Money: AFAs, CFAs, and Ethics

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Part 1: Fee Issues[*]

Part 2: *Mount Spelman & Fingerman PC v. Geotag, Inc.*

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[24] *E.g.*, Peggy Kubicz Hall, *I've Looked at Fees from Both Sides Now: A Perspective on Market-Valued*

Part 1: Fee Issues

§ 4.04 The Ethics of Alternate Fee Agreements

[1] General Principles

As in all areas of practice, patent litigation clients are looking for AFAs that vary from the once nearly ubiquitous hourly rate. Academics and others have recently begun to analyze the ethical issues they may raise.[24]

There are many forms of AFAs, some of which we discuss here. At the outset, the lawyer should not unilaterally choose from among AFAs without at least advising the client of other options.[25] Bar associations have emphasized that this discussion may be particularly appropriate where an AFA is being proposed.[26]

This chapter next addresses certain AFAs, focusing on the contingent fee agreement, and the ethical issues in more detail below. Common to virtually all fee agreements, however, are the following potential issues:[27]

□ The over-arching requirement for the fee to be "reasonable;"[28]
□ The wisdom of having the agreement be in writing, whether a writing is required or not;[29]
□ The need to clearly identify who is the client, and who if any one may need to receive a "non-engagement" letters to make it clear who the lawyer does not represent;[30]
□ The need for clarity as to the scope of the representation, including whether contingent fee arrangement includes any appeal;[31]

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[24] *E.g.*, Peggy Kubicz Hall, *I've Looked at Fees from Both Sides Now: A Perspective on Market-Valued Pricing for Legal Services*, 39 Wm. Mitchell L. Rev. 154 (2012); Richard B. Friedman & P. Michael Freed, *Ethical Issues and Alternative Fee Arrangements: What to do and what not to do*, 85 N.Y. St. B.J. 10 (May 2012); Andrea J. Paterson, *Fee Agreements: Structuring Alternative Fee Agreements to Enhance Recovery of Fees and Align Interests of Attorneys and Clients*, 35 Advoc. (Texas) 10 (2006).
[25] ABA Formal Ethics Op. 94-389 (1994).
[26] *E.g.*, ABA Formal Ethics Op. 93-373 (1993); Nev. Ethics Op. 4 (1987); Nassau Cnty. Ethics Op. 99-4 (1999).
[27] *See generally* Miriam R. Katzman, *Using Written Fee Agreements*, 63 WIS. LAW. 12 (Dec. 1990) (giving forms and examples).
[28] *See* Ga. R. 1.5(a) (describing factors to determine whether a fee is ethical).
[29] *See* Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 796 A.2d 238 (N.J. 2002) (written fee agreements avoid misunderstanding and reduce fraud). Having a discussion about fees without an actual *agreement* does not create an enforceable agreement. *See* Mar Oil SA v. Morrissey, 982 F.2d 830 (2d Cir. 1993).
[30] See Chapter 7.
[31] *See generally* Colo. Formal Ethics Op. 101 (1998) (lawyers may ethically provide "unbundled" legal services so long as lawyer explains limitations); Flatow v. Ingalls, 932 N.E.2d 726 (Ind. Ct. App. 2010) (firm could not be sued for failing to perform services that were excluded by retainer agreement, which limited firm's obligations to drafting a summary judgment motion and a reply brief on one claim).

□ What will happen if the client falls into arrears on expenses, and whether an evergreen retainer for expenses (or fees) is required;
□ Disclosing the fact that "contract lawyers" may be used;[32]
□ Disclosing the client's responsibility regarding payment of the fee, including how and when the client will be billed;[33] and
□ Whether fee disputes, malpractice claims, or both are subject to binding arbitration.[34]

[2] Ethical Issues Peculiar to Contingent Fee Agreements

[a] General Principles

Contingent fees are a relatively recent development in American law.[35] Once banned through common law doctrines, contingent fees became seen as a tool that allowed delivery of legal services to those who would otherwise be unable to front attorneys' fees in a case.[36] Contingent fees are permitted because they are perceived to provide social utility. Among other things, they permit clients who otherwise could not afford to hire a lawyer, to obtain justice and pay the costs out of any award from the opposing party.[37] At the same time, they permit lawyers to earn a living by bearing the risk of non-recovery for the client, but potentially obtaining recovery if successful.[38]

Contingent fees are now common in class actions, complex commercial litigation, patent infringement suits, and other suits where the client is generally sophisticated.[39] No longer is the contingent fee arrangement limited to solo practitioners, small firm lawyers, and personal injury clients. Today, sophisticated clients represented by large law firms agree to representation on a contingent fee basis in patent litigation.

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[32] *See In re* Wright, 290 B.R. 145 (Bankr. C.D. Cal. 2003) (firm barred from collecting fees for independent contractor attorney's time in bankruptcy proceeding where it did not obtain debtor-client's consent to farm out work). *But see* Ill. Ethics Op. 98-2 (1998) (lawyer need not obtain client consent to delegate work to closely supervised independent contractors); Cal. Ethics Op. 2004-165 (2004) (client consent not required if contract lawyer's fee is billed as a separately identified "cost" on lawyer's fee statement).

[33] For example, some states in some circumstances require quarterly billing, while others require lawyers to have written agreements under some or all circumstances.

[34] Some states have mandatory fee arbitration programs that may apply in federal court or multistate transaction, or may not. Expressly including or excluding any agreement is clearly beneficial. Further, if malpractice claims are intended to be included in the arbitration clause, special care must be given. *Compare* Lawrence v. Walzer & Gabrielson, 256 Cal. Rptr. 6 (Ct. App. 1989) (clause requiring client arbitrate "fees, costs or any other aspect of our attorney-client relationship" insufficiently clear to require client to arbitrate malpractice claims) *with* Haynes v. Kuder, 591 A.2d 1286 (D.C. 1991) (clause requiring arbitration of any "defenses or counterclaim" to firms claim for fees was clear enough to require submission of malpractice claims to arbitration).

[35] *See* Ethics Comm. of the Colo. B. Ass'n. Formal Op. 100 (June 21, 1997).

[36] *See id.*

[37] *See* Jonathan J. Fox, *Comment, Fixing Compensation Pursuant to a Contingent Fee Contract Following a Premature Termination of the Attorney-Client Relationship*, 57 Loyola L. Rev. 861, 865–67 (2011)

[38] *See id.*

[39] *See* Colo. Formal Op. 100 (noting that even as of 1997, "in recent years, there has been an increased use of contingent fee agreements in contexts other than personal injury representation.").

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