Increase Collections and Avoid Costly Fee Disputes: Nine Practical Tips

MICHAEL S. LEBOFF

Law firms are businesses. It does not matter how great your work is; if your clients do not pay, your firm will not survive. As a result, firms must always be thinking about collections. This has never been more true than today. With COVID-19-related court and business closures, many law firms are struggling to pay their bills and employees, let alone make a little profit. The ethical rules substantially limit a law firm's ability to raise capital. So when times are tight, law firms essentially have two options: cut costs or increase collections. The latter is often easier said than done. While most clients timely pay bills and many fee disputes are resolved quickly and amicably, other fee disputes can grow into large-scale battles much larger than whatever matter the attorney was hired to handle in the first place. This article discusses nine ways lawyers can improve collections and avoid costly fee disputes.

Tip 1: Sign and Return Your Fee Agreement

The Rules of Professional Conduct and the State Bar Act contain many technical requirements for fee agreements. Failing to comply with these requirements can have severe consequences. For example, be sure to provide your clients with a fully executed fee agreement. For contingency agreements, Business and Professions Code section 6147(a) provides that "[a]n attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, . . . to the plainti . . . ." Cal. Bus. & Prof. Code § 6147(a) (emphasis added.) Similarly, for hourly, That-fee, or hybrid arrangements where the "total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000)," the contract must be in writing. That section further requires that "[a]t the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, . . . to the client . . . ." Cal. Bus. & Prof. Code § 6148(a) (emphasis added.) Failing to follow these technical rules can void your fee agreement.

Tip 2: Be Wary of Conflict Waivers

Conflict waivers are another critical issue attorneys must get right. In Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc., 6 Cal. 5th 59 (2018), the California Supreme Court held that a law firm's failure to obtain a proper written conflict waiver voided the firm's engagement agreement. While the state Supreme Court did not require the firm to forfeit its entire fee, it did limit the firm's recovery to quantum meruit, holding that "[a]lthough the law firm may be entitled to some compensation for its work, its ethical breach will ordinarily require it to relinquish some or all of the profits for which it negotiated." A proper conflict waiver requires the client's "informed written consent," meaning the attorney must tell the client about all the relevant circumstances and material risks, including any actual and reasonably foreseeable adverse consequences from the

representation. Conflict waivers should be tailored to the specific situation. Boilerplate conflict waivers rarely suffice.

Tip 3: Know What Is in Your Fee Agreement

With some exceptions, fee agreements will be interpreted like an ordinary contract. See, Banning Ranch Conservancy v. Superior Court, 193 Cal. App. 4th 903, 912 (2011) ["Retainer agreements are enforced like any other contract if they are certain and unambiguous."]. Therefore, it is important that attorneys know what is in their fee agreements and ensure their billing practices are consistent with those contractual obligations. I recently represented a client in a fee dispute where the client's former lawyer charged rates that significantly differed from what was in the fee agreement and charged for costs the agreement did not allow. These errors could have cost the client hundreds of thousands of dollars in unauthorized fees and costs. This example shows why attorneys must know what is in their fee agreement and follow it. If you have not read your fee agreement in a while, you should. And, if there is something in your fee agreement that is unclear, fix it. Ambiguities in a fee agreement will be interpreted against the attorney. Leighton v. Forster, 8 Cal. App. 5th 467, 486 (2017) [Attorney-client fee agreements "are strictly construed against the attorney."].

Tip 4: Avoid Surprises by Proper Budgeting and Communication

Clients do not like surprises. While it is impossible to completely avoid unanticipated costs and fees, for the most part, surprises are avoidable, particularly for experienced lawyers. There are several ways to minimize surprises. One of the best ways to avoid surprises is to prepare a comprehensive budget early in the matter, laying out all of the potential fees and costs the client is likely to incur. This is not a marketing tool. If you provide the client a lowball budget to get hired, do not be surprised when a fee dispute arises when you have blown through your original budget before the first deposition is taken. Budgets should be honest and realistic. Clients rely on budgets to make informed decisions about legal strategy. If the client is not willing or able to pay the fees required, an estimate may get that information out early. The best time to learn about a client's financial limitations is at the start of the representation. However, do not rely solely on a budget prepared early in the case. Budgets should be updated at various points throughout the matter to ensure their accuracy. And before embarking on expensive projects, like a writ of mandate or summary judgment motions, discuss with the client the reasons for those tasks and the anticipated costs. If the client agrees, confirm it in writing.

Tip 5: Do Not Overpromise or Underdeliver

Another common source of fee disputes is the client not getting the result it wanted. In commercial litigation, there is often a winner and a loser. While attorneys can influence the result, much depends on the law and facts, which the lawyers cannot change. Thus sometimes, through no fault of their own, good lawyers get bad results. A bad result should not come as a surprise to the client. Lawyers must manage expectations. If a client goes to trial believing it has an open-and-shut case, it may be challenging to collect hundreds of thousands of dollars in costs and legal fees if the attorney lost the case. Clients are far more likely to pay fees even when there is an unfavorable result if the attorney explained

the risks and the clients willingly proceeded. Clients do not always want to hear the flaws in their case, but it is critical the attorney carefully explains the flaws and risks in writing. Not only is this required by the attorney's duty of candor, but it is very useful in avoiding fee disputes.

Tip 6: Address Problems Early

Unlike scotch, billing issues do not get better with age. It is much easier to resolve a $30,000 fee dispute than a $300,000 fee dispute. It is uncomfortable to talk about money, but once a client starts to fall behind on its invoices, it is time to have "the talk." Why is the client falling behind? Is the client unhappy with the attorney's performance? Is it a short-term cash flow issue that will work itself out, or is the client running out of money, at which time the attorney and the client should discuss revising the litigation strategy? Whatever the reason, the sooner the issue is resolved, the better. Unfortunately, attorneys often avoid this uncomfortable conversation and continue to bill large fees, clinging to the hope the client will miraculously show up with a check to pay the bill in full. This is not a sound collection policy.

Tip 7: Separate From Problem Clients

Some clients simply do not believe they should have to pay for legal services. They go from firm to firm, stiffing everyone along the way. This is an unfortunate risk in our profession. Attorneys must identify these payment risks early. Clients who are on their third or fourth set of lawyers are a major red flag. Clients who struggle or refuse to make retainer deposits are another. Clients who do not pay the first invoice are unlikely to pay the second, third, or fourth. It is not always easy to identify these payment risks prior to accepting representation, but their true colors are often revealed early. If you have one of these clients, end the representation quickly.

Tip 8: Invoices Should Be Clear and Concise

If you ask ten different lawyers what should go into a billing entry, you are likely to get eleven different answers. Some billing entries are devoid of any detail, while others go on for paragraphs. While there is no one-size-fits- all approach to billing entries, at a minimum the billing description should be clear and concise, so the client knows exactly what it is paying for. In addition, under Business & Professions Code section 6148(b), invoices must include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses. Lastly, invoices should be honest and accurate. If you are padding bills, you will eventually get caught. If you are not imputing time contemporaneously, your time entries lack credibility. When reviewing prebills it is often helpful to ask yourself two questions: (1) does the entry make sense, and (2) would I pay this if I were the client? If you cannot answer yes to both questions, revise the entry or write it off.

Tip 9: If You Must Sue, Don't Forget the MFAA Notice

If you are going to sue for fees, there is one last trap to avoid: the Notice of Right to Mandatory Fee Arbitration. Every client is entitled to demand fee arbitration under the Mandatory Fee Arbitration Act (MFAA). Under the MFAA, before filing a claim against a client, the attorney must provide the client notice of their right to arbitration under the MFAA using the form prescribed by the State Bar. Failure to serve the notice is grounds for dismissal of the collection action. The form should clearly state the amount due and should be sent in a way to ensure the client receives it, such as overnight or registered mail, attaching a proof of service of mailing, etc.

It is impossible to avoid fee disputes entirely. Legal services are expensive and the value is not always readily apparent to clients. By following these nine tips, however, lawyers can likely increase collections and avoid expensive, time-consuming fee disputes.

Michael S. LeBoff is a partner at Klein & Wilson in Newport Beach, California. Michael’s practice regularly includes representing clients in legal malpractice and attorney fee disputes. A different version of these remarks was included in the written materials for a June 24, 2020 presentation for the OCBA Business Litigation Section.