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THE CLIENT AS ADVERSE PARTY
ETHICAL LIMITS TO COLLECTING YOUR FEE

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Introduction

As lawyers we like to think we are always on the same side as our clients. We battle on behalf of our clients in the courtroom and at the deal table. We lose sleep worrying about getting a good result and we take pride as professionals for providing distinguished service to our clients. We have ethical duties to zealously represent the interests of our clients, and we can be called to task for failing to do so. As a profession, we genuinely care about our clients and for many it would be difficult to imagine another profession or service industry that is more focused on vigorously protecting, defending and serving the customer than the legal profession.

At the same time, however, within every law firm or law office there is a separation between client and counsel. On the business side of the legal profession, clients are discussed among lawyers as a valued asset to be recruited, retained, grown and coveted. Receipts are tallied and compensation doled out based on client relationships and receipts, and many an attorney has felt that his or her value is largely dictated by the famed “book of business” that is, of course, comprised of client relationships and the promise of future work from clients.

Thus, we have the inherent conflict between the lawyer-client relationship that is based solely on advancing the legal interests of the client, and the lawyer-client relationship that bestows value to the lawyer by virtue of the compensation earned from revenues paid by the client. Put in the most stark terms, the conflict is that the client wants to pay the least amount of money for legal services while the lawyer aspires for the largest amount of receipts possible (or at least fair compensation for work performed). Of course, it is quite possible to envision the scenario in which these two dimensions of the attorney-client relationship reinforce each other to mutual advantage. After all, if a lawyer succeeds in advancing the client’s interest, the client benefits and theoretically is motivated to pay the attorney’s fee or even a success premium. The rising tide of good results for the client lifts the attorneys’ boat as well, as the attorney attracts

more work from the client. This is often the case, and thus the zealous advocacy of the client's interest by the lawyer can directly translate into positive financial results for the lawyer. In these cases, the inherent conflict is overcome by good work, good results and mutual benefit.

But what about the great legal work that does not result in success for the client? Two great trial lawyers duke it out before a jury, but only one can win. Both vigorously advanced their client's interests and both earned their fees, but in this scenario only one has generated the benefit to the client that motivates the client to happily pay the fee and reward the lawyer for the good work. And what about the ungrateful client, who gets a terrific result, but in the end is even more focused on the client's interests than the lawyer, to the ultimate result of not paying the lawyer's fees or demanding significant reductions? And what about the client who is grateful for a good result, or at least a good effort, but does not have the means to pay the fee?

The reality of our profession is that, for many different reasons, many clients do not pay the lawyers' fees, seek a reduction in fees, seek terms for payment of fees, or simply lack the ability to pay the fees. In these cases, the inherent conflict between the lawyer who wants to be paid a fee and the client who wants to keep its money (or wants to continue to receive legal services without paying for it) comes to a head. It is this latter context, where the lawyers' financial interests conflict with clients' financial interest, that is addressed by this paper.

The first message of this paper is that we have to, as lawyers, acknowledge that this conflict exists. We do not in all respects zealously guard the interests of our clients. We have a caveat to that promise to promote and defend our clients' interests, and that caveat is that we expect to be paid for our work and that we can and will, if necessary, use our own legal skills and talents to enforce our right to be paid.

Once the lawyer acknowledges that this conflict exists, I suggest that it will be a best practice of attorneys to be direct and forthright with clients about payment issues throughout the engagement. Lawyers often shy away from discussions with clients about fees and payment because they think it will negatively affect the relationship with their client, or because they are uncomfortable discussing the lawyers' self interest in payment when they think they should always protect the client's interests. No one teaches a law school class on collecting accounts receivable and most lawyers have no training in these matters. It is critical, however, to have a balanced relationship with a client in which the lawyer's payment requirements are a part of the continuing conversation. Directly addressing payment issues from the onset of the engagement, is essential to collecting fees and minimizing write-offs, and in the discussion below I contend that it is the failure to address fee issues directly at all relevant times throughout the engagement that results in a higher rate of fee write-offs, conflicts with clients, and deterioration of client relationships over fee issues.

In Section II, below, I outline the ethical boundaries in which lawyers operate regarding collection of fees. In Section III, I address a number of practical actions lawyers can take to avoid fee disputes and maximize fee collections.

I. ETHICAL AND LEGAL BOUNDARIES IN COLLECTING FEES.

A starting place for considering the ethical limitations relating to collecting a fee are the applicable Rules of Professional Conduct for a given jurisdiction. Each state has its own set of rules, they all differ, and an exhaustive analysis of the applicable rules for each state is beyond the scope of this paper. Most states, however, have enacted some variation of the ABA Model Rules of Professional Conduct,¹ and the ABA Model Rules in most cases will correspond generally with a given state's rules. Attorneys must consult their own state rules, of course, to

determine the applicability of any particular ethical limitation. Below I discuss those Model Rules that most directly pertain to fee collection issues.

Rule 1.2. – Scope of Representation. We can start with Rule 1.2, which governs the scope of representation and creates an allocation of authority between lawyer and client. This Rule provides that “a lawyer shall abide by a client’s decisions concerning the objectives of representation.”² Importantly, this Rule allocates authority to the client to make decisions only regarding the “objectives of representation,” which is the substantive matter for which the attorney is engaged. Nothing in this Rule entirely subordinates the lawyer’s rights to the client’s directives. As to matters that are not concerning the objectives of representation, the lawyer is not required to accept the client’s direction – and this allows for the caveat that a lawyer may establish conditions of the representation as well.

Rule 1.4 – Communication. This Rule governs the issue of communication in the client/lawyer relationship. This Rule imposes duties on the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and to “keep the client reasonably informed about the status of the matter.”³ The “status of the matter” is broad enough to be reasonably construed as creating an obligation to keep clients informed regarding the costs of the matter. As set forth more fully in Section III, *infra*, prompt and continual communication with a client regarding all facets of the matter, including costs, are a best practice that will help lawyers avoid fee disputes and will assist a lawyer in getting paid.

Rule 1.5 – Fees. This Rule is by its title the most germane ethical limitation on the issue of fees. It provides that a lawyer’s fee may not be “unreasonable,” and sets forth factors to be considered in determining the reasonableness of the fee, including:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service;

2. The likelihood of apparent client acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged and the locality for similar legal services;
4. The amount involved and the results obtained;
5. Time limitations imposed by the client or by the circumstances;
6. The nature and the 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.⁴

When a client believes that fees have become too high, or the client otherwise wants to avoid or limit payment, this Rule provides the client significant fuel for that fire. Clients in many cases start with the presumption that lawyers are exceptionally overpriced to begin with, irrespective of the market or the quality of the legal services provided. Rule 1.5 sets forth a number of factors, primarily subjective, that allow a client to debate the reasonableness of a fee as a basis for not paying it. Further, because the burden will be entirely on the lawyer to prove reasonableness (the duty is imposed on the lawyer), and because this is cast as an ethical issue, the stakes are very high for a lawyer to justify the fee to ensure payment and also avoid potential discipline. The fact intensive, subjective nature of this inquiry makes for an issue that cannot be easily dismissed on a dispositive motion.

The Annotated Model Rules of Professional Conduct report that virtually all of the cases imposing discipline for unreasonable fees also involve issues of dishonesty or misconduct.⁵ In some cases a fee can be deemed illegal and thus unreasonable, such as where statutory fee caps apply.⁶ In other cases, lawyers have been either reprimanded or denied a fee recovery where the lawyer simply could not demonstrate that work product was prepared to justify the fee.⁷ Other lawyers have either been sanctioned or precluded from obtaining fees that subjectively were deemed excessive.⁸ On the other end of the spectrum, lawyers can violate Rule 1.5 by doing an excessive amount of work given the circumstances.⁹

Supplementing the communication requirements of Rule 1.4, Rule 1.5(b) extends the communication responsibility of the lawyer as follows:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.¹⁰

Again, because this is an ethical requirement, presumably the failure of a lawyer to communicate the basis of fees and expenses to the client could be grounds for discipline as well as a defense to a fee collection action. Although an ethical violation does not necessarily create a cause of action, it may be considered as setting a standard of care in a negligence action, thus, this Rule may be used as a basis for a malpractice claim. It certainly can be used as a basis for disputing an obligation to pay a fee that was not communicated.

Because the Rule does not identify *how* fees may be communicated, it can be argued that presenting a fee through submission of an invoice could constitute the required communication. This underscores the need for detailed bills, however, so that “the basis or rate of the fee and expenses” is communicated in the invoice and not just a flat amount due. Further, this Rule underscores the need to bill clients promptly if an attorney is to rely on an invoice as communication of the basis of the rate or fee, such communication has to be “within reasonable time after commencing the representation.” Note that the Comments to the Model Rule contemplate that the lawyer provides the client a memorandum of fees and costs, or rate schedule, at the outset of the engagement.¹¹

Rule 1.6 – Confidentiality. This Rule generally comes into play when a lawyer needs to take action against the client to collect the fee. In the course of the action it will be necessary to disclose some information about the nature of the engagement. If the entire engagement was

highly confidential and has never been made public, it may be necessary to file many if not all pleadings under seal. In other circumstances, where bills must be submitted to prove up a fee, or where an attorney-client communication must be disclosed or to prove up consent to a fee arrangement or other pertinent matters, the lawyer must tread carefully to avoid the claims in the process of that action of breach of Rule 1.6.

Notably, Rule 1.6(b)(5) addresses the specific rights of a lawyer to reveal information relating to the representation of the client, to the extent the lawyer reasonably believes it necessary, to:

[E]stablish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client.¹²

Rule 1.7 – Conflict of Interest: Current Clients. When a lawyer starts to think about bringing a collection action against a client for fees, the situation starts to feel like a conflict of interest with a current client. It is. Although not the type of conflict that lawyers consider under Rule 1.7, the key part of the Rule involves the notion that a lawyer cannot take on an engagement if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person *or by a personal interest of the lawyer.*”¹³ Clearly the question arises as to whether a lawyer could provide competent, zealous or appropriate representation to a client when there exists a dispute between the client and the lawyer regarding fees. Although not directly addressing fee disputes, the annotations to the model rules state broadly that “Absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is

likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.”¹⁴

In light of these Rules, lawyers should terminate the representation before bringing an action for recovery of fees against a client. There conceivably are limited situations where attorney and client would agree to arbitrate or otherwise determine the amount of a fee, for example, in a manner where both attorney and client are agreeable to such resolution without terminating the attorney-client relationship. In those cases, it may be that an informed client consent could overcome the Rule prohibition. This would be consistent with the provisions of Rule 1.7(b) that allow representation of a client in a concurrent conflict of interest situation if the lawyer reasonably believes the lawyer can provide competent and diligent representation, the client gives consent, and the other provisions of Rule 1.7(b) are met.¹⁵

Rule 1.9 – Conflicts With Former Clients. Assuming that a lawyer terminates the engagement with the client prior to bringing an action to collect fees, the matter than falls under the more limited conflict of interest provisions of Rule 1.9 involving former clients. In these situations, there is a general provision against being adverse a former client in a matter substantially related to the matter in which the lawyer had previously represented the client, and there is an additional concern about not using confidences to the detriment of the client as was discussed, *supra*, in regard to Rule 1.6. Although the fee dispute is related to the prior matter in which the lawyer represented the client, that is not the context in which this rule applies.

Rule 1.9(c)(1) expressly allows for use of information obtained in the engagement to the disadvantage of the former client “as these Rules would permit or require with respect to the client,”¹⁶ The pertinent Rule that would allow such disclosure to the detriment of the client is Rule 1.6(b)(5) which allows a lawyer to use information obtained in the representation as a

lawyer reasonably believes necessary “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” This Rule still requires the lawyer to exercise judgment as to what is reasonably necessary, and a lawyer should expect that to the extent revealing such information would be detrimental to interests of the client beyond the dispute with the lawyer, measures should be taken to protect that information from wider dissemination than is required to resolve the fee dispute.

Rule 1.16 – Declining or Terminating Representation. In response to non-payment of fees, many lawyers seek to withdraw from representation. This is an appropriate and reasonable response, but it has to be done within the constraints of Rule 1.16. In particular, Rule 1.16(b)(1) provides that a lawyer may withdraw from representing a client if “withdrawal can be accomplished without material adverse effect on the interests of the client.”¹⁷ The Rule also provides, however, that a lawyer may withdraw if “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.”¹⁸ In addition, Rule 1.16(c) provides that a lawyer must comply with applicable law regarding notice to or permission of a tribunal when terminating a representation. Tribunals differ and some freely allow withdrawal, while others will refuse a request for withdrawal, even if it imposes significant hardship on the lawyer. A lawyer must obtain both leave of court and meet the ethical obligations and either may be more strict in a given case. In any circumstance, Rule 1.16(d) provides that upon terminating representation “a lawyer shall take steps to the extent reasonably practicable to protect the 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.”¹⁹

Many courts have granted lawyers permission to withdraw for failure to pay the lawyer's fees.²⁰ Courts also rule to the contrary, however, as there is no shortage of decisions holding that a lawyer cannot withdraw too close to trial.²¹ In some cases, a lawyer has been permitted to withdraw based entirely on the extensive investment required and doubtful likelihood of recovery of fees.²² Cases applying the provision of the Rule allowing withdrawal when the client's conduct renders the representation unreasonably difficult have not typically related to payment issues but have been more concerned with issues of cooperation, inability to locate the client, or unwillingness to allow the lawyer to conduct the legal work.²³

II. TOP TEN ACTIONS LAWYERS CAN TAKE TO ENSURE THEY GET PAID.

1. *Get a retainer.* Lawyers routinely assist clients in obtaining security for the client's business deals. Lawyers arrange for escrows, hold backs, security interests, confessions of judgment and the like on behalf of their clients, but many lawyers are reticent to use the same security devices with respect to client payment issues. The primary reason for not getting a retainer is simply to avoid a potential obstacle to getting hired. Lawyers are afraid that a prospective client will balk at providing a check up front and instead will go to another lawyer who will dispense with that requirement. In reality, however, there probably are not that many cases where a lawyer is selected over another based on the requirement of a retainer. For those cases where the retainer is the determining factor, the lawyer who loses that client may well be better off without the client, as refusal to pay a retainer is a red flag that the client is unwilling or unable to afford the engagement.

Those lawyers who do not request a retainer on some level make the judgment that the client will pay when billed. This may be based on the blue chip nature of the client, and I will admit I usually dispense with a retainer requirement with Fortune 500 clients. I also typically do

not request a retainer for new matters for an existing client, when the client has a good payment track record on past matters. It also may be due to the lawyer's need for the engagement – in slack times it may be better to have an engagement that might get paid than none at all.

Experience, however, often proves that a retainer decision is a critical one, particularly with a new client. It is easy for a client to start an attorney-client relationship that requires no effort from the client. The client comes in to the law office, maybe is taken to lunch, lays out his or her legal problems for the attorney and then the attorney gets busy doing work for the client. There is no “skin in the game” on the client's part, which fosters a relationship in which the client may not have any sensitivity to the scope of the engagement, potential costs and the client's own ability to pay. In other words, not getting a retainer is a start toward conditioning a client to not be concerned about payment or control of costs. That is exactly the wrong signal to be sending to the client on the outset of an engagement.

Further, the request for a retainer is an excellent opportunity to separate the wheat from the chaff as clients go. In reality, you want the clients who are willing and able to write a retainer check in that first meeting or shortly thereafter, particularly when it will be a substantial engagement. You probably do not want the client who shows you up front an inability or unwillingness to invest in the cause.

It is quite common at the beginning of a litigation for clients to have an emotional drive for the case, based on a feeling that they have suffered injustice and have a desire to make things right and perhaps punish the wrongdoers. Clients often express the sentiment, at the outset, that the case “is a matter of principal” and may also state that money and cost is no object. These should be seen as warning flags because: (1) the client is acting out of emotion and emotions will die down, (2) the client has no idea what the costs might actually be and (3) most clients

generally care about money despite what they are saying. Several months into a litigation, after a few depositions and perhaps a motion hearing that did not go favorably, after learning that the other side's position is not patently frivolous, and also after receiving a few hefty bills, the client's interest in the principal of the matter wanes as the economic reality of litigation takes over.

Better for the lawyer to know up front the client's capacity for the litigation, not by listening to what the client says, but by testing that through the request for a retainer. Accordingly request a retainer from the client at the outset and do not feel sheepish about raising the issue of money with a new client. In fact, make sure you raise the issue of money and insist on a retainer.

Further, do not make the mistake of using the retainer to cover the *first* payments owed by the client to the attorney. The value of the retainer is to ensure payment of the *last* bill. This means the client has to pay a retainer up front and then will have to pay the first bills as they come in, which demonstrates a more substantial financial commitment to the case in the early stages. Holding the retainer until the end of the engagement is the only way for a retainer to be true security for payment as opposed to just advance payment for the first bill or two..

Smart clients get security from their own clients and customers. They should not be surprised that their lawyer makes the same request.

2. *Have a written engagement agreement that specifically addresses rates and payment terms.* Lawyers are known for always advising their clients to “get it in writing.” A lawyer may be quick to point this out to a client who has come with a contractual issue that involves an oral contract; indeed, one of the most common construction law disputes relates to demands for payment on change orders that were not documented in writing. This same advice

is of course, important and necessary for lawyers in their dealings with clients. Indeed, many jurisdictions require a written engagement agreement to be enforceable.²⁴

Just as with the retainer, a written engagement agreement focuses the client on the economics of the engagement and is critical in avoiding any claim for misunderstanding regarding payment obligations, rates and similar matters. There are a number of elements to a good engagement letter that should be included:

(i) *Scope of Engagement.* Many payment disputes arise out of a lack of clarity as to what services the lawyer was to perform. Clients can complain both ways. They can complain that the lawyer conducted a number of tasks or dealt with issues that the client never engaged the lawyer to do. Conversely, the client can criticize the lawyer later for not addressing issues that the client expected would be addressed. Granted, the engagement agreement cannot document every twist and turn in the course of representing a client, and the lawyer is not going to revise the engagement agreement every time there is a change in the scope. Again, though, with our construction clients we would advise the contractor to document every material change in scope of work through a change order with the owner. The lawyer can similarly document changes in scope over time, by communicating in writing with the client specific tasks that are being undertaken or not undertaken during the course of the engagement, and such documentation can be used in the manner of a change order.²⁵

The engagement agreement can, in large part, identify a scope of agreement that can be useful in later billing disputes. In particular, avoid the language of “general legal matters” or anything similar in an engagement agreement. If the engagement involves a specific project, a contract, litigation or other event in the client’s world, identify that specifically in the engagement agreement.

(ii) *Rates and Timekeepers.* An engagement agreement should identify the rates for those timekeepers expected to work on the project and should also identify the manner of billing. As with a typical project, if it is a billing on the hourly rate, the engagement agreement should make clear that there is no cap or limit on fees and that the client will be billed by the hour for tasks incurred in the engagement. It is quite common for clients to misinterpret an estimate of fees and costs as a cap or contractual limit on the cost of the matter. Accordingly, a proper engagement agreement should specifically state that any estimates or budgets are advisory only and are not intended to be guarantees of the cost.

(iii) *Enforcement Provisions.* In drafting agreements for our clients, lawyers routinely include enforcement provisions such as the ability to recover attorneys' fees, costs, interest and other expenses of enforcement from the non-breaching party. These are important in engagement agreements as well. Although lawyers certainly do not want to contemplate in detail the potential for disputes with clients at the outset of an engagement, the reality is that most clients do not balk at these terms because business clients use these tools themselves (often on the advice of their attorneys!). One could argue that clients may well respect the attorney more for following the attorney's own advice in the attorney's business. Although lawyers have varying views about the desirability of arbitration, if you determine that this advantageous for collection purposes, arbitration clauses are routinely found in engagement agreements.

3. *Record time daily and bill clients monthly.* When you think about it, lawyers create billions of dollars of value each year simply by writing down time entries in a book. For the most part, we do not generate a product that we can show the client (setting aside potentially a brief, a favorable decision, or a resolution of a matter to the client's advantage), so in most cases the client's only verification that it received value from the attorney's services is a

statement from the attorney detailing the tasks undertaken and time spent. Most businesses do not work that way, although “time and materials” is a concept understood in the construction trades. Even then, however, most clients could show a roof truss, excavation, schematic diagram or similar tangible product resulting from time spent on the job, where a lawyer’s entry of “1.0 hours – review sworn construction statement” can still leave a question as to what the lawyer did.

Given the incredible amount of dollars that are paid over to lawyers every year based solely on some lawyer’s affirmation of time spent on the project, the least we can do as lawyers is record this time promptly, accurately and in detail. Surprisingly, however, despite the central importance of timekeeping in the business of lawyering, many lawyers are extremely neglectful of time entries in two major ways: delinquent timekeeping and delinquent billing.

Many lawyers do not regularly record their time and thus are placed in the position at the end of a week or month (or even longer) of having to recall and reconstruct time spent. This effort a recall can range from imprecise to almost guesswork, yet this process will be relied upon to charge clients multiple thousands of dollars. The more a lawyer is put in the position of recalling distant events to record time and bill clients, the more there is potential for error, mistake, estimation and a dispute. Pity the poor lawyer who records a phone conference with a client on the day that the client was on a wilderness river rafting trip and had no cell phone coverage. Because clients can perceive errors and poorly recorded time entries, these practices give rise to distrust and ultimately dispute. Accordingly, prompt, detailed, accurate timekeeping is critical to avoiding disputes. Time should be entered daily and this should be either the last thing the lawyer does before leaving the office at night or the first thing the lawyer does before starting the day.

Prompt billing also is critical in avoiding billing disputes. Many lawyers labor under the belief that their relationship clients works better if they defer billing and do not remind the client that there is a significant cost to litigation. There are times when it may not be judicious to send out a bill (for example, directly after making a practice error that required correction or after obtaining a poor result in some aspect of the matter). Nonetheless, delayed billing simply ages the lawyer's receivables without even giving the client the opportunity to pay them, and in the end results in presenting a much larger bill to the client who may have been thinking the case was proceeding at much less cost, or may have made other uses of funds on the assumption that the legal bill would be less. Accordingly, regular billing on a monthly basis will help avoid disputes and gives a client the chance to plan for and pay a bill while the client still has funds.

4. *Solicit, and document client feedback on legal work as it progresses.* Most firm counsel will tell you that their first consideration in any potential collection action against a client is the prospect of a counterclaim for malpractice. It is remarkable how often lawyers commit malpractice on those very cases where the client has failed to pay the bill! More to the point, a client will be motivated to blame the lawyer in justification of the client's unwillingness to pay the bill. Because of this dynamic, client reaction to a demand for payment can evolve as that client relationship turns from one of valued collaboration to potential adversity. Clients will start by flyspecking the bill as being excessive or inefficient, and this scrutiny ultimately can lead to fabricated claims of agreements to cap fees and claims of outright malpractice.

Of course, firm counsel have to consider valid claims of malpractice, which of course happen from time to time. When a client is merely unhappy over a poor result or a too expensive result (or in some cases are unwilling to pay the bill even for a tremendous result), there are a number of things an attorney can do to prevent or at least blunt such criticism.

One good practice, on a number of scores, is to routinely solicit and document client feedback on the legal work as it progresses. Lawyers should be doing that in any event, as you always should be monitoring the client's satisfaction with the work and ensuring that you are meeting your client's objectives, whether they be the strategic objectives of the engagement or the relationship objectives of billing efficiency, responsiveness, etc.

Soliciting feedback gives the lawyer the opportunity to discover problems as they are beginning and correct them. Also, in those situations where things are going very well and the client feedback is very positive, documenting that positive feedback obviously is quite beneficial later to show either the client or the client's counsel or a judge that, in fact, the objections now raised by the client were not how the client felt before there became a payment issue.

For example, in a recent case I represented a developer in defending a mechanic's lien for a building project. The architect had filed a mechanic's lien for non-payment. The developer counterclaimed for malpractice and the engagement resulted in both a significant settlement on the malpractice claim and then invalidation of the mechanic's lien as overstated. After this complete victory for our client, we received an ecstatic email stating how great our work was and what a fabulous result the client had received. The next day, when we made a routine request for the client to authorize transfer of the settlement funds from our trust account to pay legal fees on the matter, we were quite disheartened to hear the client say that he would not authorize the transfer.

Ultimately, after enforcement of an attorney's lien and a trip through the bankruptcy court, we received most of that trust account in payment of our fees. One thing that never happened, however, was any claim from the client that we had not performed our services properly or that we were not efficient or anything of the like. This was partially due because of

the excellent result achieved, but I have seen many instances where clients have raised malpractice claims or fee capped arguments, or at least inefficiency arguments, even after a great result. The documented laudatory messages from our client played a significant role in deterring any claim of that nature.

5. *Follow-up on aging receivables.* As lawyers we know that the squeaky wheel often is the one that gets greased, and we often serve the “squeaky wheel” role on behalf of our client to ensure that the client gets paid. Following up on receivables, however, is another situation where lawyers tend not to take their own advice. As with engagement agreements, retainers and sending out bills, we are focused on creating relationships with clients and thus are reticent to bring up the unpleasant topics of bills that are owed and payments that are due.

Nonetheless, simply ignoring the receivables and continuing with the engagement is not helpful to either the lawyer or the client. Unless the lawyer goes into an engagement on a *pro bono* basis, lawyers expect and depend on getting paid and this means engaging fully in the business side of the practice. Most clients are well aware that they are behind on their bills and will be upfront in advising the lawyer that they had not budgeted for this type of legal contingency. Also, particularly when representing a party seeking funds in litigation or otherwise, the substantive issue in the litigation may be putting the client under financial duress. As receivables mount, however, lawyers need to engage the client and communicate about expectations. At a minimum, a lawyer has to learn whether there is any prospect of payment at which time the lawyer can decide whether withdrawal or other arrangements are appropriate or necessary. On the other hand, outlining with the client a plan for payment over time, on installments or with some form of security are not fool proof measures to ensure being paid, but having a plan of some sort is better than leaving the matter entirely to chance.

6. *Consider withdrawal before it is too late.* Lawyers can commit malpractice by withdrawing from a representation at a time that leaves the client in the lurch and leaves the client in a disadvantaged legal position due to the withdrawal. In many jurisdictions, lawyers must obtain judicial consent to withdraw and I have seen lawyers required to participate in the lengthy jury trials where they have no prospect of being paid because a judge was unwilling to allow the party to go unrepresented. In other jurisdictions, withdrawal can be done on or before a specific time and no later. Even where withdrawal is allowed, ethical rules or the standard of care may prohibit withdrawal at critical times solely for the lawyers economic purposes.

The foregoing topics (accurate timekeeping, prompt billing, and monitoring receivables) are important to allow the lawyer to make a timely decision as to whether to continue the engagement when the bills are not being paid. If you do not record your time or bill your client promptly, you simply won't have the feedback to know whether you are going to be paid until perhaps it is too late. Similarly, if you have substantial receivables and do not assess with the client your likelihood of being paid, you will not be focused on the issue of payment until you have passed the tipping point and are precluded from withdrawal.

Withdrawal from an engagement is an effective tool to *minimize* a lawyer's unpaid time. It will not collect bills that are due but it will prevent you from investing further in a case where you are unlikely to be paid.

7. *Utilize attorneys' liens and other forms of security.* Lawyers have at their disposal a number of means to secure payment from client. These included enforcing an attorney's lien, obtaining security in other forms from the client, and ultimately bringing legal action to obtain a judgment. At times when a client acknowledges a debt for the legal fees and is unable to pay, a confession of judgment can be useful. All of these collection tools are governed

by specific provisions of state law and each state's ethical rules. Additionally, because in most of these situations the client will not have separate counsel (given that they could not afford the first counsel), courts will scrutinize closely the lawyer's dealings with the client to ensure there is no overreaching and that the client is fully and properly advised of the client's rights. There are, in fact, times when it would make sense for the lawyer to ensure that the client has independent representation, even at the lawyer's expense, to help protect the validity of any arrangements made for security in favor of the lawyer.

8. *Explore all avenues of communication – including a personal meeting – before initiating litigation.* A common theme throughout this article has been the importance of communication between lawyer and client. From the beginning of the engagement where there needs to be direct communication about the financial aspects of the litigation, through prompt and thorough timekeeping and billing, through soliciting feedback and monitoring receivables, to the final communications regarding payment when the attorney and client relationship may turn decidedly adversarial, communication is critical to build a relationship of trust which in turn maximizes the lawyer's likelihood of being paid.

Clients can be genuinely grateful for the lawyer's work, which is a motivation to want to pay the bill. Clients may not be happy with the result of the litigation or its cost, but if they feel they have been dealt with directly and professionally, they are more likely to pay the bill even when they are not happy about the outcome of the engagement. The best clients become advocates who work actively to help the lawyer's business grow, and just as that dynamic can work to motivate a client to refer business to a lawyer, the strength of that relationship can also bear heavily on whether a client has any motivation to want to dispute bills, withhold payment or otherwise raise billing issues.

In other words, we all hear that the lawyering business is all about relationships. Lawyers are constantly trying to develop new relationships and strengthen existing client relationships. What is suggested here is that lawyers need to develop strong communication and foster relationships with respect to the financial aspects of the engagement as well as the substantive aspects of the client's business and the client's legal needs. To the extent lawyers like to refer to their "partnerships" with their clients, a true partnership requires each partner to care about and attend to the needs of the other. For that reason, lawyers should not shy away from the business side of the relationship -- collecting fees from clients. They should fully embrace that as a part of the full and robust relationship and partnership with each client.

9. *Be Prepared for the Malpractice Counterclaim.* If the unpaid fees are large enough, and the client is collectible, most lawyers will consider bringing legal action to collect the fee. In those circumstances the lawyer should be prepared for a potential malpractice counterclaim *whether or not any such claim has been asserted previously*. Just as litigators warn their clients that a lawsuit often will be met with a counterclaim if the opposing counsel is creative enough, the same motivations apply in this type of litigation. Because such a claim brings with it complication, expense and uncertainty (and transforms the collection action from a quick summary judgment or default to possible jury trial), many such counterclaims are successfully leveraged to either prevent the lawyer from collecting or to significantly compromise the lawyer's recovery.

If there has been any suggestion of a practice error before the lawyer brings the collection action, the lawyer is well advised to thoroughly analyze and assess the merits of the claim. That analysis can inform the cost-benefit analysis of deciding whether to proceed with the collection action. Even when there is no hint of a claim before bringing the collection action, the lawyer

should assess any possibility of either a claim of malpractice or assertions of: (1) inefficiency, (2) overbilling, (3) failure to adhere to a fixed fee agreement (which may be extrapolated out of a fee estimate or similar discussion), or (4) lack of qualifications to do the work, as these are common responses to a collection action.

One further consequence of a collection action turning into the defense of a malpractice claim is that the lawyer likely will have to tender the claim to insurance and that may generate a claims history that affects future malpractice insurance premiums.

10. *Business is Business.* Surprisingly, the outcome of some of even the most bitter litigations sometimes is a new collaboration or business relationship between adverse parties. Although for many a lawsuit is a burned bridge and a vow to never work with that contractor again, many clients are more resilient and recognize that disputes are part of business and ultimately can even lead to better understandings going forward.

Just like adverse parties to litigation can reconcile, so too is it not uncommon for a lawyer to take on a new engagement from a client after the lawyer has written off substantial fees or even has been in litigation with that client. Sometimes the new relationships are facilitated by a change in management or in-house counsel. Sometimes the client realizes that the lawyer actually was really good and understood the client's business in a way that cannot be easily replicated. Sometimes the litigation or dispute results in a better understanding between lawyer and client that improves the relationship going forward. Sometimes.

In those cases where a lawyer is considering taking on new engagement from the client that burned the lawyer the first time, it may be helpful to reflect over the foregoing list of best practices and see whether some or all of these practices could have helped avoid the problem. At

least in those situations the lawyer is going into the relationship with eyes wide open and can be suitably cautious and utilize some of the preventative measures described above.

Conclusion

Lawyers are in business but they tend to deemphasize the business side of their relationships with their clients. Most businesses strive to “put the customer first” and recognize the importance of good customer service. Lawyers are legally obligated well beyond that standard, however, and have a legal duty to zealously guard the client’s legal interest. Although lawyers must zealously advocate for their clients, lawyers are entitled to advocate and enforce their own rights to payment from the client. Lawyers should not shy away from the financial side of their relationships with clients, and those lawyers who fully engage their client with respect to payment issues at all stages should achieve both a better track record in the collection of fees and a stronger overall relationship with their clients.

¹ The Rules may be viewed on-line at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

² Model Rules of Prof’l Conduct 1.2(a) (2009).

³ *Id.* 1.4.

⁴ *Id.* 1.5.

⁵ See Annotated Model Rules of Professional Conduct (6th ed. 2007) at 68 (citing Chin & Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys’ Fees in Criminal Cases*, 41 B.C. L. Rev. 1 (1999); Parekh & Pelkofer, *Lawyers, Ethics, and Fees: Getting Paid Under Model Rule 1.5*, 15 Geo. J. Legal Ethics 767 (2003)).

⁶ See, e.g., *In re: Stephens*, 851 N.E.2d 1256, 1257-58 (Ind. 2006) (attorney publicly reprimanded for charging fees in excess of statutory cap for medical malpractice cases).

⁷ *In re: O’Brien*, 29 P.3d 1044, 1047 (N.M. 2001) (stating that “New Mexico attorneys should be aware that merely noting that work was done and submitting a corresponding billing statement may not suffice to justify the fee charged.”); *State ex. rel. Okla. Bar Ass’n. v. Sheridan*, 84 P.3d 710, 717 (Okla. 2003) (violation of Rule 1.5 when lawyer could produce no evidence of work being done for the client).

⁸ *Budget Rent-a-Car System Inc. v. Consol. Equity LLC*, 428 F.3d 717, 718 (7th Cir. 2005) (where the court had awarded fees for a frivolous appeal but then vacated that decision, objecting

to the resulting fee petition that sought almost \$10,000 in fees to prepare two minor papers); *see also In re Brothers*, 70 P.3d 940, 942 (Wash. 2003) (suspending a lawyer who charged a contingent fee based on one-third of the value of the property transferred, or \$36,000, to prepare a quit claim deed, when the lawyer charged other clients as little as \$50 for the same service).

⁹ *In re Coffey's Case*, 880 A.2d 403, 411 (N.H. 2005) (disbarring attorney who charged for more than 200 hours to write a brief and more than 80 hours to prepare oral argument when lawyer was already familiar with the case, some of the time entries were demonstrably false, and the Court found a typical appeal would require between 30 and 75 hours). The author recommends that the reader review the Annotated Model Rules of Professional Conduct (6th ed.), published by the Center For Professional Responsibility of the American Bar Association, for a very thorough and detailed set of annotations discussing excessive fees under Rule 1.5.

¹⁰ Model Rules of Prof'l Conduct 1.5(b).

¹¹ *Id.* 1.5 Comment [2]

¹² *Id.* 1.6.

¹³ *Id.* 1.7(a)(2)(emphasis supplied).

¹⁴ *Id.* 1.7 Comment [6].

¹⁵ *Id.* 1.7(b).

¹⁶ *Id.* 1.9(c)(1).

¹⁷ *Id.* 1.16(b)(1).

¹⁸ *Id.* 1.16(b)(5).

¹⁹ *Id.* 1.16(d).

²⁰ *See, e.g., Fidelity National Title Ins. Co. of New York v. Intercounty National Title Ins. Co.*, 310 F.3d 537, 541 (7th Cir. 2002) (permitting a lawyer to withdraw based on non-payment of bill where the lawyer gave reasonable warning under Rule 1.16 and sought to withdraw in a "quiet period" after discovery and before trial).

²¹ *Federal Trade Commission v. Intellipay, Inc.*, 828 F. Supp. 33, 34 (S.D. Tex. 1993) (lawyer criticized for not proving failure to pay fees); *Gibbs v. Lappies*, 828 F. Supp. 6, 8 (D.N.H. 1993)(refusing to allow withdrawal when insurance counsel was concerned insurer would not pay fees and the court found that the insured should not be punished on that account).

²² *In re Withdrawal of Attorney*, 594 N.W.2d 514, 521 (Mich. Ct. App. 1999).

²³ *See, e.g., Whiting v. Lacara*, 187 F.3d 317, 322-23 (2d Cir. 1999) (client dictated legal strategies and threatened to sue the lawyer if strategies were not followed); *see also* cases collected in the annotations to Rule 1.16 in the Annotated Model Rules of Professional Conduct.

²⁴ *See, e.g.,* Model Rules of Prof'l Conduct 1.5(c) (contingent fee agreements must be in writing); 2 Cal. Business and Professions Code § 6148 (requiring written fee agreements for all matters involving fees and costs estimated to exceed \$1,000).

²⁵ For example, the lawyer can send an email stating: "You have asked that I provide you an assessment of the validity of this mechanic's lien although you have instructed that I should not update my existing research, which is several years old. You understand that this research could uncover important changes in the law that could substantially change my opinion. Please confirm this is how you wish for me to proceed."