



Successful Management and Collection of Fees

**A Malpractice Insurance
Company's Perspective**

Author:

Michelle Lore

Editorial Board:

Eric T. Cooperstein

Linda J. Hay

Charles E. Lundberg

Vincent A. Thomas



MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

PROTECTING YOUR PRACTICE IS OUR POLICY.™

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A Malpractice Insurance Company's Perspective

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333 South Seventh Street
Suite 2200
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www.mlmins.com
Phone: (800) 422-1370
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About the Author: Michelle M. Lore, Claim Attorney



Michelle M. Lore, J.D., joined Minnesota Lawyers Mutual as a claim attorney in 2011. Before joining MLM, Michelle spent 11 years as an associate editor for Minnesota Lawyer, a publication that serves the state’s legal community. Prior to joining Minnesota Lawyer, she was an attorney in private practice.

From 1994-1997 and again from 1999-2000, Ms. Lore was employed with the Twin Cities firm of Horton and Associates, where she litigated employment discrimination claims. From late 1997 through much of 1998, Ms. Lore worked for Colosimo Patchin Aronson and Kearney in Virginia, MN. Ms. Lore attended William Mitchell College of Law in St. Paul, MN, and obtained her law degree in 1994.

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Eric T. Cooperstein, *Eric T. Cooperstein Ethics Consulting & Representation*



Mr. Cooperstein has a solo practice devoted to ethics consulting and representation, a product of his work as a former Senior Assistant Director of the Office of Lawyers Professional Responsibility, where he worked from 1995 to 2001. Mr. Cooperstein defends lawyers against ethics complaints, provides advice and expert opinions and represents lawyers in fee disputes and law firm break-ups. He is also a frequent writer and speaker on ethics and law practice issues. Mr. Cooperstein is chair of the Rules of Professional Conduct Committee for the Minnesota State Bar Association, a member of the Association of Professional Responsibility Lawyers, and served from 2007 to 2008 on the Supreme Court Advisory Committee to Review the Lawyer Discipline Process. Mr. Cooperstein joined the executive committee of the Hennepin County Bar Association in 2010 and will serve as its president in 2013-2014.

Linda J. Hay, *Alholm, Monahan, Klauke, Hay & Oldenburg, LLC*



Ms. Hay is a shareholder in the firm of Alholm, Monahan, Klauke, Hay & Oldenburg, LLC. Ms. Hay actively defends professional liability cases. She has tried numerous cases to successful verdict and has also handled numerous appeals in this area. Ms. Hay regularly presents seminars on risk and claim management of professional liability cases and regularly publishes in the field as well. Ms. Hay is a member of the Board of Directors of the Illinois Association of Defense Trial Counsel, and was editor-in-chief of the IDC Quarterly, the legal journal of the Illinois Defense Bar, in 2005-2006.

Charles E. Lundberg, *Bassford Remele*



Mr. Lundberg has been a member of Bassford Remele for more than 30 years, practicing primarily as a “lawyer’s lawyer” – advising attorneys and law firms on matters involving legal malpractice, legal ethics and other areas of the law of lawyering. He served for 12 years on the Minnesota Lawyers Professional Responsibility Board, including six years as board chair. He also has been recognized as one of the leading appellate attorneys in Minnesota and elected as a Fellow in the American Academy of Appellate Lawyers – an invitation-only group of outstanding lawyers whose practice focuses substantially on appeals. Mr. Lundberg has been named a Top 100 Super Lawyer; Top 10 Appellate Super Lawyer; and a Leading American Attorney; and one of the Best Lawyers in America in the fields of Appellate Law and Legal Malpractice Law. He also teaches a class in Legal Malpractice Law at the University of St. Thomas Law School.

Vincent A. Thomas, *Gustavus Adolphus College*



Mr. Thomas serves as a member of Minnesota Lawyers Mutual’s Board of Directors. He previously served as a member of the Minnesota Lawyers Board of Professional Responsibility for eight years, the last four as vice-chair. Mr. Thomas practiced law for nine years at Briggs and Morgan in the areas of public finance and municipal law. He left Briggs and Morgan in 1995 to become the Assistant Dean of Students, and an Adjunct Professor of Law at Hamline University School of Law. He taught Professional Responsibility at Hamline from 1996-2005. In 2006, Mr. Thomas joined the University of St. Thomas School of Law administration and served UST as assistant dean for Student and Multicultural Affairs and Adjunct Professor of Law for four years. Mr. Thomas currently serves as the Internship Program Director for Gustavus Adolphus College in St. Peter, Minnesota, and as a volunteer mentor at the Hamline University School of Law.

ABOUT MINNESOTA LAWYERS MUTUAL

Founded in 1982 by members of the Minnesota State Bar Association, Minnesota Lawyers Mutual Insurance Company (MLM) provides professional liability insurance and risk management services for the legal community. MLM is committed to being an efficient, accountable and permanent practice management resource. Additionally, we have returned a dividend to policyholders every year since 1987.

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There are literally hundreds of books and articles covering just about every aspect of law practice management. So, why write another one? And, why should you read it?

Minnesota Lawyers Mutual has been in the risk management business for 30 years and we've seen plenty of well-planned, well-crafted and wonderfully maintained risk management materials. Unfortunately, we've also "paid the price" in instances where an insured attorney simply wasn't familiar with a particular risk management concept or didn't know "where to go" to find that information.

So, Minnesota Lawyers Mutual has developed a Law Practice Management Booklet Series written from the perspective of an *errors and omissions insurance company*. Our goal is to provide a single source of accurate, practical information and best practices for everything from conflict of interest, to client communications, to law office technology, with the additional commitment to keep it current and accessible.

By compiling all this information into checklists, avoidance tips and examples, we've turned a mountain of material into convenient, easy-to-scan, simple-to-use "chunks" of information organized by topic. In addition, you'll find reasonably detailed real-life experiences to ponder.

Using the tools in this book will help you "cover all the bases" from a risk management perspective. Use the checklists and tips as guidelines, not requirements set in stone. At the same time, understand that each of the items is included in this book for a particular reason. Hopefully, you'll be able to match your needs with our material and in doing so, avoid potential malpractice claims.

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The successful management and collection of fees is an area where the implementation and use of proper procedures pays huge dividends. It's also an area where the risk of a malpractice claim or ethical complaint can be the greatest. As a result, it's worth taking the time to consider and put into place solid systems for billing and collecting fees.

Unfortunately, too many lawyers don't implement good billing practices and procedures, and when they end up with clients who don't pay, they immediately jump to the most drastic recourse possible – suing for their fees. As will be discussed in more detail later, fee suits inevitably spur malpractice counterclaims and ethical complaints against lawyers. While many of these claims are completely lacking in merit, it can take quite a bit of time and money, not to mention personal and professional stress, to prove that. Some lawyers who have sued their former clients to recover fees have found the personal and professional cost to defend the malpractice claim far outweighed the fees they were trying to recover in the first place.

By successfully managing and collecting fees before they build up, lawyers will increase the likelihood of avoiding the necessity of suing to recover fees, and avoid altogether the related potential malpractice lawsuit or ethics complaint.

CLIENT SCREENING

Successful fee management begins very early on – with client selection. For lawyers who have just hung out their own shingle or those that are struggling to find work, it's all too easy to take on any client that walks through the door. It's a bad idea.



Many fee disputes, and the nearly inevitable malpractice claim that follows, can be avoided if attorneys learn to properly screen prospective clients before accepting representation.

Examine Skills

ABA Model Rule 1.1 requires lawyers to provide competent representation to their clients. Accordingly, the first question in deciding whether to accept representation should always be whether the attorney has the legal knowledge and skill to be able to handle the particular matter.



Stop and review ABA Model Rule 1.1 on page 18

Some solo and small firm practitioners, either out of necessity or interest, are tempted to move beyond the practice areas where they have become comfortable. While it may be OK to do so, they should tread carefully. The comment to ABA Model Rule 1.1 states that in considering whether to take on a case in an area they are not familiar with, attorneys should consider:

- the relative complexity and specialized nature of the matter;
- the lawyer's general experience;
- the lawyer's training and experience in the field in question;
- the preparation and study the lawyer is able to give the matter; and
- whether it's possible to refer the matter to, or associate with, a lawyer of established competence in the field in question.

Many fundamental legal skills – analyzing precedent, evaluating evidence, drafting legal documents – transcend discrete practice areas. The key for practitioners who want to delve into new areas is to identify the gaps in their own competence and take the steps necessary to reach the requisite level of competence. In some cases, it may be as simple as doing additional research, while other cases require consultation with attorneys who have the knowledge and experience they lack.

Determine Client Expectations and Ability to Pay

Lawyers must also consider the prospective client's expectations concerning the matter. Does the client already have an expectation about the dollar value of the case or the length of time it will take to resolve the matter? Does the client have an expectation as to what he or she is willing to pay to prosecute or defend the matter? These can be difficult questions, but it's important they be asked early on.

One way to obtain this information is to have the potential client complete an intake form. Asking clients to describe what they would like the representation to accomplish allows the attorney to better understand the reasonableness of the client's expectations. Moreover, asking clients what they expect to pay for the legal services provided allows the attorney to determine up front whether a balance exists between the desired outcome and the likely legal bill.



Unreasonable expectations can be a red flag and the risk of not getting paid for your work may outweigh any potential benefits.

Attorneys should also determine at the outset whether the client can afford their services. It can be awkward, but in addition to asking clients up front what they expect to pay in legal fees, attorneys should ask whether they will be able to afford the fees and how the client will pay them – cash, check, credit card? If the lawyer gets the sense that the client will be unable or unwilling to pay, the lawyer should decline the representation.

Attorneys also need to be cautious when the potential client is simply changing lawyers. Find out why, even if the questions are difficult. Was the client dissatisfied with prior counsel? Was money an issue? It's a good idea to find out if the client has had fee disputes or made

grievances against other lawyers in the past. Be cautious of expressing criticism of past counsel, especially if there have been past fee disputes, as those types of comments will only serve to foster an overall mistrust by the client, which could be used against you at a later date. It is also prudent to obtain consent from the potential client to discuss the case with prior counsel, keeping in mind the confidentiality considerations contained in ABA Model Rule 1.6.



Stop and review ABA Model Rule 1.6 on page 19

Above all, lawyers should trust their gut. An attorney's first impression about the client and the case is often the best indicator of whether it will be a successful venture.

COMMUNICATION

Regular and clear communication is integral for good client relations – something lawyers must strive for in every aspect of the representation, including billing and fee collection.

Clients that have good relationships with the firm or the attorney handling their matters are less likely to sue for malpractice or bring an ethics claim.

Agree on a Reasonable Fee

Prior to initiation of the attorney-client relationship, attorneys should discuss and negotiate a reasonable fee with the client. ABA Model Rule 1.5 is the primary regulatory guideline outlining proper fee arrangements and billing practices. The rule addresses several aspects of fee setting, including contingency fees, prohibited fee arrangements, fee sharing, and whether a fee is reasonable.



Stop and review ABA Model Rule 1.5 on page 18

Throughout the rule, a few themes are prevalent. Legal fees, whether they are hourly, fixed, contingent, or shared with lawyers outside the firm, need to be reasonable. While determining what is reasonable can sometimes be difficult, the rule does provide some factors to be considered when making the determination, including:

- the difficulty of the matter;
- the fee that is customarily charged for similar services;
- whether the work will preclude the attorney from working on other legal matters;
- the amount involved and the results obtained;
- the nature and length of the relationship with the client; and
- the experience of the lawyer performing the service.

It's a good idea to take a close look at these factors when determining if a fee is reasonable since they are likely to be referred to by both the lawyer and the client if the parties find themselves in a legal fee dispute.

If after some negotiation, the attorney and potential client don't agree on what is reasonable, it's best to allow the client to find another lawyer.

Put Your Fee Agreement in Writing

Once the lawyer and client agree on the fee arrangement – whether it's an hourly rate, a flat fee, a contingency fee or some other fee method – the arrangement should be documented in a representation agreement or in a retainer letter. While ABA Model Rule 1.5 stops short of requiring a written fee arrangement for every matter, it is nonetheless preferable in all cases. (Notably, the rule does require a written fee agreement for legal services involving contingent fees and fee sharing. In some states, a writing is also required for availability fees and flat fee arrangements.)

Many of the fee disputes that arise between lawyers and their clients involve disputes over what the fee really was. The easiest method to avoid these disputes is to agree in writing on the terms of the fee arrangement and have the client sign the document confirming the fee arrangement. Both the lawyer and the client should retain copies of the agreement.

The fee agreement should also clearly set forth the scope of representation, confirming exactly what it is the lawyer has been hired to do. Absent some definition or limitation on the representation, the client may assume that the representation is a general representation for all purposes.

The agreement should also address the duration of the representation. Without it, an attorney retained to do something like draft a will or an estate plan may have a continuing obligation to advise the client on changes in estate or tax law long after the specific task has been completed. In the litigation context, the time limitation could be a final resolution by settlement or judgment. In the transactional context, it could be the closing of a deal or real estate matter. It should be crystal clear that the representation is not indefinite in duration.

The representation agreement should also provide a proposed billing method and confirmation of how the fee will be paid or collected. It should also clearly incorporate and document anticipated issues with regard to charges, costs, billing and payments, and specify the consequences of nonpayment, including the lawyer's right to withdraw from the representation or suspend work on the matter until bills are paid.



The most effective fee agreements state everything that the lawyer will do for the client and what the client should expect in return.

The agreement need not be the same for each client, but whatever the terms it should be understood and agreed to by each client in writing.



See page 22 for an example of a written fee agreement

Get a Retainer

It's often a good idea to collect a significant retainer from a client up front. This is arguably the most critical part of managing the fee relationship with the client. Collecting an advanced fee payment will help demonstrate that the client is able to pay the fees and will provide a cushion against which to bill. But lawyers must be sure the client understands that it is not an estimate of the cost of handling the entire matter.

The retainer should, at a minimum, cover the lawyer's expected fees at least until the lawyer sends the client the first bill, so that the client is not in the red after one month. Factors for determining the amount of the initial retainer include:

- the amount of work that will be done in the first month;
- whether the client is new or returning;
- whether the client resides locally or out of state;
- how difficult it may be for the lawyer to withdraw if the client does not pay the lawyer's fees; and
- whether the lawyer expects to prepare for a hearing or trial that will consume a significant amount of time.

Another possibility is to require a replenishing retainer, which requires clients to continue to make advanced payments on the lawyer's fees. An effective replenishing retainer should be replenished after each billing statement. The idea is to stay ahead of the client on fees. The replenishing retainer ensures that the client is able and willing to pay the lawyer's fee before the client develops a significant unpaid balance. An alternative is to use the retainer as the equivalent of "last month's rent," which will remain in the lawyer's trust account and only be drawn upon if the client fails to pay a monthly invoice and the lawyer is forced to withdraw.



If difficulties arise in collecting an agreed-upon retainer, be clear with the client on the necessity of sending the retainer. See an example of a retainer collection letter on page 25.

Manage Expectations

The discussion over fees should take place right away and continue throughout the representation. The more upfront the lawyer is on this topic, the less likely it is that problems will develop down the line. Attorneys should manage expectations about the anticipated cost of the proposed representation much the same way they manage expectations about the outcome of the matter.

Similarly, communicate with the client regarding all aspects of the case – good and bad – throughout the life of the case. This will avoid unreasonable expectations on the client's part. On the other hand, if the client has unreasonable expectations, consider how that will impact your future communications and ability to handle the matter appropriately.



Consider sending clients regular updates on their matters. See an example of a monthly status letter on page 26.

BILLING

At the outset, attorneys should be explicit with the client as to their billing practices so as to avoid surprises. If they bill for every telephone call, they should tell the client. Explain overhead costs for mail, faxes and storage of documents that will be billed. Attorneys must also explain the billing cycle and when they expect payment. They should create a clear expectation that they will be paid on time.

Interim Billings

When it comes to getting paid in full and on time, a good rule of thumb is to bill often and regularly.

For hourly attorneys, it's recommended that they send out invoices monthly. Regular monthly billing, particularly if there is frequent and significant activity on the matter, is much preferable to sending the client larger invoices covering several months or waiting until the end of the matter to send an invoice at all. Many fee disputes arise from "sticker shock" when a client receives a bill that is higher than expected.

For lawyers who get paid only after a settlement is reached or the matter is closed, such as a real estate or corporate transaction, it's still a good idea for the client to see what the fees are, or will be, well in advance of the request for payment. Effective avoidance of fee disputes requires that bills actually be sent at some interval regardless of how much activity there is on the file.



Bill often and bill regularly.

When asked, most clients who utilize the services of a lawyer will say the primary motivator for not paying the lawyer was the sense that the amount billed was unfair. Even one small item that affects the client's sense of fairness in an otherwise large legal bill can sometimes be enough to delay payment and jeopardize the good will that the lawyer previously established. By closely following the tenets of ABA Model Rule 1.5, lawyers stand a better chance of having clients who understand the billing process and pay their bills on time.

Detail and Consistency

Clients may not always like getting a legal bill, but if there is sufficient information in the invoice about the legal services performed, they are more likely to consider the bill to be reasonable and to compensate the attorney for the work. To that end, in the description area of each time entry on an invoice, carefully itemize and describe the service performed by the lawyer or the staff on behalf of the client. Even if the lawyer has handled tasks for which he or she has no intention of charging the client, let the client know about the work, how much time was spent on the task, and the fact that the client is getting the service at no charge.

Insufficient time entries:

[date]	Phone call with client	0.3
[date]	Legal research	1.5
[date]	Phone call with opposing counsel	0.5
[date]	Draft motion	2.0

Sufficient time entries:

[date]	Phone call with client re: merits of motion to modify custody	0.3
[date]	Legal research re: modification of custody due to job change	1.5
[date]	Phone call with opposing counsel re: possible motion, discuss stipulation, alternate custody arrangements	0.5
[date]	Draft motion to modify custody	2.0

In addition, be consistent with billing procedures and payment expectations. When clients are late in making a payment, lawyers should contact them right away and be direct about their expectations. Often, once clients know that it's important, they will pay on time. They may also need to be reminded to adhere to the payment schedule in order to continue receiving legal services.

Note that most jurisdictions allow lawyers to accept payments by credit card. Individual jurisdictions may have rules, however, regarding whether advance fee payments can be made directly to the trust account or whether the payments should be deposited in an operating account. Jurisdictions may also vary in whether lawyers are allowed to charge the client for percentage or flat rate fees that the lawyer is charged by the credit card provider.

Finally, while charging interest for overdue accounts is an option in many jurisdictions, note that the best practice is to simply keep an eye on the accounts receivables.



A critical administrative step in managing any successful business, including a law practice, is to keep the receivables current, since the older the receivable the less likely it will be collected.

Lack of action in this area only compounds the problem, as more small bills grow into one large amount due. Often the total amount due grows until paying it off becomes a very significant burden. This problem could be avoided by quicker action when amounts due are smaller and more affordable.

Ultimately, the best way to manage the risk of fee suits is to be proactive and reduce the likelihood of building up unpaid accounts receivables. That requires effective communication with the client at the outset regarding money matters, consistent and timely billing, swift follow-up when trouble is spotted, and careful judgment about which fees claims to pursue and which to forgo.

FEE DISPUTES

Some lawyers do a good job of documenting their fees and regularly sending bills, but a poor job of following up to ensure those bills are paid.

A good approach to avoid this problem is to have a pre-set time for follow-up, an actual calendar control date and reminder, on an outstanding invoice. An appropriate rule of thumb is a 30-day follow-up on an unpaid bill.



See pages 27-28 for examples of 30-day and 60-day follow-up letters

So what if, despite the attorney's best efforts, a client has fallen behind on payments or has even quit paying altogether? The sooner the lawyer identifies and addresses the issue, the better. (Note that what a lawyer should never do in this situation is keep the client's file hostage. A lawyer may not keep the case and the client and refuse to do any more work until the lawyer is paid.)

The first step the unpaid lawyer should take is to talk to the client and determine why he or she has fallen behind. This contact enables the lawyer to determine if the client has issues with the invoice or the lawyer's services or whether the failure to pay the invoice is a simple oversight or an intended delay. If there are concerns over the bills, the lawyer should address them. If it is merely an oversight, then the reminder from the lawyer is appropriate; if it's intentional, then the lawyer should discuss what the limitations are and how they might be addressed. Rather than immediately deciding to file suit in this situation, lawyers should consider other alternatives.

Note that using non-lawyer assistants to call clients about unpaid bills is perfectly acceptable. The assistant is less likely to get emotional about the unpaid bill than the lawyer and the client may feel more comfortable sharing a billing concern with the assistant than with the lawyer.

Set Up a Payment Plan

One option for dealing with a client who has fallen behind is to work with the client to formulate an alternate payment plan. The plan can include a breakdown of the total bill into monthly or even quarterly payments – whatever makes sense to both the lawyer and the client – over a specified period of time. Many times, a payment plan is a viable alternative, particularly in cases where the client doesn't dispute the bill, but is just having difficulty paying it.

Reduce the Bill

Sometimes, clients won't pay simply because they believe the bill is too large. Obviously, if the client signed an engagement letter agreeing to the fee to be charged, the lawyer is under no obligation to write down

an invoice. Nonetheless, reducing the client's bill is an option, one that can be used on its own or in conjunction with other options, such as a payment plan, in an effort to get the client to pay.

In some instances, the reduction of a disputed invoice is totally appropriate. The lawyer should ask whether he or she has the skills and experience to justify the fee charged, as well as whether the client understands the amount and nature of the fee and the work done to justify it. If the answer to either question is no, then a reduction in the invoice is likely warranted. Remember that usually what is being discussed is not the result of a matter but the value that the client attaches to it.

Some lawyers take the approach that once an invoice is sent to a client, any dissatisfaction on the part of the client is enough for them to write it down to an amount the client believes is appropriate. While no lawyer wants to see that happen, the advantage to such an approach is that it can proactively prevent a problem that lawyers don't want – unhappy clients who don't pay their bills.

Terminate the Representation

When unpaid fees and expenses are accumulating, and the attorney is beginning to sense there is little likelihood of recovery, it's time to consider terminating the attorney-client relationship. It only makes sense to cut losses short rather than allow them to continue. In fact, many attorneys will withdraw from representation as soon as the client gives some indication at all that they are not going to live up to their fee agreement.



Stop and review ABA Model Rule 1.16 on page 20

ABA Model Rule 1.16 (b)(1) allows a lawyer to withdraw from a matter for almost any reason if it can be accomplished without having a materially adverse effect on the client's interests. Generally, however, absent a situation where a lawyer must withdraw because of a conflict or because continued representation might otherwise force the lawyer to violate other rules, a lawyer should not withdraw, or even threaten to withdraw, from a matter on the eve of trial. Such action would likely leave the client without adequate time to obtain substitute counsel.

Note that Rule 1.16 (b)(5) specifically allows a lawyer to withdraw from representation if the client “fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.” The comment to the rule makes it clear that a lawyer may withdraw from the representation if the client refuses to abide by the terms of the fee arrangement contained in the representation agreement. It should be emphasized that the lawyer must give notice to the client; moreover, it is preferable that the lawyer do so in writing because the prospect of a dispute or complaint about the lawyer may easily arise from the withdrawal.

The best way to withdraw from representation is to do it honestly and with as much advance notice to the client as possible. Moreover, the lawyer should take whatever steps are necessary to mitigate the consequences to the client of his or her withdrawal. ABA Model Rule 1.16 (d) specifically states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

When withdrawing from representation before a client’s matter is completed, attorneys are advised to carefully review and follow the rules of their particular jurisdiction. In many states, court approval or notice to the court is required, particularly in pending litigation matters.

An option for collecting unpaid attorney fees after the representation has been terminated is to use a collection agency. Many jurisdictions authorize lawyers to utilize an outside collection agency to handle past-due accounts, and to disclose the identity of the client, the client’s last known address and telephone number, and the amount due. Generally, the disclosures must be the minimum information necessary for the collection effort. An advantage of using a collection agency is that it avoids an emotional confrontation between the lawyer and the former client. A lawyer would likely want to use a collection agency that would

not engage in any improper or harassing conduct that could come back to harm the lawyer. Lawyers who decide to utilize a collection agency to attempt to collect unpaid fees should refer to and become familiar with the specific rules in the jurisdiction where they practice.

Arbitrate/Mediate

Some attorneys include language in their retainer agreements relating to the handling of fee disputes should they arise. That may include a provision requiring fee dispute arbitration or mediation, although attorneys must pay close attention to the specific rules of their jurisdiction in this regard. Some states offer or even mandate participation in some type of fee arbitration or fee dispute resolution system in the case of fee disputes between lawyers and their clients. Attorneys should be aware of the rules that govern fee disputes or opportunities for resolution that may be available in the particular jurisdiction where they practice.

The advantage of arbitration or mediation is that it generally shifts the focus from *whether* the lawyer collects to *how much* the lawyer collects. Many attorneys believe that the trade-off for avoiding the risk of a counterclaim for legal malpractice is a discount from the amount of fees sought.

Sue for Fees

The last option, and one that is generally not advisable, is to sue the client for the outstanding fees. It's a step that is not to be taken lightly. While there is no ethical or procedural rule against suing a former client for outstanding legal fees, in most cases, it's just not a good idea. As noted previously, a significant number of malpractice claims and ethical grievances are filed in response to an attorney's attempt to collect unpaid legal fees.

Allegations of poor legal work tend to materialize when clients feel attacked by their former lawyer in the form of a lawsuit to recover fees, even if the clients agree that the fees are owed. Moreover, because a malpractice counterclaim is considered a compulsory counterclaim under the rules of civil procedure, the client may feel he or she has no choice but to assert the claim at the time the lawyer files the fee suit.

Countersuing for malpractice is a fairly common strategy to reduce the amount of fees actually paid to an attorney, or to get out of paying for the legal work performed at all. So while many of the claims lack merit, they still take time and money to defend and cause a great deal of personal and professional stress.

Even if a counterclaim or ethics complaint is simply a tactic to leverage a bill, because it constitutes a suit against a lawyer, it must be reported to the lawyer's malpractice carrier, creating an added headache for a lawyer who just wants to get paid for his or her work. Moreover, the counterclaim, even if successfully defended, must also be reported on future applications for professional liability insurance that ask lawyers whether a claim has ever been made against them.

Before deciding to sue, lawyers must consider the chance of success. While all attorneys believe they earned their fee and that it was reasonable, it's always a good idea to have another lawyer who did not work on the file, preferably a lawyer with some expertise in legal malpractice law, do an independent review of the work done. This peer review of the file should focus on what concerns, issues, defenses or claims might be raised by the client, for example, whether filing of the suit for fees waives a statute of limitations defense to the malpractice claim.

In examining the chance of success, lawyers must consider the result in the underlying representation. Was a good result obtained for the client? It may be more difficult for a client to allege malpractice if he or she received a favorable result in the case. On the other hand, if the case was lost, the client may be even more inclined to pursue a counterclaim and may receive a more sympathetic reaction from the court or a jury if a fee claim is asserted.



Before deciding to sue for fees, carefully consider the chance of success.

Lawyers should also carefully consider whether the amount of money at issue is worth the risks of a counterclaim or not collecting in the end anyway. By the time the lawyer adds the out-of-pocket costs associated with filing a lawsuit to the value of the attorney time invested, the decision to sue over a small amount of outstanding fees doesn't make a lot of sense. Moreover, defending a counterclaim may also cost more

than the amount sought to be collected. If a suit to recover \$10,000 in outstanding fees generates a counterclaim that must be reported on a legal malpractice policy that has a \$10,000 deductible, it may not be worth the trouble. Before deciding to sue for fees, do the math.

There are other considerations as well, such as the amount of time it takes to file and pursue the fee claim. And even if the attorney is able to secure a judgment against the nonpaying client, the client may not be able to pay or the attorney may need to pursue wage garnishment or other time-consuming post-judgment remedies. It doesn't make much sense to take a risk that has only a small chance for reward. An uncollectible judgment means no chance for reward.

Before filing suit for unpaid fees, an attorney should carefully outline the pros and cons of doing so. Consider how the representation of the client will stand up in the face of a counterclaim. Examine the reasonableness of the fees charged. Analyze the likelihood of recovery and consider the amount reasonably expected to be recovered, if any, in the event of a favorable judgment. Also consider the expected costs of the suit, including lost billing time, out-of-pocket costs and the potential loss of good will. Thoughtfully and carefully consider whether the amount at issue is worth the risk of a malpractice or ethics claim. Even a malpractice claim that lacks merit can wreak havoc on a lawyer, both professionally and personally.

Before filing suit for unpaid fees, ask the following questions:

- **Will the representation stand up in the face of a counterclaim?**
- **Were the fees reasonable?**
- **Is recovery likely? And if so, in what amount?**
- **Will the suit be costly in terms of lost billing time, out-of-pocket costs, and loss of good will?**
- **Is the amount at issue worth the risk of a malpractice or ethics claim?**

CONCLUSION



Lawyers should set expectations regarding the payment of fees early on in their representation of clients. Most fee disputes can be avoided by effective communication about this often difficult topic.

Effective communication boils down to:

- communicating and agreeing on the fee before representation;
- written confirmation of the fee with the client;
- regular communication about earned fees through consistent or interim billing; and
- timely follow-up when bills have not been paid.

For lawyers who consistently follow these steps, the need to ever sue a client for fees rarely arises. Ultimately, the key to avoiding fee disputes is the successful management and collection of fees before they build up.

***NOTE:** Much of the information for this practice management booklet was gathered from various articles and pamphlets previously prepared by MLM personnel.*

ABA Model Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA Model Rule 1.5 Fees

(a) 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.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue

to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

ABA Model Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests

or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA Model Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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ENGAGEMENT AGREEMENT LETTER

[Date]

[Client Name]

[Address]

[City, State, Zip]

Re: Consultation of [Date of Consult]

Dear [Client Name]:

I enjoyed meeting with you on _____ to discuss your representation by this firm. This letter will confirm our agreement and if after reviewing it you have no further questions about the terms of my representation, please sign the extra copy enclosed and return it to my office in the postage-paid envelope enclosed for your convenience. Our work will begin when we receive the signed copy of this letter [and required deposit].

I will undertake the following work on your behalf: [set forth the scope of the representation]. [My work will not include {set forth specific matters excluded from the representation if appropriate}.]

You will receive an itemized monthly statement of fees and expenses associated with our services. [Payment is due upon receipt.] [The fees and expenses will be deducted from your deposit, and we will advise you from time to time if an additional amount is needed to maintain a sufficient deposit to cover anticipated fees and expenses.] My rate per hour for work is \$____. Often, from time to time, other members of the firm, as well as our staff may engage in work on this matter, and their rates are as follows: partners, \$____ per hour; associate attorneys, \$____ per hour; legal assistants, \$____ per hour.

With respect to [describe representation and subject matter], there exists the possibility for the following interests of the following persons to become conflicting: [describe all reasonably foreseeable interests that each client and former client might, in the course of after-the-fact dissatisfaction, claim to have adversely affected the lawyer's judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, you believe one lawyer can adequately represent, advance, or protect each such interest without harming any other such interests. Therefore, you agree that you want me to represent each of you in this matter, and you each refuse to exercise your right to hire a different lawyer and hereby waive the conflicts described.

In addition to the fees set forth above, you will be responsible for expenses incurred in connection with this matter. Such expenses may include, among others, copying, delivery, telephone charges, fees for professional services, and travel expenses. If the firm makes payment for you, you will need to reimburse us promptly.

[If we have to bring suit against you to collect any balance owed, you agree to pay us an additional amount of _____% of the balance owed as attorney fees. To secure any balance you owe us, you grant us a security interest in any property that may come into our possession in the course of our representation and any claim or cause of action on which we are representing you.]

To achieve the best possible representation, you will need to cooperate with us fully and provide us all the information we need to assist you. I encourage you to keep detailed notes of questions that may arise and of any new information, witnesses, or other important matters that come to your attention. Please call me if something is truly urgent, but otherwise it is best to schedule an appointment to discuss your accumulated questions and concerns. So that we may maintain continuous contact with you throughout the representation please notify us immediately if there is any change in your address or telephone number.

If at any time you become dissatisfied with our handling of this matter, you should not hesitate to tell me immediately so we can discuss and resolve the problem. It is essential to your representation that we maintain a good relationship throughout. You may terminate our representation at any time. In the event of termination, you will be responsible for payment of any fees earned or expenses incurred. We may terminate this representation only as permitted or required by laws and regulations. Failure to pay [fees or]¹ expenses or make deposits when due will be cause for such termination.

[Optional]² In this joint representation, I must and will treat you [both] equally in all regards, including all communications. I will communicate all matters to both of you and will share all communications from each of you with the other.

¹ Do not use this phrase if this is a contingent fee agreement.

² Use if joint.

SAMPLE LETTERS (continued)

While the agreement is intended to prevent any confusion of the terms of my representation, should a fee dispute arise you are agreeing pursuant to this paragraph to submit any fee dispute between us to _____ arbitration with [your bar's program name]. You understand that you have the right to use other court forums to address fee disputes but we are both agreeable to compromising those rights to submit to binding arbitration. Any decision made by the arbitration panel whether for you or me will be final and non-appealable. It has the same effect and enforceability as if rendered by a court of law. The arbitration panel would hear us in [locality] and would be composed of those individuals, two attorneys and one layman. The [local bar organization] selects the panel from among a list of volunteers who have agreed to hear fee disputes. There are no costs associated with the panelists. You can seek additional independent legal counsel on this issue before signing this agreement, if you wish.

We will use our best efforts in representing you in this matter, but you acknowledge that we can give no assurances as to the final outcome.

If the above terms are acceptable, please sign and return one of the enclosed copies of this letter. I look forward to working with you.

Sincerely,

[Name of Firm]

By _____
[Name of Attorney]

[Name of Client]

Date of Acceptance

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RETAINER COLLECTION LETTER

[Date]

[Client Name]
[Address]
[City, State, Zip]

Dear [Client Name]:

This is a reminder that the firm still has not received your retainer check in the amount of \$_____.

In order for us to continue representing you on the (specify) matter, your file must be current. If we do not receive your retainer within seven (7) days, we will assume that you are no longer interested in our continued representation of you in this matter. If this is the case, we will withdraw from your matter and will bill you for time already spent on it.

We would like you to remain a client of the firm and are anxious to mark your account current. Please attend to this matter today. I have included a self-addressed, stamped envelope for your convenience. If you have already sent us a check, we thank you.

If you have any questions or are not able to send payment immediately, please call me at [telephone number] today. Thank you.

Sincerely,

[Lawyer's Name]

[Firm's Name]

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MONTHLY STATUS LETTER

[Date]

[Client Name]

[Address]

[City, State, Zip]

Re: File Number _____

Dear [Client Name]:

In order to keep you informed on a regular basis regarding your case, I will be sending you status reports such as this one on a monthly basis. Please do not hesitate to contact me at any time for more detailed information concerning the progress of your case.

Since our last meeting on _____, the following has happened: (specify court appearances, discovery, motions filed, etc.).

I have enclosed copies of correspondence, filings, other documents our firm has prepared on your behalf since our last status report, and a monthly bill for our services, which I trust you will find in order.

Thank you for allowing our firm to represent you in this matter. We will continue to apply our best efforts on your behalf and report to you as your case continues.

Sincerely,

[Lawyer's Name]

[Firm Name]

Enclosure[s]

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30-DAY FOLLOW-UP LETTER

[Date]

[Client Name]
[Address]
[City, State, Zip]

Dear [Client Name]:

In reviewing our accounts receivables, I noticed that we have not received payment in the amount of \$_____ for invoice #_____, dated _____.

I am sure this is just an oversight on your part. If, however, you have a problem with the service we have provided, please contact me immediately so we can discuss the matter.

If I do not hear from you, I will assume that you have no difficulty with the service or with paying the invoice and will look for payment by [date].

Sincerely,

[Lawyer's Name]

[Firm Name]

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60-DAY FOLLOW-UP LETTER

[Date]

[Client Name]
[Address]
[City, State, Zip]

Dear [Client Name]:

It has been thirty days (30) since my last letter and we have not heard from you regarding payment. According to our fee agreement, all invoices must be paid within 30 days of receipt of the invoice. If we are to continue to provide you with a high level of service, it is critical that we have invoices paid in a timely manner.

Please contact me immediately if you have any problems with the payment of this invoice. If I do not hear from you, we will expect full payment by [date].

Sincerely,

[Lawyer's Name]

[Firm Name]



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