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Lawyer Beware: The Consumer Protection Act

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Since the Washington Supreme Court's decision in *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984), the business aspects of law practice have been subject to the Consumer Protection Act, RCW Chapter 19.86. The CPA generally prohibits "unfair or deceptive acts or practices" in "trade or commerce" under RCW 19.86.020. Economic tensions between lawyers and their clients in recent times—particularly billing and collection disputes—have sharpened the focus of the CPA on law firms. In this column, we'll first briefly survey the elements of a CPA claim and then turn to its particular application to the business of practicing law. Before we do, though, it is important to note at the outset that the CPA is "another" remedy for clients (current and former) in disputes with their lawyers—not an "exclusive" one.

The CPA Generally

As originally enacted in 1961, the CPA addressed deceptive business practices and was enforced by the Attorney General through injunctions and civil penalties. That aspect of the CPA continues, but of more practical import for law firms, a private right of action for damages now codified at RCW 19.86.090 was added in 1970. RCW 19.86.090 also includes treble damages (to $25,000) and attorney fees.

The Supreme Court outlined five elements for a CPA claim brought as a private action in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986): (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to the plaintiff's business or property; and (5) a causal link between the unfair or deceptive practice and the injury sustained.

The Supreme Court noted in *Hangman Ridge* (105 Wn.2d at 785) and reiterated more recently in *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009), that a claimant "need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public." The Supreme Court observed in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 75, 170 P.3d 10 (2007), that "'[k]nowing failure to reveal something of material importance is "deceptive" within the CPA.'" Although many CPA cases focus on deceptive acts, it is important to underscore in the law practice context that "unfair" practices are also prohibited.

Applied to Law Practice

The Supreme Court in *Short* found that the "entrepreneurial aspects of the practice of law" fall within "trade or commerce" under the CPA and further defined those business aspects of law practice (103 Wn.2d at 61) as "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients." By contrast, *Short* left issues relating to the quality of legal services to the realm of negligence law rather than the CPA.

Notwithstanding *Short*, claimants in many circumstances had difficulty with the "public interest" element because they were dealing with essentially private agreements. As *Short* put it (103 Wn.2d at 56): "A breach of a private contract affecting no one but the parties to the contract . . . is not an act or practice affecting the public interest." In *Bertelsen v. Harris*, 459 F. Supp.2d 1055, 1063 (E.D. Wash. 2006), for example, the court dismissed a CPA claim against a law firm on this ground in a dispute over a fee agreement. In 2009, however, the Legislature amended the CPA to add RCW 19.86.093(3) so that a claimant can now meet the "public interest" element by showing that the unfair or deceptive act at issue "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." Even before the 2009 amendments, *Hangman Ridge* (105 Wn.2d at 790) noted that the "public interest" element could be satisfied if the defendant advertized to the general public. With the advent of law firm web sites, lawyers often not only advertize to the general public but in many instances feature statements that walk directly into the CPA along the lines of "we charge fair prices."

Client Acquisition. The Supreme Court in *Eriks v. Denver*, 118 Wn.2d 451, 465, 824 P.2d 1207 (1992), held that a lawyer would violate the CPA if the lawyer failed to disclose conflicts "for the purpose of obtaining clients or increasing profits." In *Eriks*, the lawyer was working for the promoters of a tax shelter at the same time he took on potential investors in the tax shelter as clients. The former investor clients argued that they would not have hired Eriks had they known he was working for the tax shelter promoters. Although the Supreme Court found that disputed issues of material fact precluded the summary judgment, it also held that the determination of whether particular conduct was driven by "entrepreneurial purposes" is a question of fact. In other words, a jury gets to decide the lawyer's motive.

Billing. Improper billing practices have long been a staple of disciplinary cases, ranging from "initial switching" on bills to misrepresent who did the work (*In re Dann*, 136 Wn.2d 67, 77, 960 P.2d 416 (1998)), to falsifying expenses (*In re Haskell*, 136 Wn.2d 300, 307-12, 962 P.2d 813 (1998)), to including work outside the scope of the fee agreement (*In re Marshall*, 160 Wn.2d 317, 335, 157 P.3d 859 (2007)). In other contexts (*see, e.g., Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d at 78-83), the Supreme Court has concluded that deceptive billing practices violate the CPA and that payment alone may be sufficient evidence of injury.

Firms that include standardized "billing practices" as addenda to fee agreements need to make sure both that the "standard practices" comport with the RPCs and that their actual bills mirror their agreements. By labeling them as "standard," firms effectively invite the conclusion that the "public interest" element of the CPA has been met because they are using them with all of their clients. Similarly, firms that routinely take stock in lieu of fees and advertise that fact on their web sites need to meet the high bar for disclosure under RPC 1.8(a) or may face a CPA claim layered in with other remedies if a dispute results. In *Cotton v. Kronenberg*, 111 Wn. App. 258, 273-74, 44 P.3d 878 (2002), for example, the Court of Appeals found that other disciplinary complaints about a lawyer's fee practices were relevant to show that the "public interest" was invoked for purposes of the CPA in a dispute over property taken in lieu of fees. Further, firms that allocate overhead expenses, such as computerized legal research or similar items purchased in bulk, should carefully review Comment 1 to RPC 1.5 and WSBA Ethics Advisory Opinion 2120, both of which discuss the critical need for any allocated charges to reasonably approximate actual costs incurred. The very fact of allocation across an entire client base suggests that any improprieties are also allocated across that same client base in a way that invites application of the CPA.

Collections. The federal district court in Seattle noted pungently in *Lang v. Gordon*, No. C10-819RSL, 2011 WL 62141 at *3 (W.D. Wash. Jan. 6, 2011) (unpublished), that "lawyers who are acting as debt collectors are engaging in the entrepreneurial aspects of law rather than practicing law." Accordingly, firms need to take special care when corresponding with clients (current or former) in an effort to collect a bill to ensure that the statements made in their "dunning letters" are accurate. If they are not, the firm may have opened itself to a counterclaim under the CPA that may quickly deflate the economic value of the bill it was seeking to collect.

Summing Up

The economic hard times of the recent past have put the business aspects of law practice front and center in many attorney-client relationships. Prudent law firm risk management counsels careful review of those practices from client intake to billing to collections—together with how a firm advertizes its business practices on the web. Firms may otherwise find themselves facing a CPA claim with its enhanced damages and attorney fee remedies.

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