

Aug. 2009
10F2

Professionalism Committee

Lori Vitale, Chair

Survival Strategies in These Tough Economic Times

Alternative Fee Arrangements and Discounts - Helping Your Clients, Saving and Building Better Relationships, and Managing Your Receivables Without Undervaluing or Selling Yourself Short

By Mark La Mantia

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. 0.1 [6] Preamble, North Carolina Rules of Professional Conduct (emphasis added)

As with most things that have evolved over time and as a result of the need to respond and adjust to changing times and economic circumstance, the current economic environment is once again challenging (if not altogether changing) the thinking within the legal community about the nature of the fee arrangements we have with our clients, what can be done to make legal services both available and affordable in these tougher economic times, and what to do when clients fall behind on or are unable to pay our invoices. Like the thinking and practices regarding lawyers taking credit cards, accepting some forms of property or security regarding fees, assisting clients in arranging for credit or taking advantage of other fee funding opportunities, or charging interest on unpaid amounts (all of which may have been considered unprofessional or were ethically prohibited at one time or another in the past, but all of which are generally permitted under certain conditions now) changes are being advocated and are occurring regarding time and billing, alternative fee structures¹, and fee payment and collection to try to accommodate the economic needs and challenges facing both lawyers and clients.

Information presented in previous Wake Bar Flyer articles makes it rather clear that there are still strong “professionalism” and “practicality” reasons for adhering to the belief that it is either professionally distaste-

¹ “Alternative fee structures” as referred to here would generally be intended to refer to something other than more traditional entirely percentage based contingent fees used in practice areas like personal injury and workers compensation.

ful or pragmatically unwise to initiate fee collection actions (and particularly going so far as to bring suit) against clients that do not or can no longer pay. However, there is little guidance on what should be done in these situations other than simply concluding the relationship (consistent with ethical rules) and walking away. And, while there is an even greater push today for lawyers to provide more pro bono services to the poor and economically disadvantaged on the one hand², on the other hand there remains some fairly strong resistance by some lawyers, and many others providing professional guidance to lawyers and firms, to the concepts of “discounting” fees or altering fee arrangements for new clients or discounting fees or reducing amounts that may be owed by an existing client. This resistance is based largely on the notions that such practices result in a devaluation of both the lawyer and the services rendered, and are therefore both unprofessional and practically unwise. The arguments against reducing or discounting fees, particularly those already charged/incurred, generally go something like this:

Discounts give rise to expectations of entitlement in clients to future discounts;

Discounts or reductions on fees charged are unprofessional because they essentially tell your clients one very negative thing: I am overcharging you up front and adjusting it on the back-end.

Similarly, discounts and write downs may introduce or convey the following unprofessional meanings and ideas:

I spent more time than I can reasonably charge you for the service provided; i.e., I am not efficiently working the matter;

² See e.g. the remainder of Comment [6] and Comments [7], [8] and [9] of the Preamble to the current North Carolina Rules of Professional Conduct and the ABA Model Rules and related recommendations regarding the provision of pro bono services.

My associates spent more time than I can reasonably charge you for the service provided; i.e., my firm has less competent attorneys working on your case or I have inefficient staff working on your case;

Even though I spent an adequate amount of time on this matter, it “seems” too high to me; i.e. I am unclear on the value of my service.³

Nonetheless, in an October 2008 post at ABAnet.org the headline read: “Law Firms Advised to Try Discounted and Alternative Fees”⁴. Reporting on a panel discussion held by the defense bar group DRI and the advice given by panelists that included a New York City law firm consultant and a managing director of a Seattle law firm, the author summarizes the consensus of the panel opinion that “Law firms that survive the troubled economic times will be willing to discount fees and try alternative billing arrangements...” Similarly, a 2007 ALM Billing Rates & Practices Survey reported that 88% of the respondents stated that they offer “alternatives” to the billable hour and that such alternative structures made up an average of 37% of their revenues.⁵

³ See Brian Ritchey, JD, Managing Partner Income, in Juris (now Redwood Analytics) from LexisNexis.com

⁴ Posted Oct 28, 2008, 07:43 am CDT, By Debra Cassens Weiss

⁵ It should be noted that the concepts of and considerations for “discounting” fees or considering alternative fee arrangements at the outset of a client relationship are somewhat different than when deciding whether and how much to work with an existing client who finds himself financially stressed. Even those pundits appearing to be more generally against discounting or reducing fees recognize that such discounts or reductions may be appropriate when responding to requests for proposals from clients who are willing to agree to provide a certain amount and type of future business, or when being used as a tool to secure prompt payments from a client. For example, in discussing such discounting, Mr. Ritchey writes in the Juris article noted above, “[T]he important part of discounting is that it is mutu-

Aug. 2009
20F2

In an ideal world, all attorney time would be incredibly efficient and perfectly billable (as we could also even perfectly predict the actions of opposing parties, their counsel and the courts) and all clients would be able to afford all of the time billed in their particular matter throughout the length of their case. We do not live in an ideal world however and, often times, despite the best practices and intentions of the parties the time, fees and costs in a matter will outpace both the initial expectations of the attorney and the client, and the client's ability to pay, or the client's financial situation will change for the worse for various reasons - especially in today's troubled economic times.

Practice Tips

So, given all of the foregoing and if we are not going to sue, what are we to do to maintain or increase our own survival rates? Because of the subjectivity of many of the considerations to be made, there is unfortunately no magic answer as to how to proceed in all cases and with all clients. However, the following basic practices and considerations may help:

First and foremost, if using a more standard hourly time and billing structure, keep on top of your time and billing and regularly communicate with clients about amounts being incurred, the status and continued strategy of their case.

Closely connected to this is making sure that your initial fee and payment structure are realistic and achievable for both you and the client - make certain that you are candid with the client about what to expect initially and that the client is candid with you about what they can really pay. It generally does no good to enter into a relationship where the client will be perpetually behind (or very close to it) absent a clear understanding of how this will work up front.

Do not be afraid to pro-actively consider alternative fee structures at the outset rather than ignoring the realities of the situation or simply turning down the business. Discounts, rate reductions, and flat fees are certainly not the only types of

ally beneficial to you and your client - there needs to be consideration for the discount. It needs to be binding so that if the client does not perform on their end, the discount doesn't get applied. If there isn't quid pro quo, you are giving a clear message to your client that you overcharge up front - and that your rates are open to negotiation."

alternatives that may be attractive or useful. For example, lower structured monthly payments and retainers, e.g. regular set payments that will be made each month for a defined period regardless of the actual scope or extent of the work performed and time incurred in any specific month may be a great way for some clients to budget for and manage the burden while allowing the attorney to budget for and manage the time, cash and receivables.

A Few More Tips

If payment starts to become a problem, promptly find out why rather than simply letting the problem lag or letting the receivables become larger. Work hard to make clients be candid and responsible in this regard.

Do not be afraid to regularly revisit everyone's expectations and ongoing case strategy decisions in light of an opponent's behaviors and either the opponent's or the client's changing economic and financial situations.

Conclusion

Certainly, not all discounts or reductions are a negative statement about your professionalism or the quality, quantity, or value of the work done and services provided.

⁶Use them selectively and for a particular purpose rather than just across the board and try to make sure the client understands the purposes and any agreements related to

⁶ Frankly, and depending on the circumstances, these actions and concessions on the part of any attorney may be the most professional course of action in today's economic environment. For example, an attorney's willingness to give some discounts and reductions to (whether on a one time or limited basis or for the foreseeable future), or restructure the relationship with, an existing client whose business they want to keep may help to build and solidify the relationship in a very positive way. This result would be consistent with our profession's goal to make legal services available and affordable. Similarly, where it appears that the relationship has soured to the point of non-payment and likely or threatened withdrawal, a prompt resolution of any debt and receivable through discounting and reduction may be the best way of achieving closure and moving forward as practically, amicably and professionally as possible under the circumstances. This would certainly seem true where the attorney knows that in no event will they take legal action to obtain full payment against the soon to be former client.

the specific discount.⁷ If the relationship is not working and you do not want to salvage it, stop the bleeding and get out (if ethically permitted) as quickly as possible - every dollar of time saved is one less dollar you have to worry about collecting or writing off.

Mark A. La Mantia, a member of the Articles Subcommittee of the 10th Judicial District's Professionalism Committee, is the president and sole shareholder of La Mantia Law Offices, P.C. He has over 26 years of experience in the practice of law and is licensed in North Carolina, Illinois and Oregon (on inactive status). Mr. La Mantia concentrates in small business, employment and franchise law and has been recognized as one of North Carolina's "Legal Elite" in business litigation in a survey conducted by NC Business Magazine (January 2006 issue). He is a North Carolina certified mediator; and a member of the American, North Carolina, Chicago, Wake County and Tenth Judicial District bar associations (where he serves on the Professionalism Committee). Mr. La Mantia has been a speaker and/or author for various seminars and presentations for the ABA, North Carolina Bar Association, National Business Institute and other sponsors, groups and organizations. He earned his B.A. degree from Northwestern University in 1979 and his J.D. degree from the Northwestern School of Law of Lewis & Clark College (now the Lewis and Clark Law School) in 1982.

⁷ One attorney contributor noted a practice of "pre-billing" various clients from time to time and encouraging them to review all of the time and fee entries for the applicable period and promptly advising the attorney of any questions, problems or concerns that they might have, and then following up with the client shortly thereafter to finalize the billing, at which time any corrections or agreed adjustments are made and any additional courtesy discounts (e.g. for prompt payment) are offered and are agreed upon. Although still a work in progress, it at least seems that this practice has helped to: enhance the communications between the attorney and client regarding the ongoing matter, the required time and services, and the client's current ability to pay; minimize any billing mistakes and belated complaints about overall time and billings; and, in most situations greatly minimize or eliminate altogether lag times in obtaining payment (albeit usually at some reduced or discounted amount for that particular billing).