

MONEY MATTERS: MAKE SURE YOU'RE HANDLING YOUR CLIENTS' DOLLARS WITH SENSE

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Money: from attorneys trying to get paid for their services, to clients unhappy about the fees attorneys charge, money issues between the attorney and client result in many bar complaints and frequent ethics calls to the Office of Bar Counsel.

What can I charge the client?

Rule of Professional Conduct (RPC) 1.5 (Fees) governs the amount of fees that an attorney can charge the client. Primarily, the rule dictates that the fee charged by the attorney cannot be unreasonable. However, numerous factors can be considered in determining whether a fee is reasonable or unreasonable. These factors are:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation and ability of the lawyer or lawyers performing the services; and
8. Whether or not the fee is fixed or contingent.

Occasionally, the grievant in a bar complaint notes that the attorney undertook representation in a personal injury case without a signed fee agreement. Although RPC 1.5(b) states that fee agreements are to be communicated to the client, preferably in writing, doing so is not mandatory unless it's a contingency fee case. RPC 1.5(c) requires that contingency fee agreements be in writing and must be signed by the client, along with several other requirements.

Specifically, RPC 1.5(c) states that:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:

1. The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;
2. Whether litigation and other expenses are to



be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;

3. Whether the client is liable for expenses regardless of outcome;

4. That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and

5. That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Occasionally, a bar grievance concerns a client who didn't return the signed fee agreement and that fact was overlooked by the attorney's staff. After the case settles, the client amazingly cites RPC 1.5(c), when presented with the disbursement sheet containing (or listing) the attorney's share of the proceeds.

Also, in regard to RPC 1.5(c)(2), it would behoove an attorney

to remember the difference between the terms "inclusive of costs" and "exclusive of costs." Our office has received calls when a lawyer realizes the fee agreement confused the two terms, of course to the lawyer's disadvantage.

The client disputes my bill. Now what?

In addition to RPC 1.4, RPC 1.15 (Safekeeping Property) is implicated when a client disputes a billing against the retainer, or when a client disputes the attorney's share of litigation proceeds. RPC 1.15 requires an attorney to hold the disputed funds until the dispute is concluded.

Specifically, RPC 1.15(e) states that:

When in the course of representation a lawyer is in possession of funds or other property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

Attorneys get in trouble when they unilaterally disburse funds. In one attorney discipline case, the attorney, after what could be described as an extremely loud conversation with his client (for whom he had obtained a partial settlement), decided

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that he was finished representing the client. The attorney subsequently took out his fee and paid the medical provider from the settlement. Neither act was carried out with the client's knowledge or consent. The attorney received a Letter of Reprimand for his conduct.

Many lawyers are not aware that the state bar's Fee Dispute Committee allows attorneys to initiate a fee-dispute arbitration. Although an attorney certainly can sue his or her client for unpaid fees, this frequently results in either (1) a bar complaint, and/or (2) a malpractice counterclaim.

What can I do if the client owes me money?

Charging Liens

What can an attorney do when representation ends and money is owed? NRS 18.015 allows an attorney to assert a charging lien:

Upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.

The lien "attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action..."

A lien asserted pursuant to NRS 18.015(1) is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services that the attorney has rendered for the client.

The lien has to be perfected by "serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the party against whom the client has a cause of action, claiming the lien and stating the amount of the lien."

Case law regarding NRS 18.015 has held that a "charging lien cannot attach to the benefit gained for the client by securing a dismissal; it attaches to 'the tangible fruits' of the attorney's services." *Leventhal v. Black & LoBello*, 305 P.3d 907 (Nev. 2013). In *Leventhal*, the firm asserted a charging lien after the property settlement to which they sought to affix the lien had occurred.

In *Leventhal*, the Supreme Court noted that under NRS 18.015(3), the lien attaches to a judgment, verdict or decree entered, or to money or property recovered, *after* the notice is served. This interpretation harmonizes NRS 18.015(3)'s

attachment provisions with NRS 18.015(2)'s requirement that a lien be perfected by proper notice — thus, if an attorney waits to perfect the lien until judgment has been entered and the proceeds of the judgment have been distributed, the right to the charging lien may be lost.

The Supreme Court noted that the firm had other avenues of pursuing its claims for fees but stated that the attorney “may not rely on perfecting and prosecuting a charging lien filed eight months after the final decree is entered, when the case was completely concluded.”

In short, timing is everything.

Retaining Liens

An attorney may also assert a retaining lien. Until 2013, retaining liens were solely creatures of common law. *See, e.g., Argentina Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 216 P.3d 779 (2009). A retaining lien “allows a discharged attorney to withhold the client’s file and other property until the court, at the request or consent of the client, adjudicates the client’s rights and obligations with respect to the lien.” *Argentina*, 125 Nev. at 532, 216 P.3d at 782.

In 2013, the Nevada Legislature amended NRS 18.015 to address retaining liens. NRS 18.015(1)(b) states that an attorney shall have a lien “[i]n any civil action, upon any file or other property properly left in the possession of the attorney by a client.”

Unlike common law, NRS 18.015(6) allows the attorney asserting the retaining lien (or a charging lien), as well as any party served or any party who has been served with notice of the lien, including the client, to make a motion, and “the court shall,

after 5 days’ notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.” Further, the statute now requires the attorney to send notice that a retaining lien being asserted. *See* NRS 18.015(3).

Just because you can assert a retaining lien doesn’t necessarily mean you should. Doing so is often a sure-fire way to guarantee a bar complaint. Depending on the amount at issue, not losing a weekend responding to the state bar may be more valuable than the outstanding balance.

Conclusion

When clients see how much the attorney is charging, or how little they are receiving, the worst can come out in people. Some grievants have outright lied to the state bar, claiming that a settlement was obtained without their consent, in an attempt to get more funds for themselves. The better-organized attorneys easily refute the claims. Sloppier attorneys find themselves at the mercy of the disciplinary boards.

The moral of this article: Don’t forget to dot your “I”s and cross your “T”s, especially when it comes to dealing with money. Not doing so could be costly, literally. ■



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