

Fee Disputes

In my discussions with lawyers around the state during bar functions or continuing legal education presentations, I've learned that there are many myths, or at least misunderstandings, about what types of complaints the Office of the Director of Lawyers Professional Responsibility investigates or doesn't investigate, and about what types of matter can result in discipline. One of the most enduring "myths" about the lawyer discipline system in Minnesota is that we do not get involved in fee disputes.

Now, on one simple level, the statement about fee disputes is true. Rule 1.5, Minnesota Rules of Professional Conduct (MRPC), states that a lawyer shall not charge or collect an unreasonable fee or an unreasonable amount for expenses. The rule then sets out a nonexclusive list of eight factors that may be applicable in determining the reasonableness of a fee.¹ If we take the language of the rule completely at face value, any complaint about a lawyer's fee could involve a potential violation of this standard and thus require an investigation to determine whether the lawyer's fee indeed was reasonable.

The Lawyers Professional Responsibility Board has adopted guidelines that give the Director's Office discretion to forgo investigation certain types of complaints that may otherwise require investigation.

One of these guidelines authorizes the summary dismissal of a complaint, or part of a complaint, on the grounds that the allegation is only a fee dispute better resolved through fee arbitration or other civil action. When such allegations are dismissed, the Director's Office provides contact information for the complainant's local arbitration

committee. District bar associations maintain fee arbitration panels to hear and resolve such fee disputes. If there is a point of contention concerning fee arbitration, it is that the process is voluntary on the lawyer's part, not mandatory.² A pilot program requiring lawyers to participate in mandatory fee arbitration was adopted by the Minnesota Supreme Court for three district bars, including Ramsey County, but was allowed to lapse in 1999. I'm not aware of any movement to revive the concept.

For the Director's Office, the difficulty in applying the Board's summary dismissal guideline is defining what constitutes only a fee dispute, as opposed to being some other fee-related issue that requires investigation and may result in discipline or is an integral part of a complaint alleging several potential violations.

The simplest example of a fee dispute is a complaint from a client that alleges that a lawyer's services were not worth what was charged. This could refer to the lawyer's hourly rate, but more likely is concerned with the overall fee being charged. The "not worth it" aspect usually indicates that the results achieved were less than what the client anticipated. At the other end of a basic spectrum, charging a fee that exceeds the amount that is in controversy in a matter, especially without clear approval from the client, at least raises a flag as to the reasonableness of the fee. Beyond such extreme examples, however, the line between a fee dispute that is not investigated and a legitimate issue of potential misconduct can get murky. Not every dispute about fees is a fee dispute.

Yelling "Fee Dispute"

Many lawyers seem to believe that if a complaint is lodged against them by a current or former client, all the lawyer needs to say in reply is "fee dispute," and the matter should magically go away. In particular, this response is frequently heard whenever a complaint is filed by a client who has either not paid their bill in full or who is requesting a refund of already paid fees. Many such complaints, however, allege other misconduct that may provide a valid reason why the client believes the

fee was inappropriate. For example, the complaint may allege a lack of diligence or communication, missed court deadlines, or a breach of confidentiality. Maybe the allegation is that the lawyer improperly withdrew on the eve of trial. The client plainly is dissatisfied with the services the lawyer provided, perhaps legitimately. Should it come as a shock that in such circumstances the client does not feel they should have to pay for the poor service and representation they received? Or if they have paid, that they feel they deserve a partial refund? Claiming that the complainant is just trying to evade paying the bill, and therefore all their allegations must be discredited, is hardly a fair method of determining the validity of the allegations. That is not to deny that complaints may be filed by a client in retaliation when a lawyer begins actual collection efforts on an unpaid account receivable, but while that fact certainly may go to how the complaint is viewed or how the complainant's credibility is viewed (if credibility is material), by itself it will not eliminate the possibility that misconduct may have occurred.

There are also many fee-related issues that do not fall under the "fee dispute" rubric. A complaint that alleges that a one-third contingent percentage fee is unreasonable does not raise an investigable issue. A claim that, in a case involving that same contingent percentage fee, there was no written fee agreement, however, will be investigated and likely result in discipline, since Rule 1.5(c), MRPC, requires all contingent fee agreements to be in writing and signed by the client. Again, claiming in response that the matter is a fee dispute is immaterial.

Another often overlooked, or at least misunderstood, aspect of charging reasonable fees relates to an attorney's billing rate for legal work or expenses. An attorney may at various intervals wish to increase her standard hourly billing rate, for example. Rule 1.5(b), MRPC, requires that any changes in the basis or rate of the fee or expenses must be communicated to the client before being imposed, so that the client can determine whether to continue representation with the lawyer under a revised agreement.



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Disputed Funds in Trust

Another type of complaint that involves a dispute about fees that can result in disciplinary problems for lawyers concerns Rule 1.15(b), MRPC, which substantially deals with safekeeping client funds in a trust account, and which in part states that,

If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the

disputed portion shall not be withdrawn until the dispute is finally resolved.

Failure to comply with this requirement and maintain the funds in trust until the dispute is resolved is a disciplinary matter, although a part of a legitimate fee dispute. Since it is the lawyer's claimed fee that is at issue and being held in trust, the lawyer should be motivated to resolve such a fee dispute matter promptly so as to distribute the funds.

Conclusion

Lawyers can avoid fee disputes and most complaints about an attorney's fees. A written fee agreement, even in matters in which one is not required, is always a wise idea. Clearly spelling out rates and billing practices can eliminate many misunderstandings with clients about fees—as will regular communication throughout the representation so that clients understand the need for certain work and the cost involved. ▲

Notes

¹ Rule 1.5(a), MRPC states:

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

² Rule 8.4(i), MRPC, does make it misconduct for an attorney to agree to binding fee arbitration and then refuse to honor a final arbitration award.

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