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Alternative Fee Arrangements and Value Billing: Lesson IV – Drafting the Alternative Fee Arrangement Agreement

Jerome Kowalski
Kowalski & Associates
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Like the legendary barefooted children of the cobbler, lawyers simply too often fail to adequately document the details of an alternative fee arrangements at the outset of an AFA engagement to their own detriment. Accordingly, moving forward from my prior primers on the subject, I now turn to the issue of the importance of meticulous drafting of an alternative fee agreement.

Several recent cases illustrate the point.

In Meyer Suozzi v Vista Maro, decided in Nassau County, New York, the client and the law firm agreed that the law firm would handle several pending and festering litigations to conclusion for a fixed fee of $300,000, plus costs, payable in three equal installments. The law firm apparently adeptly and adroitly handled the litigation and the client refused to pay more than one-half of the agreed upon fee. The law firm sued to recover the balance. The trial court ruled that the fixed fee agreement "is a non-refundable retainer agreement and as such, is unenforceable" under New York law." Similarly, in Indiana, that state's highest court found that charging flat fees violated the Code of Professional Responsibility for which a public reprimand was appropriate.

The client apparently already had a long history of protracted and expensive litigation with its antagonist and apparently did not want to keep throwing money in to the black hole of litigation. Along came Meyer Suozzi and after reviewing the file, made what was then apparently an irresistible offer to the client, namely, essentially saying "we'll solve the problem and your total exposure for legal fees will be $300,000. If we run up more than $300,000 in time solving the problem we'll eat the overage. But if we beat the clock, we get to pocket a premium."

The actual facts are that Meyer Suozzi, a leading Long Island, New York law firm, did beat the clock in resolving the client's problem. But the trial court, in ruling on a motion for summary judgment, lost the forest for the trees. She apparently got hung up on the notion that, as she read the agreement, there was a basic inequity and perhaps illegality to an agreement that would have created a condition in which the client could have simply discharged Meyer Suozzi the day after the agreement was executed and the client would still be on the hook for the full $300,000 fee. Of course that did not happen and in popular parlance, the court threw the baby out with the bath water, limiting the law firm to recovery on a *quantum meruit* basis (I frankly believe that in such a trial, the finder of fact should conclude that reasonable fee would be the stipulated amount in the retainer agreement, constituting the best evidence of the parties' understanding of what would constitute a reasonable fee). But, more adroit drafting of the initial retainer agreement would have avoided the necessity of a trial.

Another case, Kassowitz Benson v Duane Reade is also instructive. In that case, the plaintiff Kasowitz law firm alleged in its complaint said it had entered into an alternative fee arrangement, under which the client paid a $1 million flat fee to handle certain litigations and that the law firm was to receive an additional 20 percent of any recovery exceeding $4 million. Duane Reade, the client, ultimately denied that it had such an arrangement. The pleadings indicate that there is a genuine dispute concerning the very existence of a written AFA. Nonetheless, Kasowitz contends that under the AFA, it is entitled to a premium of $7.000,000

Based on its understanding of the AFA, the Kasowitz firm proceeded to litigate vigorously, as is its wont, and, apparently shortly before the matters were concluded, the defendant replaced its in-house corporate general counsel, and the new GC, who knew not Kasowitz (compare: Exodus 1:8), discharged the firm and favorably settled the matter, apparently using a different law firm. And, of course, the new GC denied that Kasowitz had any entitlement to the premium fee. On March 22, 2011, the court granted Duane Reade's motion to for summary judgment, essentially holding that the legal work for which Kasowitz sought recovery of a premium fee was not within the scope of the existing agreement.

So let's review some basics in drafting an AFA (and I do emphasize that these are just some basics):

- Without doubt, the most critical components of an AFA are a shared understanding of the scope of the engagement. The law firm and the client must have a detailed understanding of the precise scope of the engagement. This must be the subject of both detailed discussions and memorialized carefully. The retainer agreement should also recite that if the law firm is requested to perform work outside the scope of the engagement, such work will be performed in accordance with a separate change order reflecting a different fee arrangement. We have frequently seen that details of the scope of work are included in an addendum to the retainer agreement.

- Of at least equal significance is carefully memorializing the facts, circumstances that would give rise to the law firm's entitlement to a premium or success fee.

- Next, open your copy of the Rules of Professional Conduct to section 1.5 which governs the charging of legal fees and be guided by its language.

- Include a recital to the following effect: "The parties acknowledge and understand that they are entering into an Alternative Fee Arrangement, under which the law firm will not be charging and the client will not be paying legal fees based on the customary hourly rates the law firm charges and that a portion of the fees paid hereunder are contingent. The client, after considering the nature of this AFA has consulted with independent counsel and has determined that the fee arrangements described herein are fair and reasonable and that they are not excessive. The client further acknowledges that this agreement was negotiated at arms' length, without duress or compulsion and that the fees described herein reflect the client's considered understanding that these fee arrangements reflect the value to the client of the legal services to be rendered hereunder. Among other things, the client has independently reviewed and considered (a) the amount of estimated time and labor required by the law firm in order for it to discharge its obligations hereunder; (b) the novelty and difficulty of the questions involved in this engagement; (c) the skills of the law firm in these matters; (d) the likelihood that the law firm, in undertaking this engagement, will be precluded from other employment; (e) the fees charged by other law firms in the locality for such legal engagements; (f) the amounts and issues involved and the value of to the client of the results to be obtained should the law firm achieve a result that would give rise to the payment of the premium fee to the law firm, as described herein; (g) the time limitations in this matter; and (h) the nature and length of the professional relationship between the law firm and the client; the experience, reputation and ability of the lawyers to perform the services required hereunder. After independently reviewing all of the foregoing and consulting with other

professionals, the client has concluded that the fees to be paid hereunder, including, without limitation, the premium success fees described herein are fair, reasonable and are not excessive"

- Acknowledge that the client always retains the right to discharge the law firm. But, do include careful recitations that should the client discharge the law firm after the law firm has performed substantially all of the work necessary to achieve the milestone giving rise to the law firm's entitlement to receive the premium success fee but before that result is actually received, the law firm retains the complete entitlement to receive the premium success fee. Yes, this provision does not contain the precision that lawyers prefer and certainly opens the door for either vigorous debate or even litigation, but, it is quite frankly the result of inherent constraints in the Rules of Professional Conduct.

- Include a severability clause (you know the drill: "if any provision or portion of this agreement is adjudged to be invalid or illegal, …."). My own view is that some of the pending litigations between law firms and clients over AFA's would have been obviated by this clause.

- Include a choice of law provision (same type of boilerplate: This Agreement shall be governed by and in accordance with the laws of _____, without reference to principles of conflicts of laws).

I have not included most of the standard recitals in retainer agreements; they do vary from state to state and are presumed to be matters with which lawyers have familiarity.

Finally, once the AFA agreement is signed, do not, under any circumstances refrain from recording your time. I've previously addressed the necessity of accurate time keeping even in this world of AFA's. In addition, in the event your relationship with the client is severed, you may very well need to try a *quantum meruit* case in which time actually expended will be a focal point for the court and the parties.

Jerry Kowalski can be reached at jkowalski@kowalskiassociates.com