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Get It in Writing: Practical Approaches to Documenting Fee Agreements and Modifications

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> "Even in those situations where no written fee agreement is required, in order to avoid confusion or later dispute, it is always wise to have one and, if a written fee agreement is used, it should be written in clear language that the client can understand."
> ~*In re Van Camp*, 171 Wn.2d 781, 805 (2011)

When the ABA Model Rules of Professional Conduct were comprehensively updated two decades ago, the ABA Ethics 2000 Commission that developed the amendments recommended that virtually all fee agreements be in writing.[1] When all was said and done, however, the ABA adopted an amended version of Model Rule 1.5(b) that, aside from contingent fee agreements,[2] only recommended that fee agreements "preferably" be in writing. Washington's version of RPC 1.5 followed a roughly similar trajectory. The WSBA Ethics 2003 Committee, which was patterned on its ABA counterpart, debated but ultimately chose not to recommend that all fee agreements be in writing.[3] Again aside from contingent fee agreements,[4] the Washington amendments eventually adopted in 2006 only noted in an accompanying comment that written fee agreements were "desirable."[5] RPC 1.5 was amended in 2008 to also require written agreements for flat fees paid in advance that are denominated as "property on receipt."[6] Those remain the only circumstances, however, when a written fee agreement must be in writing under RPC 1.5.[7]

Although as a matter of legal ethics, fee agreements must only be in writing in relatively limited circumstances, law firm risk management counsels that most—if not all—fee agreements should be in writing. Similar considerations apply when a lawyer modifies an existing fee arrangement. The ABA Ethics 2000 Commission put its finger squarely on the reason nearly 20 years ago, and its observation has only become more apt with time: "Few issues between lawyer and client produce more misunderstandings and disputes than the fee due the lawyer."[8]

In this column, we'll survey some practical approaches to documenting both initial fee agreements and any later modifications.

Before we do, however, two qualifiers are in order.

First, in this column, we'll focus on drafting fee agreements that are clear enough to hopefully avoid disputes and that will be enforceable later if necessary. Despite that accent on the contractual aspects of fee agreements, RPC 1.5 and associated case law set a benchmark that courts often look to when addressing the enforcement of fee agreements. In *LK Operating, LLC v. The Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014), for example, the Supreme Court noted: "We have previously and repeatedly held that violations of the

RPCs or the former Code of Professional Responsibility in the formation of a contract may render the contract unenforceable as violative of public policy." In short, RPC 1.5 looms large in enforcing agreements in the civil context because it is the functional equivalent of statutory law applicable to fee agreements.

Second, billing and collection are equally sensitive associated topics. RPC 1.5 on its face also applies to charging and collecting fees, and case law both within and outside the disciplinary realm illustrates the risks lawyers run if they do not bill accurately and collect fairly.[9]

Original Agreements

Some fee agreements are quite elaborate while others are more basic—with the degree of detail often varying by practice area and clientele. Two key drafting considerations, however, cut across that spectrum: be complete and be clear.

"Complete" means including the central financial and non-financial aspects of the representation. On the former, Comment 2 to RPC 1.5 suggests the core elements: "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[.]"[10] In *In re Marshall*, 160 Wn.2d 317, 335, 157 P.3d 859 (2007), for example, a lawyer was disciplined for charging for contract attorney services

that had not been included in the lawyer's fee agreement. As for the non-financial aspects, Comment 2 to RPC 1.5 suggests inclusion of "the general nature of the legal services to be provided"[11]—to which I would add the identity of the client.[12] In *Davis Wright Tremaine LLP v. Peterson*, 2017 WL 1593009, at *4 (Wn. App. May 1, 2017) (unpublished), for example, a law firm was able to overcome the client's defense in a collection case over the scope of the matter involved by pointing to its fee agreement.[13]

"Clear" means providing the client with a fee agreement that is understandable. Courts can—and do—apply the general rule of contract construction that "ambiguity is construed against the drafter" when reviewing fee agreements. The Court of Appeals in *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. 273, 288, 198 P.3d 1042 (2009), *aff'd in part and rev'd in part*, 170 Wn.2d 157, 240 P.3d 790 (2010), for example, cited this standard in reviewing a fee agreement and underscored the rule's practical import in an environment where the lawyer or law firm involved is almost always the drafter:

> [Lawyer] not only drafted this contract, but she amended it on more than one occasion in the course of the parties' relationship. If she had intended to provide herself a specific contingency for settlement after a trial on the merits and judgment, she could have drafted appropriate language clearly indicating that the parties agreed to that contingency.[14]

Modifications

Modifying existing fee arrangements in ways that benefit the lawyer triggers a complex blend of regulatory, fiduciary, and contractual considerations. The Court of Appeals in *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 428-29, 432, 754 P.2d 120 (1988), summarized this interlocking web:

> Review of an attorney's fee agreement renegotiated after the attorney-client relationship was established requires particular attention and scrutiny . . . Such a modification is considered to be void or voidable until the attorney establishes "that the contract with his client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which it is predicated."
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> A fee agreement modified to increase an attorney's compensation after the attorney is employed is unenforceable if it is not supported by new consideration.
> (Citations omitted.)[15]

Ward involved an increase in the compensation for an engagement. The standards summarized, however, apply with equal measure to other financial elements such as adding security for fees.[16] WSBA Advisory Opinion 2209 (2012) noted the reason for this high bar: "Once the attorney-client relationship has been established, the attorney's obligations change drastically because the attorney now owes a fiduciary duty to her client."[17]

This suggests two approaches when circumstances change during an ongoing representation.

First, to the extent possible, anticipate reasonably foreseeable events in advance and then build those contingencies into the original fee agreement. Two ready examples are a mechanism for periodically changing hourly rates and increasing the percentage for a contingent fee if a case moves on to trial or appeal. If those events occur, then they will simply reflect contingencies anticipated by the original fee agreement rather than a modification.[18]

Second, if an event arises that was not anticipated by the original fee agreement, the lawyer or law firm should carefully document the changed circumstances that triggered the corresponding change in compensation or security. For example, a matter may have grown more complex than anyone anticipated, or the client may have fallen behind in paying the law firm. The same degree of completeness and clarity discussed earlier for original agreements should be applied to modifications. Further, where the change involves taking security for an existing receivable, RPC 1.8(a)—the "business transaction" rule—applies under *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 744, 153 P.3d 186 (2007),[19] and WSBA Advisory Opinion 2209.[20] Lawyers and their law firms in that situation should closely review and carefully apply the

conflict waiver standards required under RPC 1.8(a) to ensure that the resulting amended agreement will be enforceable. In situations not invoking RPC 1.8(a), the extent of the amendments or the nature of the negotiations over those changes may still require a conflict waiver under RPC 1.7(a)(2)—which governs conflicts between, among other things, the financial interests of a lawyer and the lawyer's client. Even if a conflict waiver is not required, both RPC 1.5(b)[21] and contract law[22] require discussing proposed material changes with clients rather than simply imposing them unilaterally without notice. Therefore, documenting both discussions with and the client's agreement to a modification can be critical to any later enforcement.

ABOUT THE AUTHOR

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[1] *See* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 97 (2013) (ABA Legislative History). The principal exceptions recommended at the time were for recurring matters for the same client or where fees were de minimis. *Id*.

[2] ABA Model Rule 1.5(c).

[3] WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* 145 (2004) (on file with author).

[4] RPC 1.5(c)(1). RPC 1.5(c)(2), in turn, includes mandatory elements for contingent fee agreements.

[5] RPC 1.5, cmt. 2.

[6] RPC 1.5(f) (including suggested text). For a history of this amendment, *see* Washington Courts' web site at: http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=136.

[7] Under both ABA Model Rule 1.8(a) and Washington RPC 1.8(a), business transactions with clients must also be documented in writing.

[8] ABA Legislative History, *supra*, at 97. Comment 2 to Washington RPC 1.5 makes this same point.

[9] *See, e.g., In re Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998) (lawyer disciplined for misrepresenting time entries on bills); *In re Haskell*, 136 Wn.2d 300, 962 P.2d 813 (1998) (lawyer disciplined for misrepresenting expense items on bills); *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982) (attorney lien does not attach to real property).

[10] *See also* RPC 1.5(a)(9) (including as a factor in determining the reasonableness of a fee "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").

[11] *See also* RPC 1.2(c) (limiting the scope of representation).

[12] *See, e.g., Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430, at *11-*12 (W.D. Wash. Apr. 22, 2016) (unpublished) (law firm that did not send engagement agreement defining client when representing affiliate of insurance carrier disqualified when it took on a matter opposite another affiliate of the same carrier); *see generally Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (standard for determining attorney-client relationship).

[13] These are not intended to be a comprehensive catalog. Depending on the circumstances, other items such as alternative dispute mechanisms should be detailed in writing. *See, e.g., Mann Law Group v. Digi-Net Technologies, Inc.*, 2014 WL 535181 (W.D. Wash. Feb. 11, 2014) (unpublished) (discussing arbitration provision in fee agreement); *see generally* ABA

Formal Op. 02-425 (2002) (same from national perspective). Although technically separate from fee agreements, any conflict waivers necessary to proceed with a representation must be confirmed in writing under RPCs 1.7, 1.8 or 1.9 as applicable.

[14] The Supreme Court did not accept the attorney's petition for review on this point. 170 Wn.2d at 166.

[15] *See generally* ABA Formal Op. 11-458 (2011) (addressing similar considerations from a national perspective); *Restatement (Third) of the Law Governing Lawyers*, § 18, cmt. e (2000) (same).

[16] *See Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 743-44, 153 P.3d 186 (2007) (making comments similar to those quoted from *Ward* in a case involving additional security taken for an existing receivable).

[17] *Id*. at 3.

[18] Similarly, new or follow-on work flowing from an original representation is generally considered a separate engagement rather than a modification. *See, e.g., Rafel Law Group PLLC v. Defoor*, 176 Wn. App. 210, 308 P.3d 767 (2013) (re-engagement following earlier withdrawal); *Lara v. City of Seattle*, 2010 WL 682516 (Wn. App. Mar. 1, 2010) (unpublished) (appeal treated as new matter when specifically excluded from original agreement).

[19] "The deed of trust at issue in this case has the character of a business transaction between a law firm and its client." *Id*. at 744.

[20] "If the only modification is the acceptance of a security interest for the payment of already negotiated fees, the attorney will be required to comply with the terms of RPC 1.8(a) as this constitutes a business transaction." *Id*. at 3.

[21] "Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

[22] *See Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 988 P.2d 467 (1999), *amended*, 109 Wn. App. 436, 33 P.3d 742 (2000) (discussing "full revelation" of billing rates and practices).