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TEST #12
1 HOUR CREDIT
LEGAL ETHICS (Part 1)

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The Rigors of Fee Agreements

Attorneys who do not comply with fee requirements do so at their own peril

By David M.M. Bell

Clarification: The requirement for disclosure errors & omissions coverage in written fee agreements under B&P Code §§6147 and 6148 as mentioned in this test was deleted operative Jan. 1, 2000, and is not required under the current versions of B&P Code 6147 and 6148.

Before entering private practice, I spent more than 14 years with the State Bar's Ethics Hotline. Each year, the hotline would tally incoming calls to determine which ethical issues were raised most often. Each year, the most common issue concerned fees for legal services.

This is not surprising. Legal fees are an important, yet delicate, subject for both attorneys and clients. Attorneys are expensive, and often clients do not understand and dispute the amount, basis or value of an attorney's fee.

There are numerous ethical and civil requirements regarding legal fees and fee agreements. In my experience, many practicing attorneys are not fully aware of these requirements.

Attorneys who do not comply with fee requirements do so at their own peril. They face an increased risk of attorney-client fee disputes, loss of earned fees, and malpractice and disciplinary complaints.

This article, the first of two parts, addresses basic requirements regarding legal fees and fee agreements. I focus first on fee agreements, because failure to have a proper fee agreement can be disastrous for an attorney. Lack of a written fee agreement can lead to a fee dispute by itself. If the fee dispute occurs, the attorney's ability to collect his or her entire fee will be prejudiced severely.

It is critical for an attorney to know when a fee agreement must be in writing. As discussed below, failure to provide a written fee agreement when required will render the fee agreement voidable at the option of the client and restrict the attorney to a quantum meruit recovery.

When an attorney represents a client on a contingency basis, the fee agreement must be reduced to writing and must be signed by both the attorney and client. (Bus. & Prof. Code §6147(a).) The attorney must, at the time the agreement is entered into, provide a duplicate copy of the agreement to the client. (Bus. & Prof. Code §6147(a).)

The written fee agreement must contain stipulated information, including a statement of the contingency rate that the client and attorney have agreed upon, and a statement that the fee is not set by law but is negotiable between attorney and client. (Bus. & Prof. Code §6147(a)(1), (a)(4).) The written agreement must explain how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery. (Bus. & Prof. Code §6147(a)(2).)

It must also explain to what extent the client may be required to pay compensation to the attorney for related matters, arising out of the attorney-client relationship, that are not covered by the contingency fee contract. (Bus. & Prof. Code §6147(a)(3).)

Where the attorney represents the client on a medical injury recovery action under Business & Professions Code §6146 (commonly called a MICRA action), the written contingency fee agreement must contain a statement that the fee rates set forth in §6146 are maximum rates, and that the attorney and client may negotiate a lower rate. (Bus. & Prof. Code §6147(a)(5).) The only contingency fee agreement exempted specifically from §6147 is a fee agreement covering the recovery of workers' compensation benefits. (Bus. & Prof. Code §6147(c).)

In non-contingency representations, where it is reasonably foreseeable that the total expense to the client, including attorney fees, will exceed \$1,000, the attorney-client fee agreement must again be in writing. (Bus. & Prof. Code §6148.) The attorney must provide a signed copy of the fee agreement to the client at the time the agreement is entered into. (Bus. & Prof. Code §6148(a).)

The written fee agreement must contain the basis of compensation including any hourly rates, statutory fees or flat fees, or other standard charges applicable to the representation. (Bus. & Prof. Code §6148(a)(1).) It must also contain statements describing the general nature of the legal services to be provided to the client and the respective responsibilities of the attorney and the client to the representation. (Bus. & Prof. Code §6148(a)(2), (a)(3).)

Although the §6148 requirements will apply in most hourly or flat fee representations, there are exceptions. Section 6148 requirements do not apply where legal services are rendered in an emergency situation or where a writing is otherwise impracticable. (Bus. & Prof. Code §6148(d)(1).)

The requirements do not apply where a fee arrangement is implied by the fact that the attorney's services are of the same general kind as rendered to and paid for previously by the client. (Bus. & Prof. Code §6148(d)(2).) The requirements do not apply where the client is a corporation or where the client states in writing, after full disclosure of §6148, that a writing concerning fees is not required. (Bus. & Prof. Code §6148(d)(4), (d)(3).)

Currently, under both §§6147 and 6148, where an attorney does not maintain errors and omissions insurance or has not provided the requisite law corporation guarantees covering errors and omissions, the attorney must disclose this fact to the client in the written fee agreement. (Bus. & Prof. Code §§6147(a)(6), 6148(a)(4).) This requirement is scheduled currently to end on Jan. 1, 2000. (Bus. & Prof. Code §§6147(d), 6148(f).)

Failure to comply with any written fee agreement requirement under §6147 or §6148 renders the fee agreement voidable at the option of the client and the attorney will be restricted thereafter to a quantum meruit recovery for the reasonable value of his or her services. (Bus. & Prof. Code §§6147(b), 6148(c).)

As a result, attorneys should always insure that their fee agreements meet statutory requirements. Failure to do so invites a fee dispute between the attorney and client, and can lead

to the breakdown of an otherwise harmonious and effective attorney-client relationship. As a practical matter, attorneys know that asserting their rights in a fee dispute can result in a retaliatory malpractice action or disciplinary complaint from the client.

Even where an attorney has met all statutory written fee agreement requirements, the attorney may still not be entitled to collect the contracted fee because the fee is either illegal or unconscionable. The California Rules of Professional Conduct prohibit an attorney from entering into an agreement for, charging or collecting an illegal or unconscionable fee. (Rule 4-200(A).)

An illegal fee violates existing law. An example would be a fee that exceeds the permissible amount set by law or a fee that is taken without proper court approval. For example, the maximum contingency fee that an attorney can charge or collect in a MICRA action is set by Business & Professions Code §6146, while the maximum contingency fee in a recovery action between merchants is set by Business & Professions Code §6147.5.

An example of a court approval requirement is Probate Code §2644, which requires court approval of fee agreements involving minors. Attorneys, who today generally limit their practices to no more than a few substantive areas, should investigate and educate themselves regarding applicable statutory requirements.

An unconscionable fee has been defined traditionally as a fee that is so exorbitant that it "shocks the conscience" of attorneys practicing in the same community. Today, courts still look to this standard, but also engage in an analysis of unconscionability factors set forth in California Rule of Professional Conduct 4-200. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 39 Cal.Rptr.2d 506.)

Under Rule 4-200, the determination of whether a fee is unconscionable involves a factual inquiry requiring consideration of 11 factors set forth in the rule. These factors, which are not intended to be exhaustive, are all worthy of note and include:

1. The amount of the fee in proportion to the value of the services performed;
2. The relative sophistication of the member and the client;
3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
4. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member;
5. The amount involved and the results obtained;
6. The time limitations imposed by the client or by the circumstances;
7. The nature and length of the professional relationship with the client;
8. The experience, reputation, and ability of the member or members performing the services;
9. Whether the fee is fixed or contingent;
10. The time and labor required; and
11. The informed consent of the client to the fee.

Under Rule 4-200, the unconscionability of a fee is determined on the basis of the facts and circumstances existing at the time the agreement is entered into, except where the parties contemplate that the fee will be affected by later events. (Rule 4-200(B).)

As such, clients should not be able to second-guess the contracted fee after work is performed, although some of the factors, such as factor 5 regarding the "amount involved and the results obtained," and factor 10 regarding the "time and labor required" undercut this notion.

As a practical matter, attorneys know that clients regularly second guess the fee amount following resolution of their matter and/or presentation of the attorney's bill.

As a result, factor 11 regarding the "informed consent of the client to the fee" becomes extremely important for an attorney where the client later disputes a contracted fee. Combining the unconscionability standards with the written fee agreement requirements, it becomes clear why it is so important for attorneys to reduce verbal fee agreements to signed writings.

No one likes surprises, especially when it comes to money. The written fee agreement approach minimizes surprises and benefits both the attorney and client.

It facilitates an earlier, more complete mutual understanding between the attorney and client regarding legal fees.

It protects the attorney in the event that a fee dispute later arises.

Most importantly, it works to avoid the development of the fee dispute.

Adherence to fee and fee agreement requirements benefits attorneys, clients and the legal profession. In my opinion, the better that individual attorneys understand and comply with their fee and fee agreement duties, the better the legal profession will be held in the public eye.

David M.M. Bell, now in private practice, formerly was State Bar director of professional competence, overseeing rule development and the Ethics Hotline. He can be reached at dmbell@dnai.com.

Test — Legal Ethics

1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Legal Ethics.

1. True/False. Generally, when an attorney represents a client on a contingency basis, the fee agreement must be reduced to writing and must be signed by both the attorney and client.
2. True/False. Pursuant to Business & Professions Code §6147, an attorney must provide the original written contingency fee agreement to the client, but may keep a copy for himself or herself.
3. True/False. A written contingency fee agreement must set forth the contingency rate that the attorney will charge the client.
4. True/False. A written contingency fee agreement must include a statement that costs applying to the representation are not set by law but are negotiable between attorney and client.
5. True/False. A written contingency fee agreement need not address to what extent the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship that are not covered by their contingency fee contract.
6. True/False. Contingency fee agreements covering the recovery of workers' compensation benefits must comply with Business & Professions Code §6147 written contingency fee agreement requirements.
7. True/False. Generally, in non-contingency representations where it is reasonably foreseeable that the total expense to the client, including attorney fees, will exceed \$1,000, the attorney-client fee agreement must be in writing.
8. True/False. In non-contingency representations, where a written fee agreement is required, the attorney may wait to provide a copy of the written fee agreement to the client until the attorney bills the client.
9. True/False. In non-contingency representations, where a written fee agreement is required, the agreement must describe the general nature of the legal services to be provided to the client and the respective responsibilities of the attorney and the client to the representation.
10. True/False. The requirements of Business and Professions Code §6148 do not apply if the client is a corporation.

11. True/False. The requirements of Business & Professions Code §6148 apply even where the client states in writing, after full disclosure of this section, that a writing concerning fees is not required.
12. True/False. The requirements of Business & Professions Code §6148 do not apply where legal services are rendered in an emergency situation.
13. True/False. Prior to Jan. 1, 2000, under Business & Professions Code §§6147 and 6148, an attorney must disclose to the client in the written fee agreement whether the attorney maintains errors and omissions insurance.
14. True/False. Failure to comply with the written fee agreement requirements under §§6147 or 6148 renders the fee agreement void and the attorney thereafter will be entitled only to the reasonable value of his or her services. (Bus. & Prof. Code §§6147(b), 6148(c).)
15. True/False. Even where an attorney has met all statutory written fee agreement requirements, the attorney may still not be entitled to collect the contracted fee because the fee is either illegal or unconscionable.
16. True/False. There are no maximum fee limits in California regarding contingency fee rates or representations.
17. True/False. California Rule of Professional Conduct 4-200 prohibits an attorney from collecting an illegal or unconscionable fee, but does not address whether the attorney can enter into a fee agreement that calls for or produces an unconscionable fee.
18. True/False. Under Rule 4-200, the unconscionability of a fee is determined on the basis of the facts and circumstances existing at the time the agreement is entered into, except where the parties contemplate that the fee will be affected by later events.
19. True/False. California Rule of Professional Conduct 4-200 sets forth 11 factors that are the only factors which may be considered in determining whether a particular fee is unconscionable.
20. True/False. One of the 11 factors set forth in Rule 4-200 is the financial ability of the client.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which one hour will apply to legal ethics.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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LEGAL ETHICS (Part 1)

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| 10. | TRUE | ___ | FALSE | ___ | 20. | TRUE | ___ | FALSE | ___ |