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Ethics and the Law: Slim to None - By Robert Pelton

[1]Features
[2]Robert Pelton
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Regardless of where a lawyer practices, one thing will always remain the same?*time is money.* Abraham Lincoln said it best when stating, ?a lawyer?s time and advice is his stock and trade.? When a client seeks out an attorney to represent him or her, the client is essentially paying for two things?the lawyer?s time and knowledge. More importantly, as most lawyers unfortunately know, when the case is over and the client has not fully paid, you have two chances of being paid?SLIM TO NONE?regardless of how much time and knowledge you put into it.

A lawyer?s ?inventory? is considered his time. He essentially has nothing else to sell. Unfortunately, there is only so much time in a day, and unlike a products manufacturer, all the money in the world couldn?t buy us an endless amount of time. Thus, if you don?t manage your inventory carefully, you will have wasted your time and lost your money. This is why case selection and payment collection is very important.

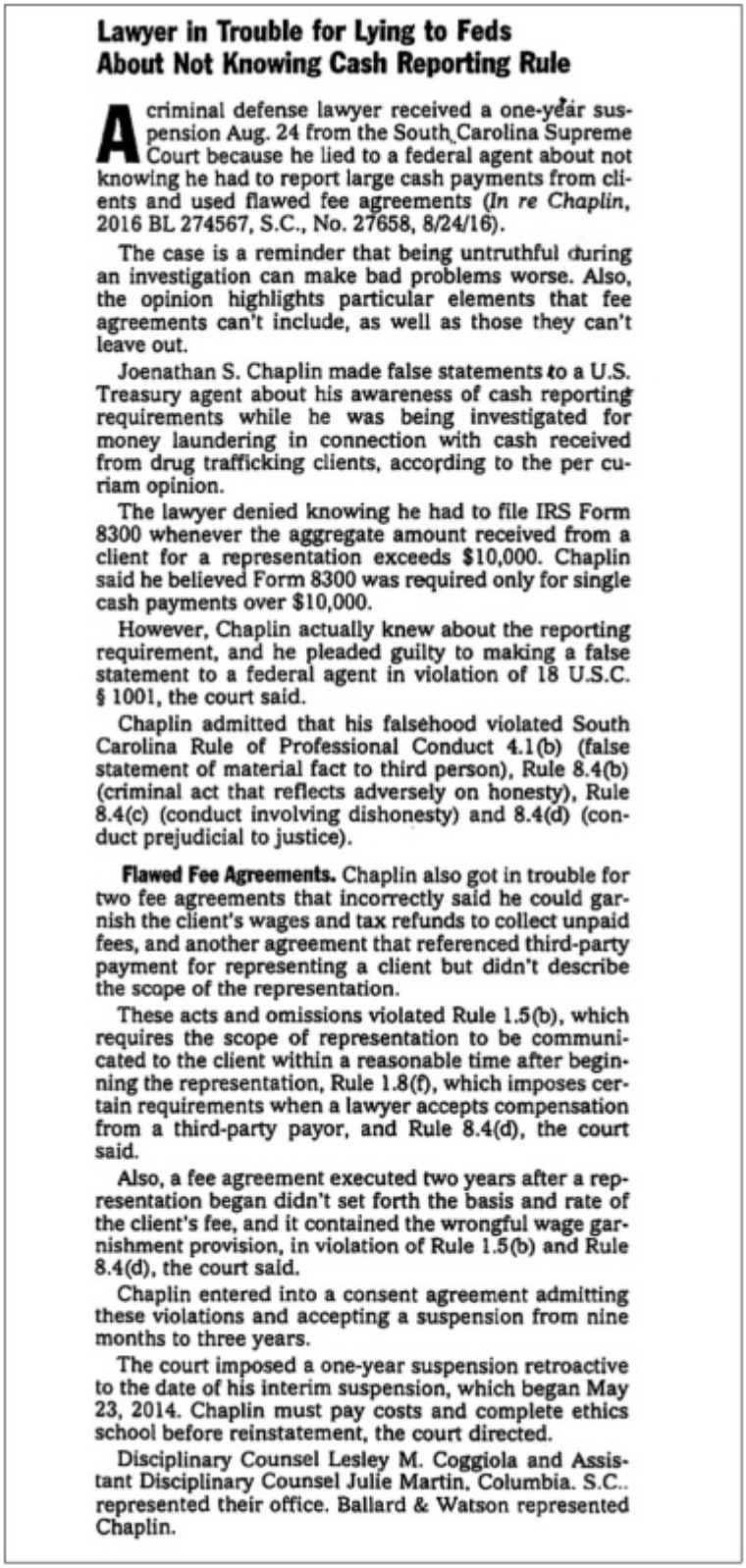
Once it makes economical sense to take on a particular case, it?s essential to ensure that the client has some ?skin in the game? as well. So long as clients have something on the line, they will almost always try to maintain communication and payment. The second clients receive what they want, they no longer are invested nor do they have an incentive to contact you or pay you.

In a perfect world, all lawyers would be paid upfront and in full. However, in reality we are left with either the occasional upfront payment or betting on the client?s word that they will comply with the signed written contract. This forces lawyers to be in between a rock and a hard spot. We take an oath and are duty bound to zealously represent the client and the client?s interests ***no matter what.*** This becomes virtually impossible when you are not paid for your time and efforts. Money opens doors and keeps the lights on, which is the only way to enable us to maintain our practice.

Collecting payment from a client is difficult at best. This raises several ethical issues: 1) who is running the show, the client or the source of the funding (e.g., Bubba?s mommy); 2) legal ramifications of accepting questionable funds (e.g., dope money in the briefcase); and 3) failure to collect essentially steals the lawyer?s time away from the ?paid-in-full? client, which in turn gives us a bad rap of being ?all about the money.? In reality we are simply looking to be compensated for services rendered, just like any other business. Because our services come in the form of advice and knowledge and it is not tangible or something concrete for the client to see and touch, the client believes that they have paid ?all this money? and have ?nothing to show for it.?

This is frustrating for both the attorney and client because the attorney has legitimately spent his or her time

and efforts to gain the best possible outcome for the client, and the client is frustrated because not only did they not get the exact outcome they wanted?which was most likely unattainable anyway?but they are also out thousands of dollars to pay the lawyer. This creates the perfect storm.



Lawyer in Trouble for Lying to Feds About Not Knowing Cash Reporting Rule

A criminal defense lawyer received a one-year suspension Aug. 24 from the South Carolina Supreme Court because he lied to a federal agent about not knowing he had to report large cash payments from clients and used flawed fee agreements (*In re Chaplin*, 2016 BL 274567, S.C., No. 27658, 8/24/16).

The case is a reminder that being untruthful during an investigation can make bad problems worse. Also, the opinion highlights particular elements that fee agreements can't include, as well as those they can't leave out.

Joenathan S. Chaplin made false statements to a U.S. Treasury agent about his awareness of cash reporting requirements while he was being investigated for money laundering in connection with cash received from drug trafficking clients, according to the per curiam opinion.

The lawyer denied knowing he had to file IRS Form 8300 whenever the aggregate amount received from a client for a representation exceeds $10,000. Chaplin said he believed Form 8300 was required only for single cash payments over $10,000.

However, Chaplin actually knew about the reporting requirement, and he pleaded guilty to making a false statement to a federal agent in violation of 18 U.S.C. § 1001, the court said.

Chaplin admitted that his falsehood violated South Carolina Rule of Professional Conduct 4.1(b) (false statement of material fact to third person), Rule 8.4(b) (criminal act that reflects adversely on honesty), Rule 8.4(c) (conduct involving dishonesty) and 8.4(d) (conduct prejudicial to justice).

Flawed Fee Agreements. Chaplin also got in trouble for two fee agreements that incorrectly said he could garnish the client's wages and tax refunds to collect unpaid fees, and another agreement that referenced third-party payment for representing a client but didn't describe the scope of the representation.

These acts and omissions violated Rule 1.5(b), which requires the scope of representation to be communicated to the client within a reasonable time after beginning the representation, Rule 1.8(f), which imposes certain requirements when a lawyer accepts compensation from a third-party payor, and Rule 8.4(d), the court said.

Also, a fee agreement executed two years after a representation began didn't set forth the basis and rate of the client's fee, and it contained the wrongful wage garnishment provision, in violation of Rule 1.5(b) and Rule 8.4(d), the court said.

Chaplin entered into a consent agreement admitting these violations and accepting a suspension from nine months to three years.

The court imposed a one-year suspension retroactive to the date of his interim suspension, which began May 23, 2014. Chaplin must pay costs and complete ethics school before reinstatement, the court directed.

Disciplinary Counsel Lesley M. Coggiola and Assistant Disciplinary Counsel Julie Martin, Columbia, S.C., represented their office. Ballard & Watson represented Chaplin.

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We are duty bound to communicate effectively with our client. When clients text, email, or call?even if you?re in line at Kroger, or at your grandson?s baseball game, or at the nail salon?they expect you to respond. In the client?s mind, it?s just ? *a simple text or email, which couldn?t have taken much of the lawyer?s time.*? The client needs to realize from the get-go that time is a valuable commodity, and that communicating in this new world of technology

can be extremely risky. The client doesn?t consider the consequences of the text or email reaching an unintended recipient, **which breaks attorney-client privilege,**and as Eric Devlin well demonstrated in his seminar talk on September 29, 2016, once a text or email is transmitted, it is always subject to retrieval. Both the client and attorney must remember that the actual defense of a case is a balancing game, and as long as both parties remain professional and communicative, they can generally come to a realistic compromise.

Another piece of the time and money puzzle conundrum involves form of payment. Fortunately, unlike most service providers, a lawyer does not always have to obtain payment in cash. Instead, a lawyer can choose to collect his fees through different forms of collateral. On several occasions, I have heard of lawyers receiving a baseball card collection, several cars, guns, real estate, and other items taken in lieu of a fee. It is amazing what turns up if you do research before meeting with the client?find out addresses, schooling/education, family history, employer information, former employers/employees, etc.

Recently I had a case where a client was on probation and unfortunately picked up another case just two months before his probation ended. He came in to discuss his new case, and when I told him my retainer fee, he claimed to have no more money. I then agreed to try to find him a lawyer who would charge less; however, what was ironic is that when he left, I walked outside and saw him drive off in a new Mercedes-Benz. My new rule became ?***Run ?em before you talk to ?em.***?

One way lawyers can ensure receiving payment is if the client has property that was seized when arrested. The lawyer can file a motion to return property and get the property released to his or her firm. Have the client sign a document releasing the property (see the below example and also see attached motion and referral to TCDLA about returning evidence). The article can be found in *The Prosecutor,* Jan.?Feb. 2009, Volume 39, No. 1?www.tdcaa.com/node/3894.

Simple Memo for Client to Sign

> The fee paid by _____[*client*] to _____ [*attorney*] is not proceeds of any criminal act.
>
> The [front-end loader, motorcycle, etc.] [*collateral*] given to me for my fee is not stolen and belongs to me. I additionally warrant that I am the sole owner of this property and no other person(s) or entity has any legal ownership interest in the property.
>
> _____[*client signature*]

Ed Mallett and Michael Mowla have both also provided me with ideas on this subject, such as referral fees. They say when you first get hired by an accused citizen, get a contract signed as soon as possible that includes the mandates found in TDRCP 1.04(f). You will find an example provided by Ed Mallett in the *Voice for the Defense*, October 2012 issue, found at [4]www.voiceforthedefenseonline.com/story/october-2012-complete-issue-pdf-d.... Additionally, the article here provided by Lawyer Mallett shows what happened to a lawyer in South Carolina regarding this issue. Lawyer Mowla is also an expert on many things?including fees?and he has provided the rule about referrals. He states:

The answer is in TDRPC 1.04(f). First, there must be a proportional division of legal services provided or join responsibility [see (f)(1)]. Second, there must be client consent [see (f)(2)]. Both factors must be present, and there are no exceptions. The referring attorney who is receiving a fee must do SOME work on the case?although this rule is bent quite a bit.

When I refer a client to another attorney, unless I plan to stay on as counsel in some capacity, I wash my hands clean of the case. If the other attorney gets hired and collects a handsome fee, good for the other attorney. I consider the referral a ?gift? to the other attorney for which I expect nothing in return (nor will I accept anything in return), and I make the referral based only upon my confidence in that attorney?s abilities.

TDRPC Rule 1.04(f) Fees (Effective March 1, 2005) reads as follows:

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:
(i) in proportion to the professional services performed by each lawyer; or
(ii) made between lawyers who assume joint responsibility for the representation; and
(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including
(i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and
(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and
(3) the aggregate fee does not violate paragraph (a).

The bottom line is that each case you take on as a lawyer should be carefully analyzed. Your time is precious and should not be wasted. As Benjamin Franklin stated, **?THEN DO NOT SQUANDER TIME, FOR THAT IS THE STUFF LIFE IS MADE OF.?**

You may have done a great job for your client and saved him or her from being locked up or convicted, but sad to say it is still SLIM TO NONE on your chances of getting paid no matter how much time you spent on it.

A special thanks to Monica Ishak, Robyn Harlin, Michael Mowla, and Ed Mallett for their advice and guidance with this article. *Robert can be reached at rpeltonlawyer1@aol.com.*

[5]

CAUSE NO. 1234567

THE STATE OF TEXAS	§	IN THE 123RD JUDICIAL
	§	
VS.	§	DISTRICT COURT
	§	
CLIENT	§	HARRIS COUNTY, TEXAS

MOTION TO RETURN PROPERTY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Robert Pelton, attorney for CLIENT, and files this Motion to Return Property. There were guns seized when Defendant was arrested in the above-referenced case. The case has been resolved by dismissal and Robert Pelton respectfully requests he be allowed to retrieve Defendant's firearms from law enforcement officials. The firearms are partial payment to Robert Pelton for fees owed to him. The Assistant District Attorney for Harris County does not object.

It is requested that the firearms be returned to Robert Pelton or his assigned agent.

Respectfully submitted,

By:_____
ROBERT PELTON, Lawyer for CLIENT
4001 N. Shepherd Drive, Suite 110
Houston, Texas 77018
713-524-8471
713-697-5903 Facsimile
SBOT 15733500

CERTIFICATE OF SERVICE

This is to certify that on _____, 2016, a true and correct copy of the above and foregoing document was served on the Harris County District Attorney's Office via hand delivery.

_____
ROBERT PELTON

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