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Monday, December 05, 2011

Collecting fees: Making life easier

Communication and clarity between attorneys and their clients can help avoid billing disputes

By J. Randolph Evans and Shari L. Klevens, Special to the Daily Report

It is that time of year again—collecting outstanding fees from clients before year end. It is an annual ritual that most lawyers in every kind of law firm (big and small) must do at this time of year. After time entry, it is also one of lawyer's least favorite things to do, but it must be done.

Fee collection is one of those areas where doing the fundamentals throughout the course of the year pays the biggest dividends. It is also one of the areas where the risk of a malpractice claim can be the greatest. As a result, there is a high premium on having solid systems in place for billing and collections. Here are the five fundamentals of effective billing and collection.

1. Negotiate the fee before the attorney-client relationship begins

Lawyers have significant flexibility in negotiating a fee before the attorney-client relationship begins. Basically, the most significant boundary is that the fee must be reasonable. In addition, fee agreements cannot penalize a client who decides to terminate a lawyer at any time.

On the other hand, once the attorney-client relation begins, the rules change based on the fiduciary relationship between attorneys and their clients. Most notably, courts (and Bar officials) are watchful for signs that a lawyer inappropriately uses information learned in the course of the attorney-client relationship to the lawyer's advantage and to the client's detriment.

Of course, circumstances can change during a representation. If they do, a different fee may be warranted. If this happens, the safest course is to suggest that the client consult independent legal advice regarding whether to agree to the new fee arrangement. Lawyers should not give clients advice regarding new fee arrangements that they propose.

2. Document the fee arrangement

While there has been considerable commentary regarding the implications of a fee agreement (specifically, whether written agreements extend the statute of limitations for legal malpractice claims), the risks of failing to document a fee arrangement far exceed the risks of an extended statute of limitations. (One option is to use a retainer letter rather than a fee agreement. For more on this option, go to "The other side of engagement letters," the Daily Report, April 20, 2011 at DailyReportOnline.com.)

The majority of fee disputes literally involve a dispute regarding what the fee was. The simplest and most effective method for avoiding these disputes is to agree in writing the terms of the fee arrangement. This means that not only should the lawyer reduce the fee arrangement to writing, but

also the client should sign the document confirming the fee arrangement as well. Both the lawyer and the client should get a copy of the signed/countersigned document.

3. Send bills regularly

Many fee disputes arise from nothing more than "sticker shock" when a client sees for the first time all the things for which lawyers bill or, what the fee agreement means in the context of an actual representation. Indeed, sometimes clients get their first bill during the last three months of the year, with a request for payment before year end.

Other times, clients don't see the amount of the fee (and incurred costs) until a settlement has been reached or, in a real estate or corporate transaction, until the closing. Regardless of the context, this is not a good thing.

The better option is for the client to see what the fees are, or will be, well in advance of the request for payment. For the hourly fee attorney, this means sending out bills regularly so that the client gets a sense of what the fees and costs are. Obviously, "regularly" differs based on the circumstances of each representation.

If there is little activity while a motion or appeal is pending, then bills might not be sent for a few months. On the other hand, if there is significant activity, then bills should be sent more frequently. Effective malpractice prevention does require that bills actually be sent at some interval regardless of how much activity there is.

For transactions, a pre-closing preview of the closing statement with the fees is helpful. For contingency fees, pre-settlement previews of the amount of the fees is appropriate. If the representation involves significant out-of-pocket expenses for which the client is responsible, interim bills are helpful. The key is to make sure the client understands what the fees are before the fees get locked in by a closing or settlement.

4. Follow-up on unpaid bills

Unpaid bills are problems waiting to happen. The sooner those problems are identified and resolved, the better. Unfortunately, many lawyers do a good job at documenting the fee and sending the bills but do a poor job on the follow-up. Rather than leave the follow-up to chance, the better approach is to actually enter a calendar control date for follow-up on outstanding bills.

If the bill has been paid, then a "thank you" would be appropriate. If the bill remains outstanding, then a "reach out" to the client is in order. This contact enables the lawyer to determine if the client has any issues or whether the failure to pay is a simple oversight or intended delay.

The sooner the lawyer knows the answer, the better. If there are concerns or issues about the bills, then the lawyer should address them. If it is oversight, then the contact is good (and the squeaky wheel rule fully applies). If it is intended delay, then the lawyer and client can discuss what the limitations are and how they might be addressed.

Again, there is no magic time for follow-up. Instead, it will depend on the contours of the relationship with the client. Generally, most risk managers recommend 30-day follow-up on an unpaid bill. The most important step is to actually have a pre-set time for follow-up accompanied by a calendar entry

with a reminder.

5. Set expectations

If the lawyer or law firm expects to get paid at least every six months, or by year end, tell the client. If the fees will be paid directly from the settlement proceeds or at the closing, tell the client. The most important prevention technique is to avoid surprises.

Simply put, most fee disputes can be averted by effective communication about the one thing most lawyers prefer not to talk about—getting paid. In the context of a representation, effective communication means (i) communicating and agreeing on the fee before the representation begins; (ii) written confirmation of the fee with the client; (iii) regular communication about earned fees through regular or interim billing; and, (iv) timely follow-up when bills have not been paid. And, it means candid communication about what the lawyer's expectations (and limitations) are for payment.

For lawyers and law firms who have followed these steps, year-end fee collections can be a little less daunting. For lawyers and law firms who have not, now is a good time to put the systems in place for 2012.

J. Randolph Evans and Shari L. Klevens are co-authors of "Georgia Legal Malpractice Law," published by Daily Report Books. Their column on legal malpractice appears monthly in the Daily Report.