

Fee Disputes: Resolve Them, Don't Litigate Them

by Anthony F. Troy and Robert A. Pustilnik

View from the Bar

In 1992, a special committee of the Virginia State Bar studied the issue of fee disputes between clients and their attorneys. As a result of the committee's recommendations, the State Bar in June 1993 implemented a Fee Dispute Resolution Program throughout the commonwealth.¹ Though not yet available in all circuits, the program is operating in much of the state, is readily accessible, and is, at \$20, still the best deal in town.

After almost two decades, the program is more important today, in our litigious society. Surveys and research from other states demonstrate that use of the judicial system by attorneys against clients, many times in the same courtroom where they represented them, lead to public disdain toward the legal profession. Litigating fees aggravates those attitudes. Measured against the aspirations set forth in the Preamble to the *Rules of Professional Conduct*, it follows that litigation should be the last resort to a fee dispute. As the preamble reminds us, as licensed professionals we are viewed as public citizens, and our conduct should always conform to the requirements of law — not only in our professional service to clients, but also in our own business and personal affairs. It is our duty to always seek respect for and improvement of the law. Conflicts are best resolved through the exercise of not only professional but also moral judgments.

If these aspirational concepts and strengthening the public's respect for the legal system and the rule of law are not motivational, then an attorney, prior to filing a lawsuit to recover fees, should consider the American Bar Association's conclusion: for every law suit brought, the probability of a malpractice counterclaim exceeds 90 percent.² One major legal malpractice carrier says that "suing clients or former clients for unpaid fees

is usually unproductive and frequently dangerous."³ The same organization, Attorneys Liability Assurance Society, reports that many legal malpractice claims arise from disputes over legal fees. These concerns are why the Fee Dispute Resolution Program was formed almost two decades ago and should be considered by an attorney to recover fees.

Despite these warnings, the fee dispute system is not being fully used. Thus, in 2002 a task force examined how participation in the program could be increased. A mediation component was added to the program and more than fifty attorney and nonattorney mediators agreed to provide free services in fee disputes.⁴ Other changes simplified the program. Frequently asked questions were added to the Fee Dispute Resolution Program Web page at VSB.org.⁵ These improvements and other changes, including providing mediation as well as arbitration services, promote greater use and an expansion of the program.

The program is simple. Volunteer attorneys chair local fee dispute committees made up of attorneys⁶ and laypersons.

The State Bar receives at least one call per day from a client or attorney involved in a fee dispute. The bar refers the caller, or "petitioner," to the chair of the fee dispute committee in the jurisdiction of the attorney involved in the dispute. The cost is \$20, paid by the petitioner at the time the hearing is requested, and is nonrefundable. The chair then contacts the other party to participate in a resolution session. Participation is voluntary and is not tied to the VSB disciplinary system. Fewer than 20 percent of callers to the program follow up on the referrals.

Surveys show that in most instances clients are willing to participate in the programs but attorneys are less willing to do so. Attorneys prefer to litigate, and they know that their clients do not.

Members of the bar choose the setting where they think they have the advantage — a concept inconsistent with the duty to instill respect for the judicial system. They are concerned that a mediation or arbitration process may lead to a reduction in their fee.

Pearl Insurance, a liability carrier, set out a six-step analysis that should be undertaken by any member of the bar who is contemplating suing a client for fees.

Recognizing that, almost always, a motivated client can develop an argument that at least some portion of services fell below some reasonable expectation and standard of care, the six-step analysis is as follows:

- Assess your odds of winning a lawsuit and adjust the amount you are seeking to recover accordingly. If your odds are 80 percent, reduce by 20 percent and re-evaluate whether it is worth pursuing.
- If you believe it is still worth pursuing, re-evaluate your fees. You cannot recover excessive fees, including in contingency situations. Reduce amount accordingly.
- Still think it is worth it? Deduct legal fees and the value of your time and that of others that will be spent pursuing the action and — most likely — defending a counterclaim. Remember that your professional liability insurance may cover some of the costs of a counterclaim defense, but likely will not address expenses related to prosecution of the fee suit.
- Still want to sue? If you want to recover fees and not expenses, deduct an appropriate percentage for taxes.
- Still want to sue? Deduct damage to public relations and good will.

- Still want to sue? Remember that clients often do not pay because they cannot pay. Deduct any amount likely to be uncollectable.

The Fee Dispute Resolution Program has the best deal. It benefits all, eliminates unseemly litigation, and instills confidence in the public about our system of justice. Let's use it.

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View from the Bench

Why would any attorney ever want to bring a fee dispute into the courtroom when the fee Dispute Resolution Program is available? Even if the program were not available, I cannot think of a good reason for asking a court to decide whether a fee is appropriate, or in having the court decide whether the attorney handled a case competently and professionally. If there is a dispute about a fee, there is an unhappy client or former client. If the client is unhappy, there must be some basis for the client's discontent. The client is going to get to tell the judge why the client did not think the attorney earned that fee, or all of it. The judge is going to determine if the client's dissatisfaction is genuine or if it is fabricated. Frankly, that is the only issue before the court in cases involving fee disputes.

Let me digress. In my thirty-five years in practice, I never sued a client for a disputed fee. I was a collection attorney. My firm was in court every week, with dozens of cases. One more case—a fee dispute—would not inconvenience us. It would not take time away from our practice, since we could make the case (and the trial) returnable on days that we were in court. But if the client was unhappy with our services, the result, or the bill, I would not want to have the client tell a judge before whom I practice regularly that my work was insufficient, or that my bill for services was not in line with my client's expectations. The reasons for taking this approach are obvious. If the court ruled that the client

was correct, that would have been the court's way of telling me that I was not all that I should have been, or that I had not done all that I should have done, in that case. How could I ever appear before that judge again, knowing that the judge felt that way about my services in a case that I brought on my own behalf?

How did I deal with disputed fees? I settled the cases for what the client felt my services were worth, even if that was zero, and walked away from the case and the client. There is no amount of money that I might recover that would justify an unfavorable result before the court in a fee dispute. And, that was before the days of social media, before the era when a client could post his dissatisfaction on my Facebook page, or his; and tell the world how he devastated me in court.

That is not to say that I never sued a client for a fee, or that an attorney should use the judicial process when a client refuses to pay an undisputed fee. In fact, in our practice we represented several firms and handled "fee collection" litigation. Attorney clients never sent us matters that they knew were contested. They apparently used the program for those cases. And, if a debtor who owed money to our client contacted us to contest the fee before suit was filed, we always gave the client the debtor's version of the dispute and let the client determine whether to go forward with litigation. In almost all cases, the attorney client chose not to do so, and we would settle the cases, or return them to the clients to write off, or to go through the Fee Dispute Resolution Program.

In my nine years on the bench, I have had heard fewer than a dozen fee dispute cases. I always offer an alternative of continuing the case and proceeding with the fee dispute program. I give them the brochure for the program and explain how it works. Almost every attorney has expressed a willingness to proceed. Any reluctance was almost always expressed by the client. Ultimately, most of the cases wound up being resolved by the program, and I have only tried a handful of cases involving disputed fees.

In those cases, the attorney almost never wins the entire amount for which he or she sues, unless I determine that the client's dissatisfaction was fabricated. The attorney, however, still must demon-

strate that he had proceeded professionally and diligently, that he had not billed by the hour for unnecessary services, and that the result of the case was not unexpected. This is a difficult burden of proof.

From the bench, these cases present other problems, as well.

A judge—often one who has not been in private practice for many years, if ever—is asked to evaluate the performance of the attorney and the reasonableness of the attorney's hourly rate. What standard can the judge use to determine the quality of service, unless the attorney plaintiff is going to bring expert witnesses into the courtroom in order to set the standard and to show that the attorney plaintiff complied with those standards? After all, the attorney has the burden of proof on each of these issues. This is a substantial burden. In a typical case, the client will claim that the attorney acted without consulting with the client, did things that the client did not want done, or refused to do things that the client suggested—all of which led to the poor result or to the excess billing. How does the attorney overcome this direct testimony? The program's panel of attorney and lay members is in a much better position than the court is to evaluate such claims.

Human nature poses the worst problem. When the attorney and client mediate, when neither is fully satisfied by the result, both think that they have won or substantially prevailed. But, when the attorney wins, in whole or in a large part, in court, the lay party thinks that the system is against him or her, that judges always side with attorneys, and that he has now been wronged twice. A bar complaint is likely, a Facebook posting is inevitable.

Which takes me back to my original question:

Why would any attorney want to bring a fee dispute into the courtroom?

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Endnotes:

- 1 The committee also studied the issues of mandatory written fee agreements and requiring, as a condition of licensure, that attorneys commit to arbitrate all fee

disputes. Neither of these mandatory requirements was recommended, though it was strongly suggested that, as a matter of professional practice, all fee arrangements should be in writing.

- 2 Executive Summary, Committee Proposal for Fee Dispute Resolution Program (1993).
- 3 General information provided to law firms in the ALAS risk retention organization.
- 4 Task Force Report, Attorney-Client Fee Dispute Mediation Program (2002).
- 5 See www.vsb.org/site/public/fee-dispute-resolution-program.
- 6 Attorneys who serve must have been members of the bar for at least five years. Committee members volunteer for three-year terms.