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Billing disputes — and some thoughts on how to avoid them

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A number of highly publicized billing controversies involving prominent law firms recently have drawn considerable attention to the process by which lawyers bill for their services.

Many clients have used these incidents as a platform for demanding greater accountability and for alternatives to the billable hour format.

There are lessons for the practitioner, at large firms or otherwise, in all of this.

Recent notable cases

In February 2012, one of the world's largest law firms brought an action against a longtime client to recover approximately $679,000 in legal fees.

The firm initially had been retained to represent the client's corporate entity in a Chapter 11 restructuring, and the firm's engagement letter was signed with the corporate entity. As it turned out, a major creditor in the bankruptcy also was a firm client and objected to the firm's retention.

The Bankruptcy Court allowed the objection and disqualified the firm. The firm then undertook to represent the client personally in the restructuring, but never negotiated a new engagement letter. After the firm sent the client a single invoice in the approximate amount of $600,000 for work performed over a period of several months, and requested that the client pay the invoice personally, the client refused to pay, leading to the filing of the firm's complaint.

The client counterclaimed, alleging that the firm actually had incurred the fees as "ghost counsel" for the client's corporation and that the client was not personally obligated for the debt.

The client also sought to recover $776,000 in fees that the client personally had paid to the firm on prior invoices. The client alleged that he had paid the bills without the benefit of monthly invoices, and that his later review of the bills showed "a systematic and sweeping practice of overbilling" for services that were "unnecessary, duplicative, or wasteful."

During discovery, the client obtained copies of internal firm emails that painted a cynical picture of the attitudes of the firm's lawyers toward billing. The emails referred to the client's legal bill, which had exceeded a budget, as having "no limits," and to the assignment of additional attorneys to the matter as "standard 'churn that bill, baby!' mode."

On the basis of the emails, in March of this year the client's attorneys sought to amend their counterclaim to add claims for fraud and unfair trade practices, and to request $22 million in punitive damages.

The story was picked up by the New York Times and quickly spread online, before the matter settled on confidential terms.

While the fee dispute involved emails of a particularly sensational nature, some of the background facts will be familiar to those who represent lawyers and law firms. In an interview published in the New York Times, the disgruntled client complained that when he first brought his work to the firm, the firm had been much smaller, and the client's matters had been handled by a particular partner whom the client considered his "point person" at the firm.

According to the client, as the firm grew, "there were all of these lawyers who I didn't know suddenly showing up on my bills." He complained that the firm was farming out his assignments to junior lawyers, resulting in "higher bills and subpar work."

Unfortunately, the firm's internal emails appeared to corroborate some of his complaints.

Similar complaints were at the heart of a recent action instituted by a real estate development company against its insurer, alleging that the national law firm retained by its insurer to defend the company in a multi-fatality workplace accident had tried to "churn its bill."

Closer to home, a large Boston law firm has been sued by a disgruntled shareholder of a corporate client for having allegedly charged excessive legal fees in connection with a corporate acquisition that never materialized. While the firm's actual client has disavowed any interest in the suit and apparently has joined in the firm's attempts to have the case dismissed, as of press time the suit remained pending.

And on June 6, the Appeals Court affirmed a judgment entered against a local lawyer on his former clients' counterclaim for an excessive fee.

The attorney had sued his clients to recover $180,000 due on a contingency agreement executed in connection with the clients' proposed sale of stock in a family business.

The clients counterclaimed, alleging that the fee was excessive and in violation of Chapter 93A and seeking disgorgement of amounts already paid to the lawyer.

A jury agreed that the fee agreement was excessive and unreasonable, and the trial judge found in the clients' favor on the Chapter 93A claim, awarding the clients treble damages, attorneys' fees and costs in the amount of $250,000, and statutory interest.

During the trial of the matter, there was testimony that it was unusual to have a contingency fee agreement in the type of business transaction at issue; that the clients had always paid the lawyer on an hourly basis for other services; and that the terms of the contingency fee agreement (1.5 percent of the $20 million in sales proceeds) would net the attorney $300,000 for an amount of work that would have resulted in only a $50,000 hourly fee.

Look before you leap

What is to be learned from these incidents, which have caused the lawyers and law firms involved needless bad publicity and potentially serious client relations problems?

First, your paperwork needs to be in order. Your engagement letter should accurately identify the firm's client, the scope of the expected engagement, the basis or rate of the fees and expenses for which the client will be responsible, and the remedies available to the firm if the client does not pay in a timely fashion.

Rule 1.5 of the Massachusetts Rules of Professional Conduct now requires a written fee agreement in most cases, with one notable exception: the "regularly represented client."

As demonstrated in the examples above, however, lawyers should have written fee agreements for all matters that are expected to generate significant fees and expenses, even with "regularly represented clients."

As the representation proceeds, make a point of looking at your engagement letter at the end of every

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calendar year. Has the scope of representation changed, or has there been a change in the way your client has agreed to pay for your services? If so, talk to your client about an amendment to the engagement letter.

Second, make sure you are communicating with your client frequently and with candor about the legal fees and expenses that are being incurred and why those fees and expenses will advance the client's matter.

Send out invoices on a regular basis and avoid "carrying" time from month to month, as clients will recognize less value from services that were provided in the past.

Review the invoices carefully, and from the client's point of view. Do the time entries fully and accurately describe the work performed and why the work was necessary?

If the bill reflects the services of multiple timekeepers, does the client know that these attorneys are working on the matter, and have you explained why you believe their services are necessary? If a timekeeper is replacing another timekeeper on a file, have you advised the client of the change and assured the client that any "transfer" time will not be billed to the client?

Remember that a bill is no less a communication than an opinion letter or status report and should be drafted with the same care.

Do not hesitate to pick up the telephone and give a client a "heads up" that a particularly large bill is coming. The client will appreciate the advance notice, particularly if he or she is reporting to more senior management, and also will appreciate that you care about the client's money and want to make sure the client is happy with how the money is being spent.

A personal phone call also will give you a chance to explain more fully any unexpected developments that caused the bill to be larger than anyone expected.

Third, suing a client to recover unpaid legal fees is a step to be taken only after the most careful consideration.

Many law firms rely on the fact that the Rules of Professional Conduct appear to permit and even encourage such an action. See Rule 1.6, comment 19 ("A lawyer entitled to a fee is permitted ... to prove the services rendered in an action to collect it."); Rule 1.6(b)(2) (a lawyer may reveal "confidential information" related to "representation" where such disclosure is "reasonably necessary" to "establish" the lawyer's fee claim).

However, pursuing a client for legal fees usually results in either a challenge to the amount of fees sought or, worse, a counterclaim. Once that happens, the rules applicable to discovery may provide clients with broader access to the law firm's internal materials than the clients would be entitled to under the Rules of Professional Conduct. See Rule 1.16(e) (setting forth documents client is entitled to recover upon termination of the representation).

In the first case mentioned above, the amount at issue constituted .003 percent of the firm's reported annual revenues, so the financial wisdom of suing in the first place is open to question. The firm also was suing on the basis of an engagement letter that was no longer accurate in light of its disqualification to act on behalf of the corporate client, and on the basis of large invoices that covered many months of time, so that there was no established record of receipt, acceptance and payment.

Finally, as is now detailed in the public record, the firm's files contained internal emails of an extremely embarrassing nature, suggesting that no thought was given, prior to filing suit, to a review of the firm's file to determine whether a collection action should be brought.

In sum, before a decision is made to bring suit for a legal fee, a firm or lawyer should know the answers to the following questions:

- Is there a signed engagement letter that accurately identifies the client, the scope of representation, the basis or rate of the fee, and the lawyer's remedies for nonpayment? If the matter is being handled on a contingency fee basis, does your contingency fee agreement comply in all respects with Rule 1.5(f)?
- Were accurate and detailed invoices sent on a regular basis, and received and paid by the client over a reasonable period of time?
- Do the circumstances suggest that any counterclaim will be forthcoming, and, if so, is there anything in the client file that the firm would not want to become public in a court filing?
- Were the overall fees charged reasonable in light of the subject matter of the representation and the client interest at stake? If the matter is being handled on a contingency fee basis, have you kept track of your time and expenses so that you can show that any recovery will not be "clearly excessive"?

If any of those questions is answered in the negative, the risks inherent in any fee collection action likely will outweigh the benefits of bringing suit.

Ethical considerations

A further caution may be in order as to a lawyer's ethical responsibilities with respect to billing practices.

The Rules of Professional Conduct obviously impose a duty of candor on all lawyers with respect to client communications, which extends to matters related to an attorney's bills. See Rule 1.4 ("A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation."); Rule 1.5 ("[T]he 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 ... ."); Rule 2.1 (duty to render candid advice).

Rule 1.5 prohibits a lawyer from entering into an agreement for, charging or collecting an illegal or "clearly excessive" fee. Unfortunately, the Massachusetts opinions in this area do not provide much guidance as to what is "excessive." See *In re Fordham*, 423 Mass. 481, 493 (1996) ($50,000 fee for defense of OUI prosecution excessive); *Landry v. Haartz*, __ Mass. App. Ct. __ (June 6, 2012) (unpublished disposition) ($300,000 contingency fee for business transaction requiring $50,000 of work was excessive); *In re Wayne T. Henry*, 28 Mass. Att'y Disc. R. __ (2012) ($91,000 fee for partition proceeding excessive); *In re Stephen J. Ellis*, 28 Mass. Att'y Disc. R. __ (2012) ($5,000 fee for simple estate plan excessive); *In re Kim E. Zadworny*, 26 Mass. Att'y Disc. R. 722 (2010) ($15,139.50 fee excessive for services as a temporary guardian); *In re Michael P. Murray*, 24 Mass. Att'y Disc. R. 483 (2008) (hourly rate of $600 excessive); *Matter of Herbert L. Kliger*, 18 Mass. Att'y Disc. R. 350 (2002) ($3,200 fee to prepare Massachusetts estate tax return excessive). It appears, therefore, that any dispute in this regard will be decided on a case-by-case basis.

Finally, Rule 5.1 imposes a duty on partners to take "reasonable" steps to insure compliance with the Rule of Professional Conduct by others, and Rule 5.1(c) makes a supervising lawyer liable for disciplinary violations if the supervising lawyer "ratifies" the misconduct.

As one treatise observes, an attorney who learns that a client has been overbilled may have a duty to arrange for a refund — even if the statute of limitations might otherwise bar the client's claim. Geoffrey C. Hazard, Jr. and W. William Hodes, "The Law of Lawyering," §42.6 (3rd ed. 2013); see also Rule 8.3 (reporting professional misconduct).

Conclusion

With all the recent publicity surrounding the lawyer-client disputes referenced above, and the ongoing (and unfounded) perception of attorneys utilizing the "billable hour" as a way to overcharge clients, lawyers can expect continued challenges from their clients to the "reasonableness" of their legal bills.

Lawyers should endeavor to eliminate or minimize these disputes through frequent and candid client communications about the services that are being rendered and the fees that are being incurred. If a client ultimately does not pay, moreover, attorneys should carefully consider the consequences before making the decision to file suit. MLW