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Do As I Say, Not as I Do – Why Lawyers Should Use Fee Agreements

These materials were prepared by Andrew P. Morrison of Shields Harney, Vancouver, BC for the Continuing Legal Education Society of British Columbia, February 2020.

DO AS I SAY, NOT AS I DO – WHY LAWYERS SHOULD USE FEE AGREEMENTS

I. Introduction

Solicitors regularly recommend that their clients record their business agreements in written contracts.

Litigators regularly lament that their clients did not record their business agreements in written contracts.

But many lawyers do not use written fee agreements to record their own agreements with their clients and those that do use written fee agreements rarely review and update them.

A well-drafted fee agreement between a lawyer and client sets client expectations and provides a roadmap for resolving issues that may arise in the lawyer-client relationship. A fee agreement provides an opportunity for a lawyer to comply with Law Society requirements and, in some cases, is mandatory.

A well-drafted fee agreement may assist a lawyer in resolving a dispute with a client. It may give a lawyer rights he or she may not otherwise have. It may assist the lawyer in obtaining a better result in a fee review. In contrast, a poorly-drafted fee agreement may prevent the lawyer from

withdrawing from an engagement, charging interest or charging hourly rates that increase over time.

Lawyers should follow the same advice they provide to clients – they should prepare and require clients to sign a well-drafted fee agreement.

II. Types of Fee Agreements

Most lawyers are familiar with two types of fee agreements – a retainer agreement and a contingency fee agreement. But, there are other types of fee agreements, some of which are not typically viewed as fee agreements. Given that a client can ask the Registrar to review a fee agreement to determine whether it is fair and reasonable, it is important to keep in mind that almost any agreement between a lawyer and client that relates to the charging or payment of fees may be a fee agreement.

Section 65 of the *Legal Profession Act* permits (but in most cases does not require) a lawyer or law firm to enter into a fee agreement with a client. If a lawyer or law firm wishes to enter into a fee agreement, the fee agreement must be signed by a lawyer. It cannot be unsigned or signed by a staff member who is not a lawyer.

The *Legal Profession Act* refers to fee agreements, as an "agreement", which is defined expansively as:

> "…a written contract respecting the fees, charges and disbursements to be paid to a lawyer or law firm for services provided or to be provided and includes a contingent fee agreement."

The definition is expansive enough to capture not just traditional retainer agreements, but also settlement agreements by which a lawyer may agree to accept a lower fee to satisfy client concerns or to obtain prompt payment. It also captures flat fee agreements and, potentially, agreements to provide security for the payment of legal fees.

The *Legal Profession Act* contains special rules for contingency fee agreements.

Again, the definition of a "contingency fee agreement" is broader than most lawyers would expect, a "contingency fee agreement" is:

> "…an agreement that provides that payment to the lawyer or law firm for services provided depends, at least in part, on the happening of an event."

Most lawyers think of a contingency fee agreement as an agreement by which the lawyer will receive a percentage of any settlement or judgment, but the definition also catches any agreement by which a fee may depend on the happening of an event, such as an agreement for the client to pay a bonus if a specific result is achieved or for fees to be payable only if the client obtains funding or approval from a third party.

It is particularly important to understand when an agreement between a lawyer and client meets the definition of a contingency fee agreement because contingency fee agreements must be in writing to be enforceable and lawyers are prohibited from entering contingency fee agreements without court approval in certain types of cases. It would be easy for a lawyer to inadvertently contravene a slew of Law Society requirements by entering an agreement that the lawyer did not realize was a contingency fee agreement.

III. Requirements for Various Types of Fee Agreements

A. Ordinary Retainer Agreements

A lawyer is not required to record a typical lawyer-client relationship in writing.

However, in the absence of a written fee agreement, the lawyer-client relationship will typically be governed by common law principles which may be more favourable to the client than the lawyer.

For example, in the absence of a written fee agreement the lawyer is likely to be compensated on a *quantum meruit* basis, rather than on the basis of the lawyer's hourly rate or on some other basis that might be more favourable to the lawyer. Moreover, the common law expects lawyers to work on an "entire contract" basis, which means that a lawyer who withdraws from a file without good cause is not entitled to charge any fee at all and the client is not required to pay interim bills, only a single final bill.

If a lawyer or law firm chooses to enter a written fee agreement with a client, the fee agreement must be signed by the lawyer. The fee agreement cannot include terms which attempt to contract out of negligence claims or which relieve the lawyer of their ordinary responsibilities (including their ethical responsibilities). Any provision in a fee agreement that attempts to contract out of negligence or other responsibilities is void.

Legal Profession Act, s. 65

B. Limited Scope Retainers

If a lawyer accepts a limited scope retainer, the lawyer must advise the client, in writing, of the services the lawyer has agreed to provide, since it is important to ensure that the client understands which services the lawyer has agreed to provide an which services he or she has not agreed to provide. In addition, the lawyer must be careful not to act in a manner that suggests to the client that the lawyer is providing full services to the client.

C. Settlement Agreements

Sometimes, lawyers will enter into an agreement with a client to solve a fee dispute. Typically, a client has complained about the fees charged by the lawyer and his withheld payment. A lawyer may agree to reduce his or her fees in return for prompt payment. This sort of agreement, if made in writing, would likely be considered a fee agreement.

The same rules apply to a written agreement to resolve a fee dispute as apply to a typical retainer agreement.

D. Contingency Fee Agreements

There are a host of rules that apply to contingency fee agreements.

For example:

(a) a contingency fee agreement must be in writing (*Law Society Rules*, Rule 8-3(a), *Code of Professional Conduct* Rule 3.6-2);

(b) there are maximum contingency fees in some cases (*Law Society Rules*, Rule 8-2(1), *Legal Profession Act*, Section 66(4));

(c) a contingency fee agreement must not provide that the lawyer is entitled to a percentage fee both on the amount recovered and on any amount of costs awarded (*Legal Profession Act*, Section 67(2));

(d) If a lawyer intends to accept the costs recoverable by a client instead of a percentage fee, that term must be recorded in the contingency fee agreement and the contingency fee agreement must contain a mandatory statement in the form required by the Law Society (*Law Society Rules*, Rule 8-2(2) and 8-4(3);

(e) a contingency fee agreement must include a statement, in the form required by the Law Society, advising the client of their right to review the fee agreement *(Law Society Rules*, Rule 8-3(b));

(f) a contingency fee agreement in a personal injury or wrongful death case must include certain statements in the form required by the Law Society (*Law Society Rules*, Rule 8-4);

(g) a contingency fee agreement must not contain terms limiting the client's ability to discontinue or settle their claim without the consent of the lawyer or prohibiting the client from terminating the engagement (*Legal Profession Act,* Section 65(3*), Law Society Rules*, Rule 8-3(c);

(h) a contingency fee agreement must not prohibit the client from changing lawyers (*Law Society Rules*, Rule 8-3(c)); and

(i) a contingency fee agreement must not contain a term relieving a lawyer of their professional responsibilities or from their negligence (*Law Society Rules*, Rule 8-3(c)).

Any lawyer who intends to enter into a contingency fee agreement with their clients should familiarize themselves with the provisions of the *Legal Profession Act*, the *Law Society Rules* and the portions of the *Code of Professional Conduct* which relate to contingency fee agreements.

The failure to comply with the Law Society requirements may render a fee agreement automatically unenforceable or vulnerable to challenge and scrutiny by the court.

More importantly, even if the contingency fee agreement remains enforceable, a lawyer may have to address a complaint to the Law Society.

IV. The Duty to Advise

The relationship between lawyer and client imposes a duty of utmost good faith on the part of the lawyer. The engagement creates a relationship of trust and confidence from which obligations of loyalty and transparency flow.

Nathanson Schacter & Thompson v. Inmet Mining Corp. 2009 BCCA 385, para 48

A lawyer owes a duty of candour to his or her client which requires the lawyer to be candid with the client in all matters concerning the retainer, including ensuring that in any transaction

between the two from which the lawyer receives a benefit, the client has been fully informed of the relevant facts and properly advised upon them.

Inmet, para 49

The duty to advise is codified in the *Code of Professional Conduct*, which requires a lawyer to fully disclose to the client the basis on which the client will be billed at the beginning of the engagement.

Code of Professional Conduct, Rule 3.6-3, Commentary # 1

At the beginning of an engagement, a lawyer should ensure that the client understands:

(a) the manner in which the fee will be calculated, including the factors or contingencies that might affect the fee;

(b) the rights of the client and lawyer to terminate the engagement;

(c) what will happen if the engagement is terminated; and

(d) the client's right to review both the contingency fee agreement and any bill rendered by the lawyer.

A lawyer should be particularly diligent in discharging their duty to advise when a client may have a cognitive injury or may not be well educated or experienced in litigation.

In certain circumstances, a lawyer should recommend that potential clients obtain independent legal advice before entering into a fee agreement.

For example, a lawyer may recommend that a client obtain independent legal advice if:

(a) the lawyer has asked the client to enter a settlement agreement or provide security for payment of legal fees;

(b) a lawyer is contemplating taking on a risky, time-consuming or complicated matter on a contingency fee basis; or

(c) the fee agreement contains unconventional terms or terms that could be particularly onerous for the client.

Requiring the client to obtain independent legal advice before executing a fee agreement may insulate the lawyer from any claim that he or she has failed to fulfill his or her duty to advise or that the fee agreement is unfair or unreasonable.

V. Important Terms

A well-drafted fee agreement will not only set out the basis on which the fee will be calculated and the terms required by the Law Society, it will include terms that will assist the lawyer in resolving disputes and avoiding future problems.

In addition to the terms required by the Law Society, a well-drafted fee agreement will set out:

(a) the scope of the engagement and provide a summary of the types of services the lawyer expects to provide;

(b) the basis on which a fee will be determined. The lawyer will not be permitted to charge a fee that is determined on a basis other than that set out in the agreement. For example, a fee agreement that provides simply for payment of a fee at an hourly rate will not permit the lawyer to charge a bonus for a good result. If the lawyer expects to increase his or her hourly rate over time, a provision should be included in the fee agreement requiring the client to pay the increased hourly rate;

(c) whether the client will be charged for disbursements and if so, whether they will be billed on a regular basis or at the end of the matter;

(d) the regularity with which the client will be billed and the time the client will have to pay a bill;

(e) whether an initial retainer is required and how that retainer will be handled – will it be used to pay bills as they are rendered, or held in reserve until the final bill. If the lawyer expects to require the client to provide additional retainers or wishes to be able to demand a retainer before trial, those terms should be set out in the fee agreement;

(f) whether the lawyer will charge interest on unpaid bills and, if so, at what rate (expressed as an annual rate as required by section 4 of the *Interest Act*);

(g) the circumstances in which the lawyer may withdraw;

(h) how the lawyer will handle conflicts of interest, especially in joint engagements; and

(i) if the lawyer is in a space sharing arrangement whether the lawyers have agreed not to act against one another's clients and the safeguards in place to prevent conflicts of interest to arise. The fee agreement should also contain a term permitting the lawyer to disclose the client's identity to the other space sharing lawyers to prevent conflicts from arising.

A sample fee agreement is available on the Law Society website, but a lawyer should invest their time in preparing a clear and comprehensive fee agreement that is suitable to the lawyer's practice.

A fee agreement should be written in plain language and not contain jargon or legalese. The goal is to avoid misunderstandings and set client expectations which is difficult to achieve if the client cannot understand the fee agreement.

If a lawyer delivers a fee agreement to a client for execution by email, the lawyer should explain in the email that it is important for the client to read the fee agreement carefully before he or she signs it since the fee agreement will govern the relationship between the parties. The lawyer should ask the client to contact the lawyer with any questions or concerns about the fee agreement and should promptly and clearly respond to any questions or concerns raised by the client.

If the lawyer meets with the client to sign a fee agreement, the lawyer should tell the client that it is important for the client to understand the agreement. The lawyer should review the agreement with the client and summarize the meaning and effect of each section. The lawyer should answer any questions the client may have honestly and clearly. The lawyer should not delegate the review and execution of the fee agreement to staff members. If the client does not

speak English (and the lawyer does not speak the same language as the client) the lawyer should arrange for someone to translate the fee agreement to ensure that the client understands it.

VI. Additional Considerations for Settlement Agreements

When a lawyer prepares a settlement agreement by which they agree to reduce their fee, it is particularly important to ensure that the agreement is clear and easy to understand.

The lawyer should include a term by which the client expressly acknowledges that he or she is aware that they may review the bills that are being settled by the settlement agreement and expressly waive their right to review the bills. The lawyer should also recommend that the client seek independent legal advice before signing the settlement agreement.

The courts will enforce a settlement agreement between a lawyer and client and find that the client is estopped from reviewing bills which have been compromised as part of a settlement agreement, but only if the client is aware that he or she is forfeiting their right to have the bills reviewed.

Lawson Lundell LLP v. 4-J Holding Co. Ltd. 2013 BCSC 2383, para. 34

A lawyer can increase the likelihood that the court will enforce a settlement agreement and prohibit the client from reviewing the compromised bills by ensuring that the settlement agreement is clear, expressly confirms that the client waives his or her right to a review and has had the chance to obtain independent legal advice.

VII. Challenges to a Fee Agreement

The *Legal Profession Act* provides a client with a right to review both the fee agreement and the fee charged pursuant to the fee agreement.

A. Review of the Fee Agreement

Section 68 of the *Legal Profession Act* permits a client to review a fee agreement to determine whether it was fair and reasonable at the time it was executed.

The time limit for applying to review a fee agreement is short. A client must obtain an Appointment to review a fee agreement within three months of the date on which the agreement is made or the solicitor client relationship ends. The court has very limited discretion to extend the time limit. A fee agreement can be reviewed even if the client has paid any bills rendered pursuant to the fee agreement.

It is particularly important for a lawyer who is taking over a file begun by another lawyer to advise his or her new client that their right to challenge the fairness of the fee agreement with the previous lawyer because the limitation period may be close to expiring.

A client who challenges the fairness of a fee agreement must establish that the agreement was fair and reasonable, given the circumstances existing at the time it was made.

A Registrar reviewing a fee agreement will first consider whether the client understood the agreement, whether there was any pressure or undue influence placed on the client and whether the lawyer took advantage of the circumstances.

If the fee agreement was obtained fairly, the Registrar will consider whether the terms of the fee agreement are reasonable. For example, a Registrar may consider a contingency fee agreement to be unreasonable if it called for a contingency fee of 60%, even if it was obtained fairly.

If the Registrar concludes that a fee agreement is unenforceable because it is unfair or unreasonable (or because the fee agreement is void because it does not comply with Law Society requirements), the lawyer may render a bill on a *quantum meruit* basis and the client may seek a review of that bill.

If the Registrar concludes that a fee agreement is fair and reasonable, the client may still seek a review of the bill rendered pursuant to the fee agreement.

In practical terms, the fee agreement sets the maximum amount a lawyer can charge since the Registrar will not permit a lawyer to charge on a basis that is not contemplated in the fee agreement or to charge disbursements or other amounts that are not permitted by the fee agreement. But, the Registrar retains the discretion to reduce the fees a client must pay even if they are determined on a formula set out in a fair and reasonable fee agreement.

B. Review of a Bill

Section 70 of the *Legal Profession Act* permits a client to challenge the fee charged pursuant to the fee agreement.

The fee charged pursuant to a fee agreement must be fair, even if it is determined precisely in accordance with the terms of a fair and reasonable fee agreement.

Section 3.6-1 of the *Code of Professional Conduct* prohibits a lawyer from charging or accepting a fee or disbursement (including interest) unless it is fair and reasonable and was disclosed in a timely manner.

Rule 8-1(2) of the *Law Society Rules* requires a lawyer who renders a bill for fees earned pursuant to a contingency fee agreement to ensure that the total fee payable by the client is reasonable given the circumstances at the time the bill is rendered.

It is possible for fees determined precisely in accordance with a fair and reasonable fee agreement to be unreasonable. For example:

(a) a fee calculated by multiplying a fair hourly rate by the number of hours spent on a matter may result in an unfair fee if the time was not well spent, the lawyer's work product was substandard or the result was poor;

(b) a fee charged pursuant to a flat fee agreement may be unfair if the lawyer spent relatively little time on the matter; and

(c) a fee calculated as a percentage of a settlement payment may be unfair if the matter settles quickly for a large sum.

In *Mide-Wilson v. Hungerford Tomyn Lawrenson and Nichols* 2013 BCSC 374, the court refused to allow a fee charged pursuant to a contingency fee agreement even though it had concluded that the contingency fee agreement was fair and reasonable, because:

> "A client need only pay a proper fee… there is a point when the differential between the work done and the fees payable under a contingency fee agreement must be adjusted to maintain the integrity of the profession. In such circumstances the terms of the contract must be sacrificed to ensure that the client pays no more than a proper fee.
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> …
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> A contingency fee agreement is not a lottery ticket. Success in the action does not guarantee a fee in the amount set out in the agreement. Even if the agreement was neither unfair, nor unreasonable at the time it was entered into, the final account must be reasonable and proper given the services provided and the risk undertaken". (para 173 and 180)

In *Mide-Wilson,* the Court of Appeal held confirmed that a contingency fee could be reviewed even if the contingency fee agreement was fair and reasonable:

> "Rather than bearing some relationship to the work done (or the difficulty of the file, the skill required or the firm's standing), the fee was simply a percentage of the value of [the settlement]. Where a lawyer charges a fee that is a percentage of a "settlement" of this kind, he or she must realize that the dollar amount might well turn out to be unreasonable when judged in to context of the *Legal Profession Act* and the professional relationship between lawyer and client."

Mide-Wilson v. Hungerford Tomyn Lawrenson and Nichols 2013 BCCA 559, para 102

The same principles apply to any type of fee agreement. Moreover, section 71(5) of the *Legal Profession Act* expressly provides that a Registrar conducting a fee review is not limited by the terms of a fee agreement.

However, when a lawyer is required to justify their fee to the Registrar he or she is much better placed to do so if the client has signed a well-drafted fee agreement. Although the fee agreement does not bind the Registrar in determining a fair fee, it can be an important persuasive element. Moreover, a well-drafted fee agreement may foreclose a client from testifying that he or she believed the lawyer would not charge more than the original retainer amount or otherwise cap his or her fee, which are arguments often made in fee reviews.

C. Enforcement of a Settlement Agreement

In *Lessing Brandon LLP v. Dyck* 2019 BCSC 2331 a law firm entered into an agreement with a client by which the firm agreed to reduce its fee, undertake some additional work and give the client some time to pay the reduced fee. The agreement was recorded in a written settlement agreement signed by the client. The client acknowledged that he would be bound by the settlement in any further proceeding, including a proceeding before the Registrar.

The firm sued the client when he did not pay the reduced fee on time. The firm's claim was framed as an action to collect a debt arising from the settlement agreement, not an action to collect money owed on a bill. The client responded by filing an Appointment to review the bills that had been settled in the settlement agreement and by seeking a review of the settlement

agreement, but the client's Appointment was filed after the deadline for reviewing the settlement agreement had expired. The client took the position that the firm could not proceed with its action to enforce the settlement agreement because section 70(12) of the *Legal Profession Act* prohibits a lawyer from proceeding with a lawsuit to collect money owed on a bill if an Appointment is filed to review the bill that is the subject of the lawsuit.

Mr. Justice Gaul rejected the client's argument ruling that the firm was not suing to collect a bill, but rather to collect a debt created by a settlement agreement. Mr. Justice Gaul noted that the client did not file an Appointment to review the settlement agreement in time and had not sought to extend the limitation period and held that, having missed the deadline, the client could not ask the court to refuse enforce the settlement agreement because it was unfair or unreasonable. Mr. Justice Gaul ruled that the settlement agreement was enforceable and granted judgment to the firm. He also ruled that the client was estopped from reviewing the bills that had been settled in the settlement agreement.

The decision in *Lessing Brandon* underlines the importance of obtained a written agreement when a lawyer agrees to compromise his or her fees. It also emphasizes the importance of promptly challenging a settlement agreement, failing which the client may not be able to review the settlement agreement or the underlying bills.

VIII. Conclusion

The value of a well-drafted fee agreement cannot be underestimated. A well-drafted fee agreement will not take long to prepare and can be used over and over again. It is a small investment to make that will help lawyers comply with Law Society requirements, avoid disputes with clients and resolve any disputes that do arise in their favour.

Lawyers should follow the advice they regularly give to their own clients and record their agreements with clients in writing.