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## **Ethics of Client Billing and Fee Collection: Balancing Financial Interests and Fiduciary Obligations**

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Today's faculty features:

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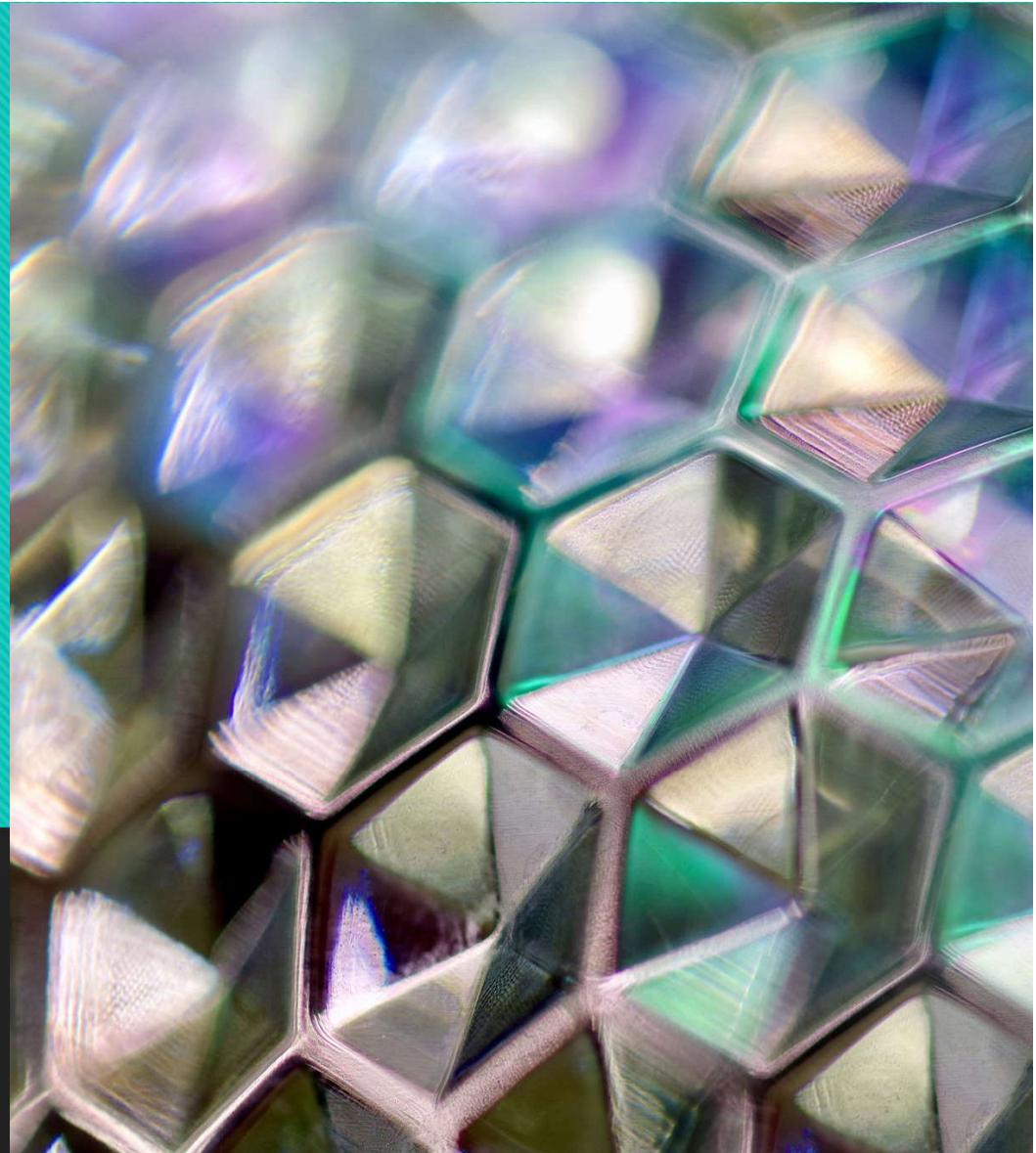
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# Ethics of Client Billing and Fee Collection: Balancing Financial Interests and Fiduciary Obligations

**Carole Buckner**  
**Jan L. Jacobowitz**  
**Ron Minkoff**



# I. Fifty Shades of Blue (or Green?)

**Skye Blum** is the hottest plaintiff's lawyer in town. Although his firm, Blum & Blueblood, P.C., is small, he has represented clients in a variety of high-profile personal injury cases and often represents celebrities in contract negotiations. In fact, he recently represented the Miami Sizzle's marquee player in his highly publicized negotiations and departure from the team.



So perhaps it comes as no surprise that **Indigo Adams, the President of Sapphire Jewelry**, the nation's largest jewelry retail outlet, and no slouch when it comes to publicity, ultimately retains Skye to file a lawsuit against Sapphire's largest turquoise supplier, **Blue/Green Minerals, Inc. ("B/G")**.



Indigo claims that Sapphire was unable to manufacture and sell turquoise jewelry – one of its most popular products – during the 2014 Holiday season as a result of **B/G's defective shipment of turquoise**. Additionally, Indigo believes that she has a trademark infringement claim against **B/G because it has recently opened several jewelry stores named "Blue Sapphire."**

## Next Add Lavender...

Sapphire's **in-house lawyer, B.B. Albert** (named after her parents' favorite blues guitarists), attempts to negotiate a resolution with B/G, but is unsuccessful. One of Indigo's neighbors, **Jack Grey**, suggests that she contact Skye. Jack explains that although he is not a lawyer, he has been playing golf with Skye for years and Skye is "as sharp as they come."

Indigo contacts Skye, and she explains: "I want the toughest junkyard dog around." Indigo is unaware that **Skye had years before promised each member of his usual golf foursome, including Grey, 5% of any fee from any matter referred to Skye.**

However, **Skye has a problem: he hasn't handled a commercial litigation matter in over 20 years since his days as an associate at BigFirm, and he has never handled a trademark matter.** He does not want to admit his inexperience to Indigo, fearing that he will lose the case. So, **he retains solo practitioner Lavender Peacocke**, a trademark litigator, to assist him on the case.

## Rainbow of Issues

Skylar agrees to pay Lavender by the hour; she will bill Skylar directly at the rate of \$150 per hour. Skylar plans to pay Lavender, and charge Indigo for Lavender's time at \$300 per hour, which will appear as a single entry on Blum & Blueblood's monthly bills as a disbursement for "outside consultant." Skylar does not discuss the arrangement with Indigo or B.B. Subsequently, B.B. approves all bills containing the outside consultant disbursement and other costs without asking for any explanation. Because trademark issues are important to the case, the disbursement often exceeds \$5,000 per month.

As for a retainer, Skylar uses his standard retainer for personal injury cases, which says simply: "I will receive one-third of the Net Recovery plus disbursements for court fees, transcription services, consultants, expert witnesses and other out-of-pocket costs." "Net Recovery" is defined as the gross amount received from B/G either as the result of a settlement or the collection of any judgment or arbitration award, less any unpaid disbursements." Indigo executes the retainer agreement on behalf of Sapphire. At the time Skylar presents and executes this agreement, he is not aware that Sapphire may be entitled to an attorneys' fee award under the Lanham Act if it prevails on its trademark claim.

# Black and White Answers?

- ❖ What are the basic rules for executing a contingency retainer? An hourly retainer? If they are different, why are they different?
- ❖ Is Skye's fee arrangement with Sapphire excessive? Can this be determined from the face of the agreement, or in some other way?
- ❖ Is the arrangement with Grey proper?
- ❖ Is the arrangement with Lavender proper? What if Skye used an associate in his firm paid him \$150 and billed him at \$300 per hour, to do the same job as Lavender (assume an hourly rather than a contingent fee)? Would that be proper? Why is the arrangement with Lavender treated differently?
- ❖ Assume Skye ultimately recovers \$600,000 in damages plus an attorney's fee award of \$150,000. How much is he entitled to keep as his fee?
- ❖ What if, to obtain this recovery, Skye only writes a demand letter and has a single meeting with opposing counsel, accruing a total of \$10,000 in time. Is the fee excessive then?
- ❖ If the fee is deemed excessive, is Skye entitled to any fees? If so, on what basis?

## Same Story, Different Shade of Green

Imagine the same fact pattern, but with a **different fee arrangement**. In this scenario, Skye decides to take the case on an hourly basis. He tells B.B. and Indigo that he has no trademark experience, but that he is a highly experienced lawyer who has often worked in areas of law with which he is not familiar and obtained excellent results. (Assume that is true, and that B.B. and Indigo had interviewed trademark litigators, but found none with the “fire in the belly” that they wanted.)

Skye charges \$750 per hour – the same as trademark litigators at BigLaw – and runs up \$250,000 in time having associates research basic trademark and commercial law issues. Skye also asks for a \$100,000 advance retainer, which his retainer agreement says is “non-refundable.” Over the course of six months, Skye and his firm rack up a total bill of \$400,000, with no objection to any of the charges from Indigo or B.B. (who is in charge of reviewing the bills.)

The case eventually settles, during mediation after the motion to dismiss stage, for \$600,000. Assume that other trademark and commercial litigators will testify that, because of their familiarity with trademark and commercial law issues, they could have accomplished the same result for \$150,000, and that they have never seen a case where \$400,000 in time had been run up in the motion to dismiss stage.

# Black and White Answers?

- ❖ May Skye make the \$100,000 fee non-refundable? If not, what consequences may Skye suffer in terms of professional discipline and getting paid?
- ❖ Is Sapphire likely to prevail on a claim that Skye's fee was excessive? On what basis? May such a claim be asserted in court, or only in the disciplinary process? If the latter, what benefit is it to Sapphire to pursue a disciplinary action?
- ❖ If Sapphire refuses to pay, what causes of action may Skye assert to obtain recovery?
- ❖ If Skye asserts an account stated claim, may Sapphire defend on the ground that the legal fee is excessive?

## Green, But With a Contingency?

Same scenario as 2, except the case does not settle at the motion to dismiss stage.

Indigo and B.B., appalled at the mounting legal fees, contact Skye to express their outrage. They say that they **will not pay another penny beyond the \$400,000.**

Skye replies: “I’m telling you, this is a good case and I have a lot of faith in it. I’m not guaranteeing anything, but I think you can do a lot better than \$600,000 here. So here’s what I’m willing to do: **let’s switch this to a contingency arrangement. You pay me \$200,000. In return for writing off the other \$200,000, I’ll get a 40% contingency of any settlement. At settlement I will give you credit for the fees you have paid me and will subtract \$200,000 from my contingency fee.**” Indigo and B.B. agree.

Three months later, Skye has done little additional work and in what comes as a complete surprise to Skye and Sapphire, B/G produces an email in which its President admits to one of his subordinates that the shipment was defective, and says, “Now we’re in double trouble. Not only have we harmed Sapphire’s Christmas season, but we’ve harmed Sapphire’s reputation, which certainly won’t help our effort to launch our Sapphire stores.”

**Using this smoking gun, Skye is able to quickly extract a \$2 million settlement, which results in a total fee of \$800,000 – almost double what Skye would have received if the hourly agreement had remained in place.**

# Black, White or Grey?

- ❖ What legal rules apply to a change in the fee arrangement mid-stream? Was what occurred here proper? Does the type of client matter?
- ❖ Was Skye's ultimate fee excessive? When is the determination of excessiveness made: at the outset of the arrangement, or in hindsight – or can it be both?

# Same Story With A Question of Trust...

Still using the fact pattern, **assume the case settles for a \$600,000.**

During the case, **Sapphire hired an economist to serve as an expert**; Skye knows the terms of the deal and assisted in the drafting of the agreement . At the end of the case, **the economist is owed \$50,000.**

**The settlement funds come into Skye's attorney trust account. Skye informs B.B. that Skye intends to pay \$50,000 to the economist and then divide the balance between his firm and Sapphire.**

**B.B. objects:** "That economist was useless. **We don't want to pay him.**"

Skye says: "This was a straight hourly arrangement, and his report was key to the settlement. B.B., you know that!"

B.B. responds: "Well, Sapphire won't let it happen. And **you are our lawyer and have to follow our instructions.**"

# What's A Lawyer To Do?

- ❖ What are Skye's ethical obligations at this point? Which ethical rules apply?
- ❖ Does Skye have any options under the ethics rules that will help him avoid ethical or civil liability?
- ❖ May Skye face civil liability if he does not comply with the ethics rules? What are his liability risks?

# Same Problem, But With A Little Green Help

Using either Scenario 1 or 2, assume that as the case drags on, Sapphire becomes concerned about having to lay out all the money to finance the litigation.

B.B. contacts Blue Meanies Legal Funding (“BMLF”) to provide \$500,000 in litigation financing. BMLF suggests several different possible funding arrangements:

- (a) BMLF will lend the money at 2.5% monthly interest;
- (b) in return for the money, BMLF will receive 10% of the net recovery; or
- (c) in return for the money, BMLF will receive 20% of the net legal fee.

# Black, White, or Grey?

- ❖ Are any of these arrangements legally or ethically permissible? If not, are there permissible arrangements?
- ❖ Assuming it is permissible for BMLF to receive 10% of the net recovery, must Skye protect these funds if B.B. subsequently objects to paying BMLF ?
- ❖ In terms of avoiding legal or ethical risk, is it better for Sapphire to obtain the financing or Skye?

## II. Discovery or Who's In Charge?

Smith & Jones, P.L.C., has a commercial litigation practice. The firm agrees to represent The Daily Bulletin in the defense of a libel case. The Daily Bulletin is concerned that anticipated fees and costs might prove burdensome.

The Daily Bulletin requires that Smith & Jones agree both to utilize an e-discovery company that The Daily Bulletin has previously used, and to limit the scope and method of discovery in accordance with The Daily Bulletin's instructions.

# Questions...

- ❖ Do The Law Bulletin's requirements interfere with the professional independence of the law firm?
- ❖ If the firm acquiesces in those requirements, how will the risk of the scope of discovery limits be allocated between the firm and The Law Bulletin?
- ❖ What actions should the firm and The Law Bulletin take to minimize unforeseen negative outcomes?

# Dropping Out or Dropping into the Future?

Sharon drops out of Stanford to create the next tech success. She believes the legal profession has ignored a multibillion-dollar consumer market for routine legal matters. She develops Affordable Lawyer, an app to match consumers needing wills, closings, contracts and the like with lawyers willing to provide those services at a flat fee set by Affordable.

Lawyers make known their willingness to provide the services via the app. Affordable generates a lot of client interest. When a client wants one of these services, the app shows the names of willing lawyers in the same geographic area as the client. If a lawyer and client reach an agreement to representation, the fee is sent to Affordable, which deposits the fee in the lawyer's business account only upon completion of the legal matter. Affordable then debits the lawyer's account for its marketing fee, which Affordable has set based upon the amount of the legal fee.

# Questions...

- ❖ Is Affordable's holding of the fee a trust account violation?
- ❖ What if costs were advanced?
- ❖ Does this set up compromise the lawyer's independence?
- ❖ Is the marketing fee an improper payment for a referral of a legal matter?
- ❖ Is the marketing fee really an impermissible fee split?

# Resources

Absent Contrary Agreement Statutory Fees Belong to the Lawyer

By Carole J. Buckner

<https://blawg401.com/absent-contrary-agreement-statutory-fees-belong-to-the-lawyer/>

Fee Sharing and Insurance Disclosure

By Carole J. Buckner

<https://www.sdcba.org/?pg=EthicsinBrief20200224>

Collecting Your Referral Fee

By Carole J. Buckner

<https://www.sdcba.org/index.cfm?pg=FTR-April-2020-5>

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# Resources

<http://www.newyorklegalethics.com/how-to-lose-your-legal-fee-part-3-fee-disputes-with-clients-in-federal-court/>

<http://www.newyorklegalethics.com/how-to-lose-your-legal-fee-part-2-legal-fee-forfeiture/>

<http://www.newyorklegalethics.com/how-to-lose-your-legal-fee-part-1-excessive-fees/>