Confidentiality and Fee Collections

- Duty of Confidentiality is broad
  - (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)
Model Rule 1.6(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(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
CA Privileges

- Lawyer-Client Privilege
- CA Evidence Code §§950-962
- Duties of an attorney
  - (B&P § 6068(e):
"To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."
Privilege Exceptions

- **CA Evidence Code § 958**
  - "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

- **Atty released from privilege to defend self.**

- **OK to testify to get paid.**
Special Fee Arbitration
Exceptions

■ CA Rules of Professional Conduct Rule 3-100
  ■ "(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client..."

■ B&P § 6202:
  ■ Allows disclosure of relevant work product in connection with MFA hearings, trial after arbitration and "In no event shall such disclosure be deemed a waiver of the confidential character of such matters for any other purposes."
Third Party Complications

- Guarantor – Parent – Non-Client
  - Preserving the client confidences in proceedings involving parties OTHER THAN the client.
Third Party Complications

- California Mandatory Fee Arbitration
  - (B & P § 6200 et seq)
    - Arbitration Advisory 07-02 (7/20/2007)
    - Privilege NOT waived and must be preserved.
    - If third party guarantor is part of the Mandatory Fee Arbitration that is OK except that "when the complete resolution of the dispute is impossible without the unconsented revelation of client confidences or secrets, the fee arbitration must be dismissed."
No Waiver After a Balancing!

- Without waiver the barrier is absolute:
    - "In sum, there can be no balancing of the attorney-client privilege against the right to prosecute a lawsuit to redress a legal wrong. Consequently, as General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, [1190] ... teaches, unless a statutory provision removes the protection afforded by the attorney-client privilege to confidential communications between attorney and client, an attorney plaintiff may not prosecute a lawsuit if in doing so client confidences would be disclosed."
Thank You.

Mark J. Fucile
Fucile & Reising LLP
(503) 224-4895
mark@frllp.com
www.frllp.com

Gerald G. Knapton
Ropers Majeski Kohn & Bentley
(213) 312-2000
(213) 312-2016 direct
gknapton@rmkb.com
www.rmkb.com

Michael Downey
Hinshaw & Culbertson LLP
(314) 241-2600
(314) 425-2104 direct
mdowney@hinshawlaw.com
www.hinshawlaw.com
Billing Ethics

By Mark J. Fucile
Fucile & Reising LLP

In law school, billing gets little attention. In private practice, however, billing is a mundane, but central, part of firm management. Done right, billing provides the client with a timely and accurate report of the services rendered that is consistent with the fee agreement involved. Done wrong, billing can be a flashpoint between the client and the lawyer. “Billing ethics” broadly encompasses understandable fee agreements at the outset, accurate time and expense tracking along the way and reports at the end of the billing cycle reflecting the agreed services performed. In this column, we’ll look at all three. Before we do, though, it is important to note that billing ethics is not simply a concern from the perspective of avoiding regulatory discipline. Billing “done wrong” can lead to both problems with enforcing fee agreements and risks of civil liability.

Fee Agreements

RPC 1.5 generally controls whether a fee agreement must be in writing. RPC 1.5(b) strongly suggests, but does not mandate, that hourly fee agreements be in writing. RPC 1.5(c), in turn, requires that contingent fee agreements both be in writing and signed by the client. RPC 1.5(f), which was adopted last year, also requires that “flat fees” paid in advance be in writing and signed by the client if they are considered a lawyer’s property immediately. Finally, fee agreements...
involving business transactions with a client (such as taking stock in lieu of fees) are also governed by RPC 1.8(a) and must be in writing and signed by the client. Illustrating the practical import of the writing requirement, the Supreme Court in *Barr v. Day*, 124 Wn.2d 318, 330-31, 879 P.2d 912 (1994), held that where a written fee agreement is required and none exists, the lawyer is (at most) entitled to quantum meruit recovery.

Each form of fee arrangement has additional specific requirements and both the rules and the accompanying comments involved warrant careful review. RPC 1.5(a)(9) governs the level of detail required in a fee agreement and, because it is one of the factors that goes to the baseline issue of whether the resulting fee is reasonable, applies to all fee agreements. RPC 1.5(a)(9) focuses on “whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer’s billing practices.” What is “reasonable and fair disclosure” will vary with the circumstances. Failure to meet this standard, however, can both lead to discipline (see, e.g., *In re Vanderbeek*, 153 Wn.2d 64, 85, 101 P.3d 88 (2004) (finding a collection provision unclear)) and put enforceability at risk (see, e.g., *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 109 Wn. App. 436, 988 P.2d 467 (1999), amended, 109 Wn. App. 436, 33 P.3d 742 (2000) (fact issue whether hourly rates were described sufficiently)).
One of the key reasons for having a thorough fee agreement at the outset is that it can be difficult to change them later. Although lawyers can generally bargain at arms length before an attorney-client relationship is formed, once a lawyer's fiduciary duties attach with the creation of an attorney-client relationship modifying a fee agreement in the lawyer's favor is generally only permitted (under Perez v. Pappas, 98 Wn.2d 835, 841, 659 P.2d 475 (1983), and Ward v. Richards & Rossano, Inc., P.S., 51 Wn. App. 423, 432, 754 P.2d 120 (1988)) with client consent and additional consideration. Further, the Supreme Court held in Valley/50th Avenue, L.L.C. v. Stewart, 159 Wn.2d 736, 744-45, 153 P.3d 186 (2007), that taking new security for payment of past fees, which it viewed as the functional equivalent of security for a past debt rather than for future performance, invokes the heightened disclosure and consent requirements governing lawyer-client business transactions under RPC 1.8(a).

**Timekeeping and Expenses**

Simply put, in hourly-based billing it is critical that time be tracked and reported accurately. Again, failure to do so can both lead to discipline (see, e.g., In re Dann, 136 Wn.2d 67, 960 P.2d 416 (1998) (initials switched on billings from lower to higher rate lawyer) and bar recovery (see, e.g., In re Columbia Plastics, Inc., 251 B.R. 580 (Bkrtcy. W.D. Wash. 2000) (word processors shown as paralegals on billings). So, too, with reimbursable expenses regardless of the billing system (see, e.g., In re Haskell, 136 Wn.2d 300, 307-08, 962 P.2d 813
(1998) (first class airfare reported as coach)). On expenses in particular, Comment 1 to RPC 1.5 notes that “[a] lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.” WSBA Informal Ethics Opinion 2120 (2006) cautions, however, that “[t]o avoid misunderstandings, clients should be provided with advance disclosure of specific, foreseeable categories of expenses for which they will be charged, such as on-line research.”

**Billing Forms**

Whether providing the client with a monthly bill or a concluding contingent fee summary, only items within the scope of the fee agreement can be included (see, e.g., *In re Marshall*, 160 Wn.2d 317, 332-33, 157 P.3d 859 (2007) (contract lawyer time improperly included when not within agreement) and should be clear enough so that the client can make that determination (see RPC 1.5(b); see, e.g., *Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*). The need for scrupulous accuracy, of course, applies with equal measure to the billing statements the client receives (see, e.g., *In re Dann, In re Haskell*). In instances where a third party will be paying the bill, care also needs to be taken not to disclose confidential information in the billing entries (see WSBA Formal Ethics Op. 195 (1999)).
Comment 10 to RPC 1.5 notes that the requirement that fees and expenses be “reasonable” and the accompanying factors outlined in RPC 1.5(a) apply to “[e]very fee agreed to, charged, or collected” regardless of the compensation agreement used. The nine factors listed in RPC 1.5(a) range from the difficulty of the project to the skill of the lawyer to the terms of the fee agreement. Comment 1 to RPC 1.5 counsels both that the nine factors listed are not exclusive and that not all of the factors will apply in any given instance.

As with the other aspects of billing discussed, the risks involved with an unreasonable fee include (see, e.g., In re DeRuiz, 152 Wn.2d 558, 575, 99 P.3d 881 (2004) (“flat fee” unreasonable when unearned) but are not limited to regulatory discipline. In Holmes v. Loveless, 122 Wn. App. 470, 94 P.3d 338 (2004), for example, the Court of Appeals held that the “reasonableness” requirement extends over the life of a fee agreement and can even outlive the services performed when, as was the case in Holmes, continuing payment obligations from an investment in lieu of cash fees eventually became unenforceable as unreasonable. Further, when a fee agreement is voided on policy grounds for violation of the RPCs, the lawyer or firm may, but need not, receive quantum meruit recovery instead. The Supreme Court in Ross v. Scannell, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982), found that the trial court has discretion to award nothing and in Eriks v. Denver, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992), held that a trial court also had discretion to require
disgorgement of fees already paid. Similarly, in Cotton v. Kronenberg, 111 Wn. App. 258, 269-272, 44 P.3d 878 (2002), the Court of Appeals found that a lawyer had breached his fiduciary duty to a client for charging a fee that was unreasonable in several respects. Eriks and Cotton also noted that the Supreme Court held in Short v. Demopolis, 103 Wn.2d 52, 61, 691 P.2d 163 (1984), that the Consumer Protection Act (with its treble damages and attorney fee remedies) applies to the business aspects of law practice, including billing: “how the price of legal services is determined, billed and collected[.]”

**Summing Up**

For lawyers in private practice, billing is an essential part of the business side of running a firm. Billing is also an area where disputes can arise with clients and, if they do, lawyers are subject to close scrutiny flowing from the fiduciary duties that apply along with their purely contractual obligations. It pays, therefore, in both a monetary and a practical sense, to devote the same care to billing that lawyers bring to their legal work itself.

**ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon
State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB’s Ethical Oregon Lawyer and the WSBA’s Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.
Ethics and Contingency Fees

By Michael Downey

Recently I had occasion to ask several plaintiffs’ lawyers what ethical issues interested them. These lawyers, who like me serve on the Missouri Bar’s Special Committee on Lawyer Advertising, asked for a column that discussed what payments a lawyer could receive when a contingency fee arrangement was terminated prematurely.

I accepted this assignment. Having been asked to write two columns in a row, however, I decided to address this column next month. Today, I thought I would address three issues that commonly arise when representations are accepted on a contingency fee. If you believe you don’t charge contingency fees, I ask that you at least read the first analysis of the first issue, for it may surprise you.

1. What Constitutes a Contingency Fee?

Under the ethics rules, any type of fee that varies based upon the outcome of the representation constitutes a contingency fee. Lawyers often assume that contingency fees only exist for plaintiffs’ litigation work, for personal injury, workers’ compensation, medical malpractice, and similar cases. This is wrong.

Cases where a lawyer agrees to represent a plaintiff and to share in whatever the client recovers are contingency fee engagements. This is true whether the contingency is all or part of the expected fee.

Case law also recognizes that a contingency fee may also exist for litigation defense. A “reverse” contingency is a case where the lawyer receives compensation, or a different amount of compensation, based upon whether a case is successfully defended. Jones v. Jones, 63 S.W.2d 146, 149 (Mo. 1930), for example, reviewed the reasonableness of a contingency fee paid in land for defense of a will contest. Yet contingency fees may also arise, for example, if a lawyer and client agree that the lawyer will receive a premium payment should the case be resolved before trial.

Contingency fee arrangements may also arise in non-litigation engagements. In the 2000 AOL-Time Warner merger, for example, Time Warner’s counsel Cravath Swain & Moore agreed not to recover for partner time if the merger did not close. The merger did close, however, so the firm received an agreed $35 million fixed fee.

In sum, contingency fees and the special rules that govern them can involve any type of legal matter (although, as discussed below, certain types of matters may not be handled on a contingency fee arrangement).

Care should be taken to assess whether a fee arrangement with conditions regarding payment should be deemed a contingency fee. In Shanks v. Kilgore, 589 S.W.2d 318 (Mo. App. W.D. 1979), for example, a lawyer had agreed on the day a divorce was final that he would receive a $60,000 fee, and that this fee would be paid in installments as his client received $300,000 in property settlement installment payments from her ex-husband. The court found this was contingent on the receipt of the payments from the ex-husband, and — since other formalities were not observed — was unenforceable.

2. What special requirements are imposed on contingency fee arrangements?

Demanding special requirements for contingency fee arrangements are contained in Missouri Supreme Court Rule 4-1.5(c) and (d). These requirements may be divided into three categories: (1) those that relate to memorializing the fee arrangement; (2) those that relate to providing an accounting at the end of a representation; and (3) those that relate to prohibitions for contingency fees in certain types of representations.

Memorialization (Writing) Requirements. Rule 4-1.5 contains three requirements for the writing that memorializes the relationship: the writing must (1) explain how the fee is determined, (2) expressly deal with costs, and (3) be signed by the client. Rule 4-1.5(c) states in relevant part:

A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

The Missouri Supreme Court has previously warned that failure to set out a contingency fee in writing is grounds for discipline, even if no fee results. See In re Crews, 159 S.W.3d 355 (Mo. 2005).

Of the three requirements for memorialization of the fee agreement, the first is that the writing must state “the method by which the fee [will] be determined.” This should include information regarding whether the fee will vary if the case settles prior to litigation, at or after trial, or on appeal. Missouri law
has previously indicated that, absent agreement to the contrary, a contingency fee arrangement would generally include representation including through appeal. See, e.g., Specialty Restaurants Corp. v. Gaehler, 956 S.W.2d 391 (Mo. App. W.D. 1997) (citing Knight v. DeMarea, 670 S.W.2d 59 (Mo. App. W.D. 1984)); see also Creason v. Deatherage, 30 S.W.2d 1 (Mo. 1930) (stating a presumption that a contingency fee included representation through collection of a judgment).

In light of the emphasis that Rule 4-1.5(c) places on the required explanation of the fee, such case law appears to remain valid. Thus, if a lawyer fails to specify that a fee will increase if a case is tried or appealed, the client should be entitled to paying only the fee on which the parties agreed at the outset. Also, under Mo. Informal Advisory Opinion 970123, discussed below, it is possible that a lawyer who fails to address such matters could face discipline, although Informal Opinion 970123 more likely rests on the fact that the information which would not be disclosed in that opinion must be disclosed under Rule 4-7.1. See infra.

The Rule 4-1.5(c) requirement regarding expenses, meanwhile, actually involves two requirements: (1) to explain who will bear responsibility for fees and (2) to specify if a client will be required to pay fees even if no recovery is made.

Whether the lawyer’s share will be deducted before or after expenses are deducted often has a major impact on the amount of fee a client will receive. Expenses including expert witnesses fees may easily surpass recovery, and may total $100,000 or more in major cases. Rule 4-1.5(c) requires that the fee agreement plainly state whether both the lawyer’s and client’s shares be reduced by expenses, or whether the lawyer’s fee will be deducted from the gross amount, prior to payment of expenses, such that the client alone will bear all responsibility for expenses.

Should the agreement remain silent on this issue, Baker v. Whitaker, 887 S.W.2d 664 (Mo. App. W.D. 1994), supports that expenses should be deducted before the lawyer’s share is allocated.

Rule 4-1.5(c) also requires that the fee agreement specify whether a client will be responsible for expenses even if they fail to recover on the matter. This correlates with Rule 4-1.8(e), which allows repayment of expenses to be “contingent on the outcome of the matter.”

The requirement to tell a client that they will be responsible for costs even if they make no recovery also correlates with the requirement in Rule 4-7.1(k) that communications about contingency fee agreements are misleading if they do not state “conspicuously that the client may be responsible for costs or expenses, if that is the case.”

Mo. Informal Advisory Opinion 970123 further states that, if an agreement is silent regarding how expenses will be treated if there is no recovery, “[t]his would not constitute adequate communication with the client regarding the fee arrangement” which could serve as a basis for discipline against the lawyer. See also Mo. S. Ct. R. 4-1.5 cmt [2] (discussing obligations regarding explaining fee arrangements to clients).

Finally, Rule 4-1.5(c) now requires that the writing be “signed by the client.” This constitutes a recent change in Missouri law. Prior to July 2007, the client was not required to sign a contingency fee agreement. In light of this change, it seem probable that a court would refuse a lawyer’s request to enforce an unsigned contingency fee agreement.

If a client did sign, and the parties later could not locate a signed copy of the agreement, however, the recent decision Tobin v. Jerry, 243 S.W.3d 437 (Mo. App. E.D. 2007), suggests the agreement would still be enforceable. Tobin held that, although neither party could find a signed copy of the agreement, there was adequate evidence that the plaintiff agreed to be bound by agreement. (The parties in Tobin had entered their agreement before Rule 4-1.5(c) required that the client sign the agreement, but the parties had unsigned copies of the agreement and the lawyer testified that the client had signed it. Id. at 441.)

**Accounting Requirements.** In addition to the memorialization requirements, Rule 4-1.5(c) contains an accounting requirement. The Rule states:

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Mo. S. Ct. R. 4-1.5(c). While Missouri appears to have little authority on this requirement, it seems reasonable to expect that, consistent with Crews, a lawyer could face discipline based solely upon failure to provide such an accounting.

**Representations Where Contingency Fees Are Prohibited.** In addition to specifying certain requirements for contingency fee agreements, Rule 4-1.5 contains two types of representations where contingency fees are expressly prohibited. Those types of representations are:

1. any fee in a domestic relations matter the payment or amount of which is contingent upon the securing of a divorce or dissolution of the marriage or upon the amount of maintenance, alimony or support or property settlement in lieu thereof; or
2. a contingent fee for representing a defendant in a criminal case.

Mo. S. Ct. R. 4-1.5(d).

Missouri has issued considerable guidance on when a representation is a domestic relations matter where a contingency fee arrangement is prohibited under Rule 4-1.5(d)(1). Basically, this guidance boils down to explaining the principle stated in Rule 4-1.5(d)(1) that a contingency fee may not be used where the fee will vary based upon (a) whether a divorce is granted or (b) on the amount of maintenance, alimony, or support that is granted.

For example, a lawyer may enter a contingency fee agreement where the representation would “involve collection of the accrued balance of overdue child support payments under a final judgment,” or the filing of a contempt action to recover past due maintenance and child support. Mo. Informal Advisory Opinions 9600025 & 960225. A lawyer may also take a matter on contingency to correct a divorce decree where, for example, pension rights were omitted, as long as maintenance and support are not involved. Mo. Informal Opinion 980178.

Where the amounts of maintenance and support were not previously established, or may be reopened through the representation, Rule 4-1.5(d)(1) prohibits a contingency fee arrangement. See Mo. Informal Advisory Opinion 970104 & 970217.
The prohibition against charging a contingency fee in a criminal case, meanwhile, generally does not appear to generate many questions. Rule 4-1.5(d)(2) applies regardless of whether the defendant is an individual or corporation. However, Rule 4-1.5(d)(2) normally would not prevent charging a contingency fee on a civil matter related to a criminal prosecution. See ABA Annotated Model Rules of Professional Conduct 84 (6th Ed. 2007).

3. When is the reasonableness of a contingency fee assessed?

Finally, Missouri law appears to require that the lawyer assess the reasonableness of a contingency fee both at the outset and at the conclusion of the litigation.

Once, Missouri law required that reasonableness be assessed only at the outset of the litigation. In Murphey v. Dalton, 314 S.W.2d 726 (Mo. 1958), the Missouri Supreme Court agreed that “the fairness of a contingent fee contract must be viewed from the standpoint of the circumstances of the parties at the time of its execution and not viewed in retrospect after success has been obtained by a smaller expenditure of time and effort than was contemplated or than might have been necessary.” Id. at 733.

The present version of Missouri Rule 4-1.5(a), however, directs that a lawyer shall not “make an agreement for, charge, or collect an unreasonable fee.” “Making” the agreement clearly appears to suggest that the fee arrangement must seem reasonable at the outset, but “collecting” the fee appears to require re-evaluation of the fee at the end of the representation. Thus, Rule 4-1.5 indicates that Murphey is no longer accurate, and thus reasonableness must be assessed “in retrospect” as well as “at the time of execution.” See also Mo. Informal Advisory Opinion 20000090 (“The reasonableness of the actual fee should be reviewed at the conclusion of the representation.”).

So how is reasonableness assessed at the conclusion of the matter? As reasonableness of a fee is assessed in every other type of representation, through evaluation of the eight factors contained in Rule 4-1.5(a). See Tobin, 243 S.W.3d at 443-44 (applying the factors to conclude a 40 percent contingency fee was reasonable in the circumstances of that representation); accord Mo. Informal Advisory Opinion 20000090.

Michael Downey is now a partner in the national legal ethics practice at Hinshaw & Culbertson, LLP. Mike also teaches legal ethics at Washington University School of Law. He can be reached at 314-241-2600 or mdowney@hinshawlaw.com.
Ethics and Time-Based Billing

By Michael Downey

In 1965, law firm associates normally billed about 1400 to 1600 hours and partners about 1200 to 1400 hours. See William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 2-3 (1996) (citing a 1965 ABA survey). Now, forty years later, www.infirmation.com reports that associates at large firms in many cities average more than 2200 hours billed. And anecdotal evidence suggests some firms unofficially require associates to bill 2100 hours or more if they want to keep their jobs.

Facing such billable hour requirements, or perhaps hoping to generate more revenue or reach the next bonus threshold, some lawyers fabricate, inflate, or “pad” their billable time. Extreme examples of fabricated billing are legendary and include:

- A Norwich, CT, lawyer who billed 94 hours for a single day’s work;
- A Raleigh, NC, lawyer who billed 13,000 hours for a thirteen-month (approximately 9500 hour) period; and
- A Baltimore, MD, lawyer who – with approval from the chairman of his firm’s finance committee – had computers automatically increase all time billed to a particular client by 15 percent.

While these extreme examples of fabricated billing capture the headlines, ordinary billing inflation or padding is probably rather common. In a 1991 survey, a majority of surveyed lawyers estimated 5 percent of all billed time is padding, and one-sixth of those surveyed said 25 percent of all billed time is padding. *The Honest Hour* at 29. Such “padding” may involve a lawyer’s increasing the amount of time spent on a project, for example billing a client 1.1 or 1.25 hours or more for 1.0 hour of work. Or it may involve a lawyer who regularly allocates 100 percent of his or her time in the office to billable matters, ignoring that a portion of that time was necessarily spent on non-billable activities. (Billing experts generally believe about 70 or perhaps 80 percent of
time in the office should generally be billed.) Or it may involve transferring time worked by a person who does not bill or bills at a lower rate to a person who bills at a higher rate.

Holiday distractions and year-end deadlines for bonuses and billable hours may make padding more common this time of year. Thus, it seems an appropriate time to review the guidelines for ethical billing set forth in the seminal advisory opinion on the issue, ABA Formal Opinion 93-379, and its guidance against inflating hours and billing multiple clients for the same time or same work.

When a lawyer has agreed to bill a client based on the time spent on a project, inflating, fabricating, or padding of hours violates a host of ethical rules. Rules that prohibit padding or lying about hours worked include ABA Model Rules 1.5 (requiring that fees be reasonable), 8.4 (prohibiting fraud, deceit, and misrepresentation by lawyers), and 7.1 (prohibiting false statements about a lawyer’s services), and the comparable rules in most states.

ABA Opinion 93-379 succinctly states the practical impact of these rules: “In matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time than [he or she] actually spends on a matter, except to the extent that [lawyer] rounds up to minimum time periods (such as one-quarter or one-tenth of an hour).” “[T]he lawyer who has agreed to bill on the basis of hours expended does not fulfill [his or her] ethical duty if [that lawyer] bills the client for more time than [was] actually spent on the client’s behalf.” *Id.*

ABA Opinion 93-379 also explores the impact of this principle to two instances when lawyers often bill improperly: billing more than once for the same time or more than once for the same work. ABA Opinion 93-379 describes three common situations when over-billing occurs: (1) billing multiple clients each for the full duration of a court appearance when the lawyer spends some time during that appearance on each client’s matter; (2) billing one client for travel time and a second client for the same time because the lawyer did work on the second client’s matter while traveling for the first client; and (3) recycling work product and billing the client who receives the recycled work product time already billed to another client when that work product was originally created.

In each of these situations, ABA Opinion 93-379 directs that the lawyer may not bill more than the total amount of time *actually spent*. More specifically, a lawyer may
not bill all clients combined more than the amount of time actually spent in court or traveling. Rather, the duration of the court appearance or travel should be reasonably allocated among the clients whose work was performed during that time. Also, a lawyer who recycles work product may only bill the client receiving the recycled work product time spent updating the original work product. Billing the client otherwise is unethical and often illegal.

To explain the limitations on billing for the same time or same work, ABA Opinion 93-379 states these situations should be considered “not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned”:

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.

Instead of over-billing, in each instance “the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client.” Billing several clients for the same time or work product results in an unreasonable fee, and thus violates Model Rule 1.5 in addition to rules against engaging in fraud or deception. Of course, if the lawyer and client agree the fees will be based on something other than the time spent (such as a fixed fee for each appearance in court or document prepared), the lawyer may be able to bill multiple clients for a single court appearance or for largely recycled work as long as the billing is consistent with the agreement and the total fee is reasonable.

Many lawyers understand that the rules do not allow them to inflate or pad time, bill multiple clients for the same time, or bill multiple times for the same work. For others, it may be useful to read (or re-read) ABA Opinion 93-379, or otherwise consider how the pressure to bill may be undermining a lawyer’s ability to follow the ethical rules in this and other matters. One rather strong statement of this danger is voiced by Patrick J. Schiltz, whose article *On being a Happy, Healthy and Ethical Member of an Unhappy*,
Unhealthy, and Unethical Profession, 52 Vand. L. Rev. 871 (1999), warns that the sliding slope to unethical behavior often “will start with your time sheets” and may lead to “stealing from your clients almost every day, and you won’t even notice.”

Good luck and – in the words of a former colleague – “back to your billing station.”

An earlier version of this article appeared in the December 2005 St. Louis Lawyer. This is printed with permission from the Bar Association of Metropolitan St. Louis and the ABA Law Practice Management Section.
Recovering Fees When Lawyer-Client Relationships End

By Michael Downey

What fee may a lawyer recover when a lawyer-client relationship terminates? The correct answer is, “It depends.” This column examines two issues upon which the outcome of this question will often depend: (1) what measure of fees should apply and (2) what would cause a lawyer to forfeit the right to recover a fee after termination.

In addressing these two issues, this column fulfills the promise that I made in the previous Eye on Ethics column that I would address what fee a lawyer may recover when a contingency-fee engagement ends early. This column is broader, and should provide guidance upon fees earned at the end of any lawyer-client relationship.

Since this was the original purpose of this column, however, I end this column with a warning about convertible fees that lawyers sometimes use to protect the size of their fee when a contingency-fee engagement is terminated prior to satisfaction of the contingency.

1. Measure of Fees Upon Termination.

Ordinarily, a lawyer’s fee upon discharge is limited to the “reasonable value of services rendered” up to the time of discharge. Roberds v. Sweitzer, 733 S.W.2d 444, 447 (Mo. 1987) (quoting Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 57 (Mo. 1982)). The reasonable value of services, in turn, may be measured either through the contract or through quantum meruit, but never both, depending upon the pre-dispute agreement between the lawyer and client.

When the lawyer and client had previously agreed upon an amount the lawyer would receive for the work completed, this agreement normally establishes the reasonable value or maximum fee that the lawyer can recover for such work. If the lawyer and client have agreed the lawyer would earn a certain amount for each hour worked, or a certain fee for completing a document or other portion of a representation, the lawyer can recover the agreed amount and no more. See Mello v. Davis, 182 S.W.3d 622 (Mo. App. E.D. 2005). This prevents the terminated lawyer from proceeding in quantum meruit to “obtain a second bite of the apple” or more than what the lawyer has earned. Id. (internal citations omitted).

In contingency engagements, this limit that a lawyer who has completed contracted work may only receive what payments the contract establishes applies with full force. The Mello v. Davis court therefore held a lawyer could not claim a portion of an employment-discrimination client’s future wages when the lawyer-client agreement did not clearly provide these payments would be included when calculating the lawyer’s fee. Id. at 623.

When the contracted services are not completed, recovery on the contract is not allowed. “Once termination of the lawyer-client relationship has occurred before completion of a contingent fee contract, the lawyers’ only recovery could be in quantum meruit for benefits conferred.” International Materials Corp. v. Sun Corp., 824 S.W.2d 890, 895 (Mo. 1992) (summarizing Plaza Shoe Store); accord Kuczwar v. Continental Baking Co., 24 S.W.3d 712 (Mo. App. E.D. 1999), overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).

In Plaza Shoe Store, the Missouri Supreme Court adopted this rule that recovery upon termination cannot be based on the contract and overruled In re Downs, 363 S.W.2d 679, 686 (Mo. 1963), because “requiring payment of the contracted contingent fee regardless of the posture of the case at the time of discharge, was and continues to be patently unfair to clients, particularly where the client truly has lost faith in the attorney.” Plaza Shoe, 636 S.W.2d at 58; accord Risjord v. Lewis, 987 S.W.2d 403, 405-06 (Mo. App. W.D. 1999).

Where off-contract, quantum meruit will be awarded, courts try to identify some anchor to ensure the fee is not arbitrary. “The determination of a fair and reasonable fee involves a balancing of many interests. The fee certainly cannot be arbitrarily set and must be supported by evidence in the record regarding the necessity, reasonableness, and fairness of the fee.” Kuczwar, 24 S.W.3d at 715.

One anchor courts use is to consider the hours worked, and treat the terminated engagement as if it were an hourly-fee arrangement. To determine the reasonable value of an attorney’s services, courts then identify a reasonable rate for the attorney and multiply this rate by the number of hours that the lawyer spent on the matter to assess a “reasonable” fee. See, e.g., International Machine, 824 S.W.2d at 896. This method of calculating a reasonable fee is not required, however, and it may result in an unjust award including when the value provided to the client is overlooked and the fee calculation compensates the terminated lawyer for work that must be redone by the client’s new lawyer. Id.

A reasonable fee may also be calculated without requiring a court to assess reasonable rates and hours worked.

This article was originally printed in St. Louis Lawyer Magazine, Copyright of the Bar Association of Metropolitan St. Louis and Legal Communications Corp.
on a matter. In Kuczwara, for instance, the court affirms a trial court’s decision to award a discharged lawyer a portion of the fee the lawyer would have earned had the lawyer completed the representation. v. Continental Baking Co., 24 S.W.3d 715-16.

Restatement (Third) of the Law Governing Lawyers § 40 provides perhaps the most succinct statement of what a lawyer’s reasonable fee should entail: “If a client-lawyer relationship ends before the lawyer has completed the services due for a matter and the lawyer’s fee has not been forfeited, . . . a lawyer who has been discharged or withdraws may recover the lesser of the fair value of the lawyer’s services . . . and the ratable proportion of the compensation provided by any otherwise enforceable contract between lawyer and client for the services performed.”

No Missouri court appears to have adopted this exact formulation. Adoption seems possible, however, because the language of Restatement § 40 seems consistent with existing Missouri law as discussed earlier. Also, the Missouri Supreme Court relies upon and follows an earlier draft of the Restatement in International Machine. See 824 S.W.2d at 894-96.

2. Forfeiting Right to Recover Fee.

A. Lawyer Withdrawal Without “Just Cause”

Lawyers ordinarily forfeit the right to recover a fee through one of four paths. First, a lawyer may forfeit the right to a fee by withdrawing prior to completion and without “just cause.” In International Machine, the Missouri Supreme Court summarizes Missouri’s long-standing rule as follows: “[A] lawyer who abandons or withdraws from a case, without justifiable cause, before termination of a case and before the lawyer has fully performed the services required, loses all right to compensation for services rendered.” 824 S.W.2d at 894 (citing cases including from the 1880s).

International Machine also lists the following client actions as constituting just cause for termination of the lawyer-client relationship:

- 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; or
- Employment of co-counsel with whom the withdrawing lawyer cannot cordially cooperate.

Id. (citing cases).

While each instance listed in International Machine that justifies the lawyer’s withdrawal is client conduct that “str[ikes] at the heart of the lawyer-client relationship of trust and confidentiality,” the International Machine court states that whether the lawyer’s or client’s conduct caused the relationship to deteriorate is not dispositive. Id. at 894-95. Recovery may occur when the lawyer is required to withdraw due to a conflict or other ethical considerations. Id. at 895.

B. Serious Lawyer Misconduct.

Second, a lawyer may engage in serious misconduct that results in termination of the lawyer-client relationship either by the client or by operation of law. The threshold for lawyer misconduct that causes forfeiture of a fee is quite high. Complete forfeiture of all fees, the International Machine court warns, is warranted “only when a lawyer’s clear and serious violation of a duty to a client is found to have destroyed the client-lawyer relationship and thereby the justification for the lawyer’s claim to compensation.” Id. at 896.

While such serious lawyer misconduct may cause a lawyer to forfeit his or her right to a fee, courts have found certain lesser lawyer misconduct may not result in forfeiture of any otherwise collectible fee. In Roberds v. Switzer, for example, the court allowed the lawyer to recover in quantum meruit when the initial lawyer-client fee arrangement – a contingency arrangement in a dissolution cause – was void for public policy. 733 S.W.2d at 447. A lawyer may even recover a fee post-suspension, as long as the conduct giving rise to the suspension was not related to the matter in which the fee is sought. See Collins v. Hertenstein, 181 S.W.3d. 204, 214 (Mo. App. W.D. 2005).

C. Lawyer Unable to Prove Services Provided.

The third way lawyers often forfeit their right to a fee is their inability to document the quantum or amount of services they provided to the client. Kuczwara provides an interesting contrast on this point. In Kuczwara, two lawyers sought to recover a portion of their former client’s recovery. The court reviewed evidence – primarily pleadings and correspondence – presented by the first lawyer and found that lawyer’s right to recover a fee was “well-documented.” 24 S.W.3d at 715. The court denied a fee to a second lawyer, however, finding the record was virtually void of evidence regarding what services that lawyer had provided. Id. at 715-16.

Kuczwara does not appear to not require a lawyer to submit time records in order to recover a fee outside of contract. But a Missouri Practice guide recommends keeping such records. Eric
3. Use of Convertible Fee Arrangements.

Lawyers who recognize potential hazards from early termination of a contingency-fee arrangement sometimes seek to protect themselves by providing other fee arrangements if the representation ends before the contingency is reached. The most common type of such convertible fee is a contingency fee arrangement that converts to an hourly-fee arrangement if the representation ends before a settlement or judgment is reached. Such arrangements have even been suggested as protection against the “vagaries of quantum meruit recovery.” Ziegenhorn, Missouri Practice, Legal Forms § 30:102.

Such convertible arrangements may trigger two special sets of ethical concerns. First, Missouri Supreme Court Rule 4-1.5 states a lawyer “shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” One factor for assessing whether a fee is reasonable is whether the fee is “fixed or contingent.” Mo. S. Ct. R. 4-1.5(a)(8). An arrangement that removes any chance the lawyer would cause this factor to weigh against the reasonableness of the fee, and could result in a contingency-fee arrangement being deemed unreasonable. Cf. In re Swartz, 686 P.2d 1236 (Ariz. 1984) (contingency fee excessive where, due to the facts of the case, there was no uncertainty as to recovery).

Second, such a convertible fee agreement may run afoul of legal ethics rules where the conversion to hourly fees effectively prevents the client from discharging counsel or controlling the outcome of a matter. In Compton v. Kittleson, 171 P.3d 172 (AK 2007), a lawyer took a case on a one-third contingency that converted to an hourly fee if the client settled the case for an amount that paid the lawyer less than $175 per hour; then, the fee converted to a $175 per hour hourly fee.

The threat of conversion to hourly fees – which would have totaled more than the settlement offered – prevented the client from settling the case for $25,000 before trial. Ultimately, the client lost the case, was ordered to pay to the defendant $100,000 in attorney fees and costs, and was forced into bankruptcy.

The bankruptcy trustee then sued the lawyer for malpractice, challenging the lawyer’s fee arrangement as a deliberate attempt to pressure a client against settling. Although the trial court allowed the arrangement, the Supreme Court reversed, stating, “Because the potential cost of a future obligation of this kind and the potential value of the right the client is asked to forgo to avoid the obligation are both largely incalculable at the inception of the attorney-client relationship, when the fee agreement is signed, we conclude that the fee-conversion provision at issue here impermissibly burdens the client’s right to settle a case.” Id. at 179.

4. Conclusion.

When either the lawyer or client terminates a lawyer-client relationship early, the lawyer may still be entitled to recover a fee. Relevant precedent, including the three issues addressed in this column, must be examined to consider if this is the case, and what fee might be recovered.

Michael Downey is a partner in the national legal ethics practice at Hinshaw & Culbertson, LLP. Mike also teaches legal ethics at Washington University School of Law. He can be reached at 314-241-2600 or mdowney@hinshawlaw.com.