



Legal Tender: How to Resolve (and Avoid) Fee Disputes

It's a fact of life in the legal profession: Clients can and do dispute their legal fees. The results can range from minor (a disgruntled client) to devastating (costly proceedings and malpractice claims).

Certainly, conflict over legal fees can be unwarranted, such as when clients unfairly project their frustrations with legal outcomes on their attorneys. Other times, clients may have a legitimate complaint about the quality and cost of legal services they receive.

Client Psychology 101

Warranted or not, the reality is that poor communication almost always lies at the heart of a fee dispute. Here are a few ways to avoid common issues:

Perceived "guarantees" - Anything that a client perceives as a "guarantee" of the case (outcome, time frame, costs) can come back to haunt you. Avoid placing undue emphasis on your qualifications and prior successful outcomes.

Unrealistic expectations - The client brings misperceptions to the table - everything from the probability of success to the scope (and cost) of the matter. It's your job to manage these expectations. Do that by explaining what you can and cannot do for the client - this includes the legal assistance you can provide, the limitations of your representation and potential pitfalls the client may face during the course of the representation. Likewise, help clients clearly understand what a positive outcome looks like (e.g., avoiding trial, limiting damages, etc.).

Lack of progress - Delays, continuances and clogged dockets are a common source of friction and misunderstanding with clients. While attorneys can often do little to speed the wheels of justice, they can educate clients on what to expect and then

regularly update them on the status of their matter. Talk to clients even when there is no news to share.

Failure to communicate - Attorneys have a legal and ethical obligation to clearly communicate with clients. Yet, many mistakenly assume a terse e-mail here and there covers that obligation. To keep the lines of communication open, add some verbal communication (e.g., face-to-face meetings, conference calls) to your mix of e-mails, faxes and memos.

Start at the Beginning

Avoiding fee disputes requires focus and attention throughout the entire course of a legal matter - even before you actually accept the representation of a client. Consider these pointers:

Evaluate your fee. Most courts and state bars have established factors for determining the reasonableness of fees - everything from the time and labor expended to the novelty and difficulty of the questions raised, and even the undesirability of the case within the legal community. Objectively examine your fee in light of these factors and then have a candid discussion with the client (be sure to document the discussion).

Listen carefully. Here, your challenge is to identify the client's needs, goals and expectations, and confirm that you understand them correctly and have the expertise to satisfy them. Just as important, listen to what is not said - sometimes what clients don't articulate is even more telling.

Prepare a thorough engagement letter. Even if you have a long-standing relationship with the client, have him or her sign an engagement letter as well as a written fee agreement. The fee agreement should cover the following areas in detail:

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- The scope and nature of the representation.
- What you agree to do (and, in appropriate cases, will not do).
- The rates charged for any attorneys or legal assistants who will work on the matter.
- A general description of other costs and charges the client may incur.
- Billing frequency and payment terms.

Once Underway

Simply covering the basics of client service - regular progress updates, clear communication and timely attention to the client's case - will prevent many fee disputes once work is underway. For example:

Maintain accurate time records. Remember that if a fee dispute proceeds to a formal hearing, the burden rests on the attorney to prove the reasonableness of the fee. Of course, hourly rate agreements call for accurate, descriptive time records, and can go a long way toward supporting your fee. Avoid so-called "block-billing" practices, where a one-time charge is assigned to multiple tasks ("Legal research; telephone conference with expert witness; meeting with client and associate - 5.00 hours").

Likewise, descriptions of the time spent in a contingent fee or flat fee case are important when defending a fee dispute. This is especially true if you later need to establish a quantum meruit claim for payment of the fee, or if you need to establish your share of the contingent fee.

Send written reports. Get in the habit of providing simple reports outlining the progress of the case and the nature of the work performed. Even a quick, bare-bones letter or e-mail can negate a client's claim that he or she was not advised of certain matters.

A simple way of keeping clients up to speed on issues is to "cc" them on relevant correspondence sent to opposing counsel. Sometimes a client may not wish to receive updates on certain items or request that you notify them only of specific events.

In such cases, be sure to clearly document those instructions in a client letter.

Bill at regular intervals. Establish a mutually agreeable billing cycle and then bill promptly, while the work is still fresh in everyone's mind. Here, an itemized bill can be a powerful tool for summarizing completed work - research, meetings, pleadings, etc. In contingent cases in which no itemized bills are generated, regularly updating the client is even more critical.

After the Fact

There's no time for complacency as a client matter winds down. In fact, it may be best to over communicate at this critical juncture:

Talk it through. Take the time to discuss the outcome with your client. Provide explanations for any results that did not meet the client's expectations, and answer any questions or concerns the client has about the fee. If concerns remain, suggest that the client review the fees with another attorney.

Notify the client when the matter concludes. It happens with surprising regularity, but fee disputes can arise when a matter is actually concluded but the client believes there is still work to be done. Once the case is finished and you have met the agreed-upon terms of your representation, inform the client - in writing - that you have completed the work and are closing the file.

Reduce or write off fees when necessary. Ensuring that your fee is reasonable sometimes requires write-offs or reductions. When this happens, make sure the client knows about the reduction.

Close the Case

After expending hours and effort on a case, you certainly don't want to worry about collecting your fee. Take steps now to reduce the potential for fee disputes by clearly communicating with your clients and carefully evaluating your billing practices.

We can help you document fee arrangements to avoid questions and disputes. Please contact our office for guidance.

Structured Fee Settlements: An Attorney's Best Friend?

Structured fee settlements are often an effective way for attorneys to defer income taxes on contingent legal fees. Similar to structuring a claimant's settlement, fees can be paid over a specified number of years. Best of all, any contingent fee can be deferred - not just those from personal injury cases.

Structured properly, such an arrangement can provide tax relief as well as create a stream of secure and stable tax-deferred income to meet financial objectives, which may include:

- Covering overhead expenses
- Smoothing out practice cash flow
- Making quarterly tax payments
- Providing funds for a future buy/sell agreement
- Paying college tuition
- Funding retirement

The case of *Richard A. Childs, et al. v. Commissioner of Internal Revenue* clearly establishes a taxation precedent. Attorneys who defer the payment of their fees from a settlement, judgment or verdict pursuant to a structured settlement arrangement are not required to include the fees in their taxable income until the fees are actually received.

In essence, the claimant agrees to pay the attorney's fee over a period of time and then transfers funds to an assignment company, which purchases investments to fund future periodic payments (often, a life insurance annuity contract).

Timing Is Everything

Perhaps the most critical aspect of preserving the potential tax benefits of any structured attorney fee arrangement is understanding what constitutes "receipt" of the funds.

Fundamentally, the ability to structure fees on a tax-deferred basis is eliminated when an attorney takes receipt or possession of any portion of the settlement that is intended for structuring. This generally occurs one of two ways:

1. Actual receipt - The funds are transferred or deposited into the attorney's trust account.

2. Constructive receipt - As a result of a poorly drafted settlement document, the attorney receives "an unqualified vested right to receive immediate payment" (*Childs, supra, quoting Martin v. Commissioner*).

Here, it is critical to note that a structured arrangement provides for treatment of the fees on a tax-deferred, not tax-exempt, basis. Ultimately, the attorney must pay taxes on fees once they are received as income. This is regardless of the nature of the underlying settlement (taxable or non-taxable).

Elements of a Structured Arrangement

Ultimately, an attorney must agree to a structured fee prior to the case being resolved (i.e., before a client signs documents and checks are issued). Ideally, this is spelled out in the client's contingency fee agreement and specifies that the attorney can accept all or a portion of fees earned in the form of periodic payments. All documents should clearly indicate that the attorney has no right to accelerate any of the payments, avoiding any argument that the attorney had constructive receipt of the funds.

Attorneys can structure their fee regardless of whether clients choose a structured settlement. Options for structuring the fee include:

Plaintiff income stream - The timing and amount of the attorney's structure payments can be completely independent and does not have to correspond with those of the plaintiff.

Individual attorney vs. law firm - Payments can be made to either the law firm or an individual attorney. This critical decision must take multiple factors into consideration: how the firm is incorporated, whether employment agreements are in place, etc.

Plaintiff cash-out - An attorney can structure a fee on a stand-alone basis if the plaintiff does not want to participate in a structured fee settlement.

Multiple attorneys - In the case of multiple plaintiff attorneys, a structured fee arrangement is still possible. The fee is simply split among the attorneys, with each having the ability to structure his or her

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own unique payment schedule. Furthermore, not every attorney has to structure his or her portion.

A Pension Plan Alternative?

Increasingly, attorneys and law firms are utilizing structured settlements to fund retirement. This may enable you to effectively enjoy the benefits of a qualified pension plan without the associated administrative and regulatory burdens.

For example, there is no requirement that ongoing contributions be made and no need to wait until age 59½ before receiving distributions. And structured

legal fees are not subject to annual qualified pension plan contribution limits, making them a good option for attorneys who are nearing retirement and need to catch up on their retirement savings.

Our experienced professionals can help you evaluate critical factors and determine whether a structured fee settlement is appropriate.

FOREIGN ASSET REPORTING UPDATE: IRS Moves Aggressively on Offshore Accounts

In its continuing efforts to prevent foreign income tax evasion by U.S. taxpayers, the IRS has implemented a new reporting measure. IRS Form 8938, *Statement of Specified Foreign Assets*, requires details of any foreign financial asset (account or individual financial asset) that exceeds these minimum thresholds:

Single Individual: \$50,000 on the last day of the year or \$75,000 any time during the year.

Married Couple: \$100,000 on the last day of the year or \$150,000 any time during the year.

Effective for tax year 2011 reporting, taxpayers with foreign financial assets valued over these limits will be required to file Form 8938 annually. Note that Puerto Rico and other U.S. possessions are considered "foreign" for this purpose. Note also that the regulations specifically state that the fact that foreign law makes it illegal to file this form is *not* reasonable cause for not filing.

To comply, taxpayers must trace foreign asset income, deductions and credits from Form 8938 to where the same are reported on the tax return. As it did with Switzerland-based UBS AG, the IRS is actively working with a number of major banking institutions to secure the names of depositors who hold offshore accounts.

One means for reducing a taxpayer's exposure to criminal prosecution is through the IRS's Voluntary Disclosure (VD) program. However, any VD procedure must be initiated before the IRS has begun civil or criminal investigations, and before it has received specific information about the taxpayer from a third party.

Our accounting professionals have extensive experience with the complex regulatory provisions governing the reporting of foreign assets and bank accounts.

Mueller Prost PC is a team of CPAs and business advisors headquartered in St. Louis. From humble beginnings on a ping-pong table in 1983, the corporation has grown into one of the leading CPA and business advisory firms in the area, operating out of two locations with more than 80 staff members. By **Advising with Vision**[®], we offer clients new and unique ways to look at their businesses. Our forward-thinking CPAs and advisors stand ready to provide depth of expertise, strategies and resources required to help clients set and achieve their goals at every stage of the business lifecycle. As a member of both the PKF North America and PKF International networks (associations of independent CPA firms), our team has the ability to leverage national and global resources when needed to benefit client engagements.

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