



# How Well-Crafted Fee Agreements Can Reduce Risk and Help You Do Better Financially

By Steve Lewis



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**I**n the thirty-three years I have been representing and advising lawyers, I have learned a critical lesson. Once you and a prospective client decide you are a good match for each other, the simplest way to lessen the risk of fee disputes, malpractice claims and State Bar complaints, and to increase your satisfaction with your practice is to take the time to craft effective fee agreements.

The best risk management advice I can provide on crafting a fee agreement is: (1) make sure that the terms are fair and reason-

able and that it is clear to the client; (2) while both the client and the attorney must sign the agreement, the attorney should be

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*Steve Lewis is a principal in the firm of Lewis & Bacon in Sacramento, and is also affiliated with Hinshaw & Culbertson. His practice includes ethics and risk management consultations, attorney-client fee disputes, representation of attorneys in State Bar proceedings and legal malpractice cases.*

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the last to sign and should do so only after any conditions (such as advance deposits) have been met; (3) identify your clients and include a conflict disclosure and consent provision nearly every time you represent multiple parties; (4) carefully identify the services you are performing and those related services you are not performing; (5) make sure, in words and actions, that the client understands the financial commitment required; (6) get it right the first time; (7) keep up — and comply with — the law governing the content of fee agreements; and (8) watch for, and avoid, traps for the unwary! In this article, I'll touch briefly on all of these points with the hope that, at the end, you will take a few minutes to transform your fee agreements into documents that work well for your clients and for you.

### **\_\_\_ Obtain the \_\_\_ Client's Informed Consent**

Fee agreements must be fair, reasonable and fully-explained to the client in order that the client truly provides *informed consent* to the arrangement. *Bird, Marella, Boxer & Wolpert v. Superior Court*, 106 Cal. App. 4th 419, 430 (2003).

Under Rule 4-200(A) of the California Rules of Professional Conduct ("CRPC"), an attorney can be disciplined not only for charging or collecting an unconscionable fee, but also for *entering into an agreement* that is unconscionable. CRPC 4-200(B) then defines unconscionability by reference to 11 factors similar to those used by courts in evaluating the reasonableness of an attorney's fee. Thus, an unreasonable financial arrangement may lead not only to a fee dispute with the client, but to discipline as well.

While many of the eleven factors in Rule 4-200(B) relate to the amount of the fee charged, the last-listed factor is "The informed consent of the client to the fee." In this setting, last is most certainly not least as

the Review Department of the State Bar Court has determined that the absence of informed consent can be the critical component in determining whether a fee agreement is unconscionable, and thus whether an attorney should be disciplined. *In the Matter of Wells* (Review Dep't 2006) 4 Cal. Bar State Ct. Rptr. 896, 908-909; *In the Matter of Kroff*, (Review Dep't 1998) 3 Cal. State Bar Ct. Rptr. 838, 850-851.

### **\_\_\_ A Fee Agreement Is a \_\_\_ Contract, Not a Letter**

Under Bus. & Prof. Code 6147, contingency fee agreements are not enforceable if they are not in writing and if they do not comply with all terms of the statute. While there are a few exceptions to the companion requirement that non-contingency fee agreements be in writing (Bus. & Prof. Code § 6148 (a) [fee not to exceed \$1,000] and (d) [emergency services, corporate clients, etc]), it is always prudent to have a written fee agreement with *every* client.

Oftentimes, I see attorney-client fee agreements in the form of a letter from the attorney to the client, signed by the attorney and then presented to the client. I caution against this approach. A better practice is to provide the client with a document that looks more like a contract (after all, it is one) than a letter and for you not to sign off until (a) the client has signed, and (b) you have received any deposit or conflict of interest waiver/consent upon which the agreement is conditioned. (See sections 3 and 5, below.) That way, you won't find yourself in a situation (and yes, I've seen it) where you have not received a signed agreement back from the client, but the client claims you were his attorney as evidenced by an agreement both of you had signed!

Many attorneys ask about situations where they have an on-going relationship



with a client for whom they handle numerous small matters. In those situations, separate fee agreements for each matter are not always practical. So, what is a good approach? Try preparing a master fee agreement for the client (with the scope of repre-

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sentation designed to cover the first matter covered by that agreement) and adding a clause to the effect that the terms and provisions of the master agreement apply to future matters in which you agree to represent client — but with the caveat that the scope of representation for all such matters will have to be confirmed in writing by you.

### **\_\_ Identify Your Client(s) – Comply \_\_ with Conflict Disclosure & Consent Rules**

Your fee agreement should identify the client(s) you are representing. And, whenever you’re dealing with the plural rather than the singular, you should *almost always* include a multiple client conflict disclosure statement and then obtain the joint clients’ informed written consent. (See, CRPC 3-310(C)(1) and (2).) Keep in mind that, depending on the facts, an attorney who fails to obtain informed written consent in a conflict of interest situation may be subject not only to disqualification but to forfeiture of fees as well. *Jeffrey v. Pounds*, 67 Cal. App. 3d 6, 10-12 (1977); *Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal. App. 4th 257, 278-279 (2007).

### **\_\_ Identify the \_\_ Scope of Representation**

One of the most common issues of dispute in legal malpractice cases is the scope of the attorney’s representation — what was the attorney retained to do? The bottom line is that you should not use “boilerplate” language to define the scope of representation. Rather, in every matter, you should sit down with the client to determine what the scope of representation is going to include, and what related matters it is *not* going to include, and tailor the agreement for each matter. When preparing the scope of representation portion of your agreements, think in terms of Goldilocks: You don’t want your scope provision to be too broad — in which case you might be held to duties you never intended to undertake — and you don’t want your scope provision to be too narrow — in which case you might find yourself not being paid for work you thought the client agreed you should perform. Rather, you want your scope provision to be “just right.”

California lawyers also have an obligation



to inform clients of matters they are not undertaking, and of the attendant risks, if a reasonable client would be relying upon the attorney for advice on those matters. In *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1686-1687 (1993), the court held that a lawyer representing a client in a workers' compensation matter could limit the scope of services being provided to the workers' compensation action, but doing so was not enough to avoid liability for the client's failure to timely file a third-party tort action. In order to avoid exposure the court held the attorney should have informed the client that: (a) there may be other related-remedies for the same injuries that the attorney is not handling, such as a third-party tort claim, (b) there are time deadlines applicable to the pursuit of such claims (without a need to define the specific time deadlines); and (c) it would be advisable to consult other counsel regarding other aspects of the client's legal matter.

So, spend time thinking about the nature of your practice and related advice a client retaining you might reasonably be relying upon you to provide. If you are not giving clients (or this particular client) advice of that nature — such as the tax ramifications of the matter you are handling — let the client know and suggest they consult with another attorney or appropriate professional. The place to make this disclosure is in the scope of representation section of your fee agreement.

Of course, clearly identifying the work you are not undertaking is even more important for the increasing numbers of attorneys engaged in limited scope representation. For a primer on issues arising from limited scope representation, see the Committee on Professional Responsibility's ("COPRAC") Fall 2004 Ethics Primer on Limited Scope Representation, available at [http://calbar.ca.gov/calbar/pdfs/ethics/COPRAC/COPRAC\\_02-0005\\_11-17-04.pdf](http://calbar.ca.gov/calbar/pdfs/ethics/COPRAC/COPRAC_02-0005_11-17-04.pdf)

## — Candor, Money-up-Front — and Charging Liens

*Candor.* In order to get clients, many attorneys make the mistake of underestimating the amount of fees the client is likely to be charged. I have a simple, three-word response to that approach to marketing — “DON'T DO IT!” The truth of the matter is that clients, like everyone else, hate surprises that cost them more money than they anticipated. On the other hand, they love surprises that cost them less. If you were entering into a contract with a lawyer, or with a house painter for that matter, you would want knowledge about what it was going to cost you so you could both make an informed judgment about how to proceed, and budget accordingly. Do the same for your clients — they will be happier and you will be safer.

*Deposits.* The best way for a client to truly appreciate what a matter is going to cost is to require a reasonable deposit up front. And, the best way to avoid headaches during the course of the representation is to require additional deposits so you are always ahead of the game. While CRPC 4-100(A) only requires deposits that are going to be used, either in whole or in part, to cover costs to be deposited in an attorney's client trust account, a better practice is to put all advance deposits, even if just to cover fees, into your client trust account. (See, State Bar Formal Opinion 2007-172 for a discussion regarding what funds must be placed in trust.) Of course, your handling of deposits and money held in trust should be spelled out carefully in your fee agreement. I recommend to all lawyers that they include in their agreement provisions confirming when and how deposits held in trust are to be taken out of the client trust account to cover fees and costs. In that regard, good practice is to indicate in the agreement that unless the client objects,



the attorney's fee will be deemed "fixed" under CRPC 4-100(A)(2) and your corresponding right to take the money out of trust will likewise be fixed a set number of days after sending the client an invoice. This approach allows the attorney to take the money out of trust in accordance with the parties' agreement, and while it does not create a period of limitations barring a later dispute by the client *Charnay v. Colbert*, 145 Cal. App. 4th 170 (2006) it eliminates any obligation on the attorney's part to return the disputed funds to the trust account pending resolution of a late-surfacing dispute. (State Bar Formal Opinion 2006-171)

*Charging Liens.* A charging lien is the provision found in virtually all contingency fee agreements (and in increasing numbers of non-contingency fee agreements) giving the attorney a lien against the proceeds of any recovery obtained by the client. Under California law, an attorney who wants a charging lien in an hourly-fee case must comply with CRPC, Rule 3-300 governing (among other things) attorney acquisition of security interests in client property. *Fletcher v. Davis*, 33 Cal. 4th 61 (2004). Rule 3-300 requires: (a) the terms of the acquisition to be fair, reasonable and fully disclosed and transmitted to the client in writing; (b) the client to be advised in writing of the right to seek the advice of independent counsel and provided reasonable opportunity to do so; and (c) written consent by the client. In *Fletcher*, the Supreme Court left open the issue of whether Rule 3-300 compliance is required for charging liens included in contingency fee agreements. *Fletcher v. Davis, supra*, 33 Cal. 4th at fn. 3, p. 70. In State Bar Formal Opinion 2006-170, COPRAC stated the case as to why Rule 3-300 should not be applied to charging liens in contingency fee contracts; however, as there has been no definitive court decision, COPRAC warned that lawyers may wish to include Rule 3-300 compliance in their con-

tingency fee contracts, virtually all of which include charging liens. Opinion 2006-170 is available at <http://calbar.ca.gov/calbar/pdfs/ethics/2006-170.pdf>

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— **Get It Right the First Time** —

While no California court has clarified the obligations attendant upon attorneys who seek to modify fee agreements, there have recently been some significant developments. In a State Bar Court proceeding, the Review Department held that an attorney who demanded modification of a fee agreement shortly before an ill client's deposition was scheduled to commence committed an

act of moral turpitude warranting discipline. *In the Matter of Shalant* (Review Dep't 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.

No California court has yet held that CRPC, Rule 3-300 applies when an attorney seeks to modify a fee agreement. In 2008, COPRAC issued Proposed Formal Opinion 05-0001 stating that Rule 3-300 (and its requirement that the client be advised in writing of the right to consult independent

fee agreements remain unclear. As such, the prudent practitioner, focused on managing and reducing risk, will comply with Rule 3-300 whenever the need to modify a fee agreement arises. (See COPRAC's June 2009 Ethics Primer entitled, "Uncertain Ethics Requirements for Attorney Fee Modifications Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement" available at <http://calbar.ca.gov/calbar/pdfs/ethics/Ethic>



counsel) did not apply. After extensive comment both supporting and opposing the proposed opinion (notably the Chief Trial Counsel of the State Bar opposed adoption of the opinion), the Board of Governors declined to approve it. At this writing, the ethical obligations of attorneys seeking to modify

*s-Alert-Modification.pdf*)

In another recent development regarding modifications of fee agreements, the court in *Stroud v. Tunzi* 160 Cal. App. 4th 337 (2008) held that in order for a modified contingent fee agreement to be enforced, the lawyer cannot rely upon the original agree-



ment. Rather, the modification must, in all material respects, comply with terms of Bus. & Prof. Code § 6147.

### **— Keep Abreast of the — Ever-Changing Law of Lawyering**

It is not uncommon for lawyers to prepare a form fee agreement and keep it in their systems for years on end — never even thinking that the law regarding fee agreements changes just as much as the law in the substantive areas in which they practice. This year, the big change in the law is the adoption of new CRPC, Rule 3-410, effective January 1, 2010. In a nutshell, the new rule requires (with certain exceptions and limitations) lawyers who do not carry professional liability insurance to so advise new clients and returning clients with new matters. The discussion section of the rule offers language uninsured attorneys can insert in their fee agreements to comply with the law: “Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance.” As the requirement is now set forth in a rule of professional conduct, failure to comply will subject the attorney to discipline.

### **— Avoid Traps for the Unwary —**

*No guarantees and no oral modifications.* — In *Charnay v. Cobert, supra*, 145 Cal. App. 4th 170, the client alleged that she relied upon the attorney’s assurances that she would prevail and recover fees. The attorney defended on grounds that his fee agreement expressly stated “No guarantees of any specific results can be made...” In overruling the trial court’s order sustaining a demurrer to the client’s complaint, the court of appeal noted that the agreement was subject to modification because it did not include a clause requiring all modifications

to be in writing. The lesson of *Charnay*: Include in your fee agreements provisions both disclaiming guarantees and requiring any modification to be in writing.

*Acknowledgement of understanding.* It is also good practice to include a clause above the client’s signature confirming that the client has read and understood all of the terms of the agreement and that all questions the client has had about the agreement have been adequately answered. In a legal malpractice case I handled years ago, the client attempted to defeat summary judgment by asserting she did not understand the limitation on the scope of the attorney’s representation as set forth in the fee agreement. In granting summary judgment, the court relied upon the statement above the client’s signature acknowledging that she had in fact read and understood the agreement and had her questions answered.

Your fee agreement should be considered and treated as one of the most important documents in your law practice. Properly crafted agreements will aid you in your efforts to serve your clients effectively, to earn a living, and to decrease your risk of fee disputes, malpractice claims and State Bar complaints. A little time spent reviewing and revising your form fee agreements and custom-tailoring them to each client’s situation will help you increase your clients’ satisfaction with your services — and yes, even your bills — cause you less angst about finances, and increase your enjoyment of your practice.

Note: The views expressed in this article are not intended to reflect the author’s opinions regarding the standard of care or the standard of practice. Rather, the goal of the article is to encourage lawyers to use best practices in order to limit the risk of exposure to fee disputes, malpractice actions and State Bar complaints.