#458 – ETHICS: OBTAINING ATTORNEYS’ FEES

James King is a sole practitioner in San Diego, CA and has been practicing law for more than 30 years. His trial testimony as a legal expert has been praised by juries and judges for his unique ability to distill complex legal issues into understandable concepts. A graduate of Stanford Law School (Order of the Coif, Law Review), Mr. King has consistently qualified as an expert whenever his testimony has been offered. Jim's practice is focused on the following areas:

- Legal Ethics
- Attorney Fee Disputes
- Standards of Practice in Litigation and Trials
- Legal Malpractice and Professional Liability
- Attorney Professional Responsibility.

He can be reached at jking1737@gmail.com or (858) 753-1737.

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1. **TWO CONTEXTS**

A. **Fee dispute with the client**

In this context the attorney and her client are involved in a dispute over the fees that the attorney has charged to her client.

B. **Fee award from the Court**

This context concerns a judicial award of fees to an attorney, with the awarded fees paid by the opposing party or her counsel.

C. **Analysis of Fees Involves Both**

1. Fee disputes with the client are often resolved by referring to case law regarding judicial legal fee awards. The bases on which the awards are requested and opposed are usually the same as those used in the context of fee disputes.

2. Similarly, courts making fee awards not only use generally the same factors as to be used in any consideration of the reasonableness of legal fees (ABA Model Rule 1.5; Cal.RuleProf.Conduct 4-200), but also expressly state that a key factor in their consideration is whether the client paid the fees requested or has agreed to pay them, and whether a reasonable client would be expected to pay the fees requested.
II. DISPUTES WITH CLIENT

A. Basic law

1. The first source are the applicable Rules of Professional Conduct – ABA Model Rule 1.5 and CRPC 4-200 (which describes the factors to be used in determining whether a fee is unconscionable; the same factors are to be used in determining reasonableness).

2. The second are Ethics Opinions of a given State or the ABA. In California, the most pertinent are Fee Arbitration Advisories issued by the State Bar of California. The link to them is: [www.calbar.ca.gov/Attorneys/MemberServices/FeeArbitration/ArbitrationAdvisories.aspx](http://www.calbar.ca.gov/Attorneys/MemberServices/FeeArbitration/ArbitrationAdvisories.aspx). These are considered to be persuasive precedent by the Ninth Circuit, hence should be considered in every state. E.g., Lahari v. Universal Music and Video Distribution Corp. (9th Cir. 2010) 606 F.3d 1216, 1222-23; Welch v. Metro. Life Ins. Co. (9th Cir. 2007) 480 F.3d 942, 948; Darling Inter., Inc. v. Baywood Partners, Inc., (N.D. Cal. 2007) 2007 WL 4532233 *9, n.5.

3. The third is the case law which has developed in all States and Federal Circuits regarding fee awards. There are hundreds of such cases from each Federal District in California, all of which are considered to be of precedential value in any relevant context within California.

B. The Retention Agreement

1. Governing “Constitution”

Think of the retainer agreement as the basic “Constitution” which governs the attorney-client relationship in all matters that it addresses (unless it is void). It may be bent on occasion, disregarded to some extent on others, but in general it is the main source of guidance.
However, it is also subject to interpretation and certain limitations. In other words, the fee agreement is always of great importance, but it is seldom determinative by itself.

2. Basic provisions

These are basic provisions which an attorney should put in the retention agreement, which are often overlooked:

A. Evergreen Retainer. First, consider that a retainer (except for a True or Classic Retainer, which is the subject of a separate course) is really an advance, to be applied to fees billed. Virtually all states hold that there is no such thing as a “Nonrefundable Retainer”. Hence, in your initial retention agreement, the client pays $x as an advance – typically labeled a “retainer”. To make it an Evergreen Retainer, the agreement must provide that when the initial retainer is exhausted, the client must replenish it in whole or in a specified amount. For example, if the initial retainer is $10,000, the fee agreement might provide that “when the initial retainer is exhausted, Client will pay all outstanding invoices and replenish the Trust Account by $5,000 within 15 days. Thereafter, Client will maintain a balance of $5,000 at all times.”

B. Deemed Accepted. It is standard language to have a provision in the retention agreement which states that the client is deemed to have accepted a bill if not disputed within 30 days (or a similarly specified reasonable period). Although in practice this is rarely, if ever, fully enforced, it does have two practical implications: A). It may be part of the foundation of a claim for “account stated”, which is an alternative means of recovery of legal fees. Trafton v. Youngblood (1968) 69 Cal.2d 17, 25; California Practice Guide, Professional Responsibility, The Rutter Group (2012) [5:1022-23.1].
C. Right to Withdraw at Will.

1. Law. As a matter of law, a provision giving the attorney the right to withdraw at will is enforceable. *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904. The rationale for this is that before the attorney is retained, the attorney and client are at arms’ length and hence agreed provisions are presumptively valid.

2. Requisite Language: “You, as the client, have the right to terminate our attorney-client relationship at any time at will – meaning for any reason or no reason. Because the attorney-client relationship is one of mutual trust and respect, by this agreement you are expressly agreeing that our Firm similarly terminate the attorney-client relationship at will – that is, at any time and for any reason or no reason. Further, you agree that if our firm seeks to withdraw from any litigated matter, we may present this paragraph to the tribunal as part of our motion to be relieved as counsel.”

- The latter sentence is necessary because the attorney-client retention agreement has now been determined to be privileged. Cal.Bus.&Prof.Code §6149. Hence, it would be improper to reveal it unless specifically authorized to do so by the client.

- Because there are various ethical limitations on an attorney’s right to withdraw which must be followed in all events, such as the prohibition against prejudicing the client (client abandonment) and the requirement for approval by a tribunal in a litigated matter, the use of this language also requires use of the “savings clause” stated below.

3. Practical Effect. This protects the attorney in a number of ways. First, without it the attorney would have to explain the reason for withdrawal to a Court, which of itself might breach the attorney-client privilege and constitute malpractice. See *Kirsch v. Duryea* (1978) 21 Cal.3d 303; *Manfredi v. Superior Court* (1998) 66 Cal.App.4th 1128. Second,
if this provision is not in the agreement the attorney may be required to show “cause” for the withdrawal, and failure to pay fees may or may not be held sufficient cause by a particular Judge.

Third, its legal effect is essentially to change the standard of review by the Judge from one of discretion (which would otherwise generally be the case) to one of a matter of law (which should be the case under Ramirez. Fourth, this allows the attorney to simply tell the client that the attorney will withdraw if the client is behind on his fee obligations – however, if doing so, you MUST make certain that the claimed fees are all justifiable.

D. Binding Arbitration.

1. As a matter of law, if the retention agreement provides for the ultimate resolution of all disputes by binding arbitration instead of the judicial system, such a provision is valid and arbitration may be compelled. *Schatz v. Allen Matkins* (2009) 45 Cal. 4th 557. Given the vagaries of the judicial system – especially in a time of low budgets and hence massive delay – the attorney will almost always prefer binding arbitration. (In the author’s experience and opinion, so should/would the client.)

E. Savings Clause.

A typical savings clause would read: “To the extent that any interpretation of this Agreement or any portion thereof would render it violative of any applicable Rule of Professional Conduct, such interpretation shall not be applied. Under all circumstances the Firm intends to abide by its responsibilities under the Rules of Professional Conduct. Should any part of this Agreement be held to violate any Rule of Professional Conduct, such a finding shall not affect the applicability of any other portion of this Agreement.”
The value of such a clause is at least two-fold: A) In general, it shows an intent to be ethical, which is always a good thing for the attorney; B) It also protects any other provisions which the attorney may want included from being entirely stricken or declared unconscionable.

F. Compliance with Rules Prohibiting “Interest Adverse to Client”

In *Fletcher v. Davis* (2004) 33 Cal.4th 61, the California Supreme Court held that attorneys’ liens (which had been in use for over 125 years) were an “interest adverse to the client” under CRPC 3-300; thus, to be valid the client’s agreement for the lien required compliance with CRPC 3-300. In effect, this meant that the client was informed that the client was giving the attorney an interest which was adverse, or at least potentially adverse, to the client; and that the client acknowledged that the attorney had advised the client of the client’s right to independent counsel.

*Fletcher* teaches that any provision in a fee agreement which favors the attorney may, later, be deemed by some Court to be an “interest adverse to the client”. Hence, the attorney might as well comply with CRPC 3-300 in all events. This is simple to do: The final paragraph in the retention agreement should read in bold:

“*This agreement, and/or portions thereof, may be actual or potential interests adverse to you, the client. Accordingly, you need to review this agreement carefully. Further, by signing this agreement you are acknowledging that you have been advised of your right to obtain independent counsel to review this agreement and advise you regarding it.*”

Note that following *Fletcher*, the California State Bar began including similar language in its sample retention agreements (all of which are available online).
In addition, you might want the client to initial each page of the agreement.

**G. Annual Rate Increases**

All attorneys raise their rates annually, to reflect inflation and usually to reflect increased experience and efficiency. However, for the increases to be valid, they must be both agreed-to by the client and the client must receive notice of them annually. *Severson & Werson v. Bolinger* (1991) 235 Cal. App. 3d 1569. Hence, a provision to this effect must be included in the retention agreement.

1. **Provisions Which Alter Basic Billing Rules**

The California State Bar has promulgated billing guidelines (known as Fee Arbitration Advisories, see above, in particular Fee Arbitration Advisory 2003-01), which specify the proper hourly increments (.1), prohibit (or punish) practices such as “block billing” (i.e., billing all time spent in a day without differentiating the time), etc. It would theoretically be possible to alter such Guidelines (e.g., such as to allow for billing in quarterly-hours); however, doing so might well lead to a finding that the agreement is unconscionable (and hence void). The author suggests that attorneys simply follow the Guidelines.

2. **Optional – Attorney's Fees in Event of Dispute**

Consider whether you want the retention agreement to provide that in the event of any dispute (it could be limited to a fee dispute, or broadened to include any dispute – i.e., a malpractice claim), the prevailing party obtains legal fees. Be aware that if an attorney represents herself in her claim for fees, she is not entitled to her fees because she is essentially just another pro per litigant. *Trope v. Katz* (1995) 11 Cal.4th 274 (however, later cases have
reduced Trope’s applicability). The question is whether such a provision will incentivize or disincentivize a client from raising a spurious claim or refusing to pay a legitimate bill.

3. If No Valid Agreement

A. Under California law, if there is no valid, written retainer agreement, the attorney is entitled to a “reasonable fee”. Cal.Bus.&Prof.Code §§6146-48. Similarly, if the agreement is improper (usually because of unconscionability) it is voidable by the client, and the failure to render proper monthly statements similarly renders the fee agreement voidable. Cal. State Bar Fee Arb. Adv. 98-03, 96-04, 95-02.

B. However, the California State Bar has commented that even where there is a valid fee agreement, the attorney is still only entitled to receive a fee which is “reasonable”, given the attorney’s performance. Id., 93-02, 98-03. The basis of this opinion are that the attorney has an implied duty of good faith and fair dealing within the retention agreement, hence despite its terms may charge no more than would be “in good faith” and constitute “fair dealing”. The author notes that the same result is reached under the basic analysis of fiduciary duty – as a fiduciary to the client, the attorney has a duty to only collect a reasonable amount given the work actually performed.

C. In this author’s experience, in a dispute concerning attorney’s fees, the existence of a valid written agreement: 1) establishes the rates for the attorneys; 2) at least arguably shifts the burden to the client to show that the attorney’s performance was not worth the agreed amount.
H. Bills

1. Remember that the one document which every client reads in detail are the bills. Remember also that every fee dispute will involve an analysis of your bills. In other words, pay great attention to every bill you ever send any client.

2. California statutory law requires clear bills (Bus.&Prof.Code §6148); the sanction for which is that the agreement is voided. The California State Bar has issued specific guidelines as to the bills. Fee Arb. Adv. 95-02.

3. Note that if the bills are vague at all, the Ninth Circuit has held that the attorney may be subject to a 10% haircut at the discretion of the Judge without any explanation of any specific problems. Further, the Court may reduce the fees further based on vagueness, and need only specify the particular problems it finds in the bills to do so.

4. Further, the California State Bar has issued a Guideline entitled “Detecting Attorney Bill Padding”, which goes into specifics about billing particularities. ( Arb. Adv. 2003-01). This Guideline has been applied by Federal Courts, including the Ninth Circuit. E.g., E.g., Lahari v. Universal Music and Video Distribution Corp. (9th Cir. 2010) 606 F.3d 1216, 1222-23; Welch v. Metro. Life Ins. Co. (9th Cir. 2007) 480 F.3d 942, 948; Darling Inter., Inc. v. Baywood Partners, Inc., (N.D. Cal. 2007) 2007 WL 4532233 *9, n.5.

I. Fee Disputes

1. Mandatory Fee Arbitration.

- At or before the time that any attorney in California sues her client for fees, she must serve the client with a Notice of Right to Arbitrate under the California statutory scheme of attorney fee arbitrations. See Cal. Bus. & Prof. Code §§6200 et seq. (“Mandatory Fee
Arbitration Act” – “MFAA”). Such an arbitration is handled by the local county bar association, unless there is none (in which case the arbitration is conducted by the State Bar). Under the MFAA, the client may compel arbitration, but the attorney may not. In any event, for the arbitration to be binding, both parties must agree that it is binding in a document filed in the arbitration itself after the dispute arose, as opposed to being a provision in the retention agreement.

- If the dispute exceeds a minimum amount, there is a panel of three arbitrators, appointed by the local bar association. Two are attorneys, one is not. Many clients believe that the panels are thus inherently biased in favor of attorneys; in this author’s experience, if anything there is a slight bias is for the client.

- Although an award may be technically “nonbinding”, the vast majority of disputes do not proceed beyond the issuance of such an award. There are two reasons. First, as a practical matter once there is an arbitration both sides understand the other’s position better, and realize that once a knowledgeable and non-biased panel has reached a given result it is unlikely that a later decider will reach a substantially-different one. Second, there are general penalties which apply to a party who has gone through arbitration, then chosen to litigate, and receives a lesser award through the litigation – these are usually considered applicable to a fee arbitration and hence deter further litigation.

2. Litigation

- If either the client declines Mandatory Fee Arbitration, or either side is not satisfied with the award of a non-binding arbitration, the attorney may pursue her claim through the ordinary litigation process. i.e., if the amount in controversy is small enough for small claims court, that is her forum; if not, she will need to file a Superior Court action.
- If the attorney sues the client for fees, the attorney may expect a counterclaim for legal malpractice. The attorney’s method to avoid such a counterclaim is to let the statute of limitations for legal malpractice expire (usually one year) before bringing her claim for fees (which has a four year statute of limitations in California if on a written contract – CCP §337).

- However, knowledgeable clients with both a large receivable owing to the law firm and who have a potential malpractice claim now will bring the malpractice case within the statute of limitations period.

- The practical effect of this is that if the attorney allows a bill to accumulate which is so high that the client finds it cheaper to sue the lawyer than pay the bill, the attorney may expect a lawsuit.

- The conclusion here is to tie together everything above – if the retention agreement allows for withdrawal at will, the attorney should withdraw when the client first fails to pay a legitimate bill. If the attorney remains in the representation, the client will inevitably fall further and further behind, until mathematically it is economically beneficial to the client to bring a malpractice case than pay the bill. Advice to attorneys in such a situation: seek advice from other counsel, and do not continue representing a “problem” client once the “problem” becomes apparent. Do not through further time after non-recoverable time.

III. Fee Awards From Courts

A. Contexts

There are a variety of contexts in which attorneys may seek fees from Courts. Some examples are:

- A fee-shifting provision in a contract (Cal. Civil Code §1717);
- Statutory Fee Awards (Civil Rights, Antitrust, certain Securities cases, etc.)
- “Private Attorney General” or other public policy cases

B. Initial Approach

1. The attorney must know the substantive area of law sufficiently to know whether there may or will be an attorney fee award at the time a final judgment is rendered.

2. The attorney must then inform the client of the risks (if the client may be liable for the other side’s fees), and/or the distribution of moneys (if the client may be eligible to receive a fee award). In the former instance, it is possible that eventually the fees run up by opposing counsel may be multiples of the amount at issue, meaning that the client is taking a significant risk in bringing the matter to trial – the client deserves to be aware of this risk. In the latter instance, it is essential that the fee agreement clearly spell out who is entitled to the fees (i.e., the attorney or the client).

3. As to the fee agreement, there are generally three possible approaches. One, usually used in a case where the attorney bills on an hourly basis, is to give the entire award to the client. The second is to provide the entire award to the attorney – however, if this would lead to a true windfall to the attorney (as opposed to a legitimate incentive), it might be held to be unconscionable. The third, usually employed in contingency fee cases, is to agree that the fee award will be included in the total recovery to be divided as per the agreement (i.e., if the attorney’s rate is 40% after trial, the fees awarded – which necessarily would occur after a trial – would be divided 60% to the attorney and 40% to the client.)

4. The attorney needs to be certain what must be disclosed to the Court, etc., in the particular case, and structure the fee agreement and conduct of the litigation accordingly. The
amount of disclosure varies between contexts and Courts, which cannot be covered in full in this outline.

C. Know Your Judge

The most important advice you can receive in any fee award case is to do a thorough Westlaw or Lexus search of the particular Judge who will be deciding your case. There are decisions available on-line from virtually every Federal Judge who has sat for over a year either giving or denying one or more fee requests. If your case is not Federal, there will no doubt be some decision(s) by the applicable State appellate Court(s).

D. Method of Computation – Lodestar

1. The usual method of computing an attorneys’ fee award (in both Federal and State Court) is by the “lodestar” method. See generally Pearl, California Attorney Fee Awards, Vol. 2, 3d ed., CEB, Chapter 9. The mathematics is to determine the appropriate lodestar by determining the reasonable rate of the prevailing attorneys, multiplied by the time they spent. This result is then labeled the “lodestar”. Upon calculation of the “lodestar”, it may be adjusted upward (and possibly downward) based on factors such as risk of no recovery, quality of legal work, difficulty of the work, etc.

2. Although the lodestar may be adjusted for such factors, Courts are usually reluctant to do so because in determining both the reasonable rates and allowable time for the attorneys, those factors are almost necessarily considered in the initial lodestar calculation. See generally Pearl, California Attorney Fee Awards, Vol. 2, 3d ed., CEB, Chapter 10.
3. The typical kind of case which does receive a significant positive modifier to the lodestar are the “private attorney general” cases, in which the prevailing attorneys establish a matter of significant public policy which goes well beyond the specific amounts at issue in the specific case. Typically, these cases are also high-risk of no recovery, meaning that they qualify for a multiplier on that basis as well. See generally Pearl, California Attorney Fee Awards, Vol. 1, 3d ed., CEB, Chapter 3, Section II (Private Attorney General Doctrine and CCP Section 1021.5); id., Vol. 2, Chapter 10, Section 10.41 et seq.

4. The rates used in calculating lodestar are usually the “prevailing rates” in the specific legal community involved (i.e., the venue of the litigation), unless there is a good reason to look elsewhere. For example, environmental litigation specialists may be paid their usual rates (e.g., those of a large city) where litigating in an area where prevailing rates are much lower if it was necessary to employ such specialists. See generally Pearl, California Attorney Fee Awards, Vol. 2, 3d ed., CEB, Chapter 9, Section III.