

ETHICAL PITFALLS IN CLIENT BILLING AND FEE COLLECTION

- ◆ *Timekeeping and Expenses*
- ◆ *Withdrawal*

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Mark J. Fucile
Fucile & Reising LLP
mark@frllp.com
503.224.4895
www.frllp.com

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

Withdrawal

ABA 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.”

Model Rule 1.16(d)

“(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

Comment 9 to ABA Model Rule 1.16

“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