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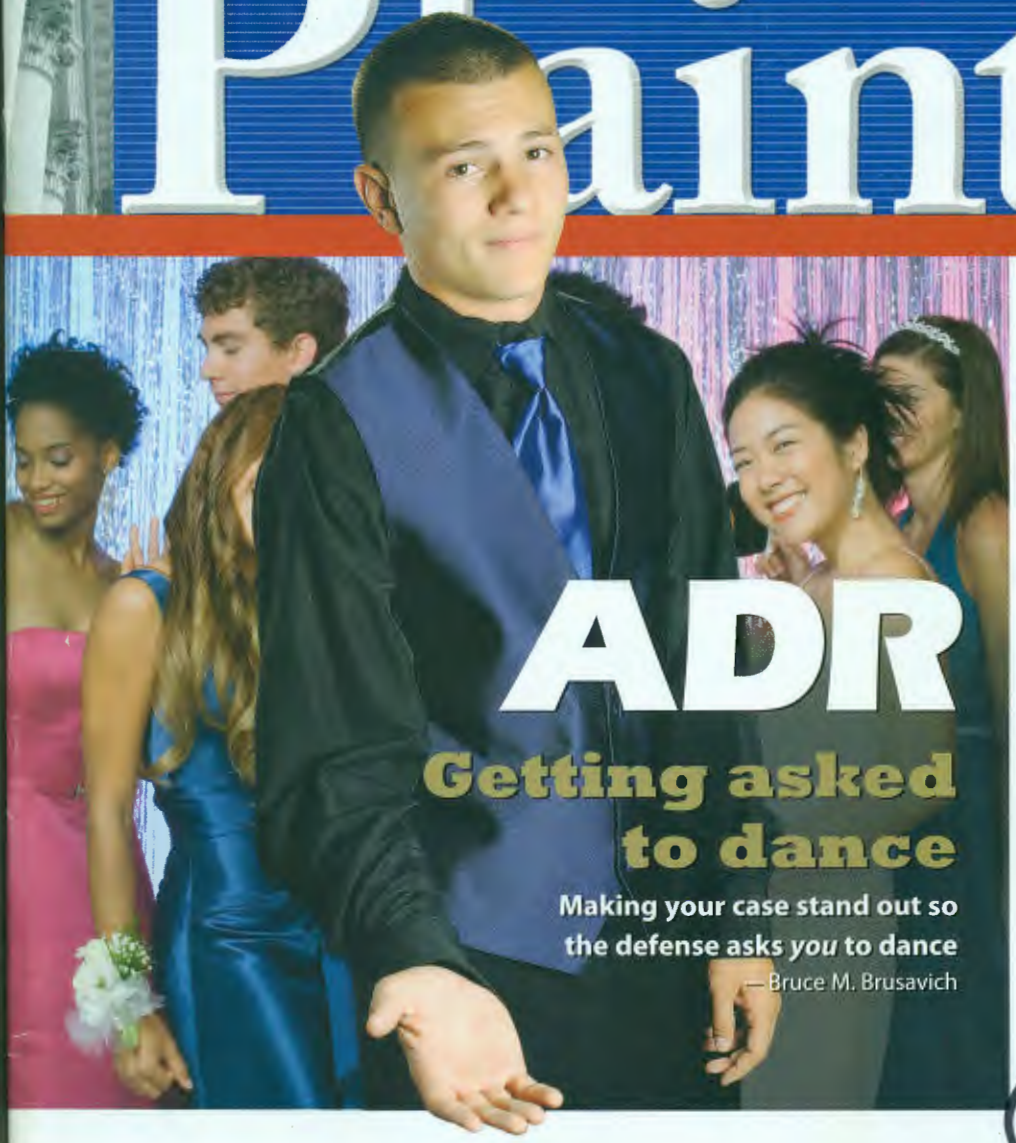
Plaintiff



ADR

Getting asked to dance

Making your case stand out so the defense asks *you* to dance
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The inherent conflict of interest in "Prevailing Party Attorney's Fees" provisions

While a PPAFP does not strictly amount to a de jure *"proprietary interest" in the litigation, it certainly has the characteristics of a de facto interest*

By Fred Carr

This article is born from a recent experience I had serving as a mediator in a contract dispute that included a "prevailing party attorney's fees provision" (PPAFP). The dispute involved a single plaintiff and three defendants. By the time the matter had been referred to me, it had been through several other mediation sessions and was scheduled to proceed to trial within a few weeks. More importantly, *each* of the parties had incurred between $200,000 and $300,000 in legal fees, and yet the basis of the dispute had a *total value of no more than $300,000* by even the plaintiff's accounting! Which begs the question, "what went wrong?"

While this circumstance has been unusual in my experience as a mediator, regrettably, it was not unprecedented. As such, I thought it worthy of investing a little time to help remind us all of our roles as both "zealous advocates" and "fiduciaries," as guided by various Rules of Professional Conduct that if arguably had been adhered to, the matter would have resolved with far less expense to the parties.

Attorney as zealous advocate

No one would argue against the tenet that as attorneys we have a professional and even moral obligation to represent our clients with zealous advocacy. Indeed, the Preamble to the Model Rules of Professional Conduct states: [The basic principles underlying these Rules] include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law...." (Unless otherwise indicated, all references to the "Rules" refer to the American Bar Association Rules of Professional Conduct.)

That "advocacy" is quite broad and incorporates rendering "candid advice" including considerations such as moral, *economic*, social and even political factors that may be relevant to the client's situation. The Rules further observe that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most *legal* questions and may decisively influence how the law will be applied. Often times, when a client is inexperienced in legal matters, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations." When a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse *legal* consequences to the client, the lawyer's duty to the client may require that the lawyer offer advice if the client's course of action is related to the representation. (Rule 2.1, Comments.) Arguably, in the context of the PPAFP, the word "economic" could, and perhaps should, be substituted for the word "legal."

Attorney as fiduciary

A fiduciary duty is a legal duty to act solely in another party's interests. Fiduciaries may not profit from their relationship with their principals unless they have the principal's express informed consent. Fiduciaries also have a duty to avoid any conflicts of interest between themselves and their principals or between their principals and the fiduciary's other clients. A fiduciary duty is the strictest duty of care recognized by the U.S. legal system. (Cornell University Law School Legal Information Institute.) What's more, the relationship between an attorney and client is a fiduciary relationship of the very highest character and all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness. In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation. (California Rules of Professional Conduct, Discussion: Rule 3-120.)

The inherent conflict of interest

While the Rules clearly require an attorney to "abide by a client's decisions concerning the objectives of representation" and particularly with regard to settling a dispute, those decisions are to be carried out "within the limits imposed by law and *the lawyer's professional obligations*."

(See, Comment, Rule 1.7 [1] "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.") However, as noted, because clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters, counsel should be particularly sensitive to potential, if not inherent, conflicts of interest. (Rule 1.2, Comment [2].)

One such inherent conflict of interest arises as a result of the fact that "[a] lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of *overreaching* when the lawyer participates in a business, property or *financial* transaction with a client. (Rule 1.8.)

Although a lawyer may accept property in payment for services, such as an ownership interest in an enterprise, s/he may not do so if it involves acquisition of a *proprietary interest in the cause of action or subject matter of the litigation*. (Rule 1.5, Comment [4].) While a PPAFP does not strictly amount to a *de jure* "proprietary interest" in the litigation, it certainly has the characteristics of a *de facto* interest. ("If it walks like a duck....")

While the Model Rules may not expressly recognize the inherent conflict of interest that results from a contractual PPAFP, they certainly recognize the generic conflict when an attorney acquires a "personal" or "proprietary" interest" in the matter: "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: "there is a significant risk that the representation of [the] client[] will be materially limited by ... a personal interest of the lawyer." Similarly, attorneys are prohibited from acquiring a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, *except* when certain *substantial* safeguards are met: when the transaction itself is fair to the client and its essential terms and the desirability of seeking the advice of independent legal counsel are communicated to the client *in writing*, and the client's consent is obtained *in writing*. (See also, California Rules of Professional Conduct, Rule 3-300 and California Rules of Professional Conduct, Rule 3-310.)

Aggressive litigation tactics

As attorneys we have an obligation to "zealously" represent our clients. However, we are prohibited from bringing or defending a proceeding, or asserting or controverting an issue unless there is a basis in law and fact for doing so that is *not frivolous*. Perhaps, not rising to the point of being frivolous, but when counsel is confident of a meritorious claim or defense, and has the benefit of a PPAFP s/he is more likely to be open to more aggressive litigation techniques, which clearly translate into more billable hours and greater self-interest.

Rule 3.1 provides that attorneys have a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse procedure. While a litigation tactic may not be frivolous even though the lawyer believes that the client's position ultimately will *not* prevail, the action *is* frivolous if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. Notwithstanding, I suggest that Rule 3.1 should be broadened to include consideration of not only a "good-faith argument" for an expansion of the law, but a balancing of the financial cost and strategic benefit to the client against the economic benefit to the attorney.

Dilatory tactics

As litigators, we have all been the occasional victim of opposing counsel's dilatory tactics. While frustrating, it's very difficult to prevent, control or seek redress from the court, and even when judicial intervention is sought, our clients must often incur the expense of doing so only for an ineffectual admonishment of opposing counsel. Although Rule 3.2 provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client," and expressly acknowledges the occasional need for counsel to seek a postponement for personal reasons, "a failure to expedite the litigation for purposes of *[r]ealizing financial or other benefit from otherwise improper delay in litigation is* ***not*** *a legitimate interest of the client* (Rule 3.2 Comment [1].)

When are fees unreasonable or unconscionable?

Attorneys are prohibited from charging "unreasonable" sums for fees and expenses. But what is "unreasonable?" Factors to be considered include: (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; and (4) *the amount involved and the results obtained*." (Rule 1.5.)

Impliedly, a balancing of the cost of taking certain action against the benefit to the client must be taken into consideration. Filing Motions to Compel, when a phone call to opposing counsel could have achieved the same result, or conversely, forcing opposing counsel to file such a motion as opposed to producing evidence that is required to be produced pursuant to the code and/or case law, are actions that financially benefit counsel at the expense of the client and should be avoided. "A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." (Rule 1.5 Comment [5].)

What's more, attorneys are clearly and expressly prohibited from 'entering into an agreement for, charging, and collecting an illegal or unconscionable fee.' (California Rules of Professional Conduct, Rule 4-200 and Comments.) Unconscionability is determined on the basis of the totality of the circumstances.

See ***PPAFP****, Page 10*

PPAFP, continued from Page 8

The Model Rules identify several factors to be considered. Arguably the most important factor to be considered in the PPAFP context is the amount of the fee in proportion to the value of the services performed, e.g., the cost of the services and the results obtained! For purposes of this discussion, and without knowing the "totality of the circumstances," expending hundreds of thousands of dollars in the defense of a claim with a total value of a small fraction of that figure, smacks of unconscionability.

Attorney discipline

Although attorneys are personally answerable to the entire criminal law, we are professionally answerable only for offenses that indicate a lack of those *character traits* relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice all fall within that broad category. When attorneys exercise undue influence over clients or *take unfair advantage of clients*, when they violate or attempt to violate the Rules of Professional Conduct, or knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf, discipline is warranted.

Conclusion

The Preamble to the Model Rules of Professional Conduct both acknowledges the inherent conflict that arises as a result of incorporating PPAFPs into contracts, and provides astute guidance in avoiding such conflicts:

> In the nature of law practice ... conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the *lawyer's own interest in remaining an ethical person while earning a satisfactory living*. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation

*See **PPAFP**, Page 12*

PPAFP, continued from Page 10

zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Given my recent experience, I would advocate for a minor amendment to the foregoing: "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests within the boundary of the law, *and place those interests before his/her own self interest,* while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system."

Postscript

In the above referenced contract matter, the parties were able to resolve the dispute pre-trial based upon new, substituted counsel placing their own self-interest (billing an additional $100,000 to prosecute/defend the action through trial) *behind* the best interests of their clients. *Kudos to them all!*

Carr

Fred Carr is an international, AV® preeminent rated attorney-mediator. With over 20 years of litigation and negotiation experience and having mediated hundreds of cases involving personal injury, wrongful death, property damage, construction defects, contract, real estate, probate, employment, sexual harassment and assault, Mr. Carr is keenly capable of maintaining control of negotiations and facilitating resolution of disputes. He is a mediation practitioner at Carr & Venner ADR *in San Rafael.*