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C O N F I D E N T I A L • S U B J E C T T O A T T O R N E Y - C L I E N T P R I V I L E G E
P R O T E C T E D B Y W O R K P R O D U C T D O C T R I N E

TO: Mr. Tony Petrucciani, CEO CasePacer LLC

FROM: Attorneys James Bell and David Hensel, Hoover Hull Turner, LLP

DATE: May 4, 2023

SUBJECT: Ethics Opinion Regarding Billing Clients For Expenses

I. Introduction

CasePacer is a cloud-based legal case management software system that is geared toward assisting plaintiff lawyers manage their cases. The way CasePacer bills for its services is outlined below. The purpose of this memorandum is to provide an ethics opinion regarding whether Indiana attorneys may ethically pass on their CasePacer expenses to their client and whether Indiana attorneys can calculate their fee prior to charging the expenses.

II. Limitation on Our Opinion

Please note that although we base our opinion on ethics authorities from across the nation, Hoover Hull Turner is an Indiana law firm and we are only qualified to render Indiana ethics advice. Therefore, our ethics opinions are limited to Indiana law.

III. Facts/Proposed Work Arrangement

In an April 13, 2023 email, you supplied us with the facts as to how CasePacer operated. That email stated:

> "CasePacer is a cloud-based legal case management software system that is geared toward plaintiff lawyers.

We are different from most (if not all) software providers based on the way we license and charge for our software. We do not charge by or limit the number of users that a law firm requests or uses for accessing our software. We charge by the case. We have two primary ways that we charge:

1) Monthly - $5/case – once the case is on the system, we charge $5 to the case (we actually put it into the Expenses area of the case) for each month that the case is active on our system. Once the case settles or is closed, we stop charging that $5.

a. Options – we have a mobile communication platform that the law firm can "private label". This optional product, called CP Direct, is used to provide secure messaging between the law firm and the plaintiff. If the firm and the plaintiff desire to use this option, we charge a monthly case expense (typically $1/month) to the case to open up that functionality.

2) At Settlement - $150/case – we allow up to 24 months for the case to be settled/closed. At the point of settlement/closure, we place $150 into the case expenses and the firm is expected to remit that $150 amount to us. If a case goes longer than 24 months, we do add a $6/month expense to the case until the case is settled or closed.

We have roughly 60 customers, and they are primarily what we call "single event" law firms. They represent a plaintiff for a specific case such as a truck accident or medical malpractice.

We have multiple customers now that focus on MDL/Mass Tort, which is interesting to us since those firms typically get anywhere from dozens to hundreds or thousands of cases due to the specific event(s) such as the Wildfires in California or the upcoming Camp Lejeune lawsuits.

We have several customers that have told us that they charge the expenses related to the case back against the case at the time of settlement.

However, we have run into prospective customers that are unsure about the ethics of charging the case expense for our software against their client's case.

> Most software companies charge by the user, and those expenses are typically seen as overhead for the firm and not a direct expense of a specific plaintiff case.
>
> We believe this is a differentiator for us, but we need something more official than, "we know some of our customers do it, so you should as well"
>
> We have not delved into the concept of the timing of when expenses are taken from a settlement. **Specifically, can a lawyer take their fee from the settlement amount then pay the expenses then remit the remainder to the plaintiff vs. taking the expenses from the settlement amount then take their percentage from that amount then remit the remainder to the plaintiff?**

(Emphasis added.)

Our opinion below is based on these facts. Please let us know if any of these facts are incorrect as the accuracy of these facts may change our ethics opinion.

IV. Issues

1. May an Indiana attorney who utilizes CasePacer's software ethically deduct the CasePacer expense from the personal injury client's portion of award? Or must the Indiana attorney treat the CasePacer expense as overhead and not "pass" the expense on to the client?

2. May an Indiana attorney ethically calculate his or her contingent fee from the total settlement, before applying the CasePacer expense? Or must the CasePacer expense be deducted from the total settlement before the attorney calculates the contingent fee?

V. Issue #1: An Indiana Attorney May Ethically Deduct the CasePacer Expense from the Client's Portion of the Fee

A. Indiana Rules of Professional Conduct and ABA Formal Opinion 93-379

Rule 1.5 of the Indiana Rules of Professional Conduct provides some guidance as to how lawyers should charge expenses. For example, Rule 1.5(a) states that a lawyer "shall not . . . charge, or collect an unreasonable fee or an unreasonable amount for expenses." Additionally, Rule 1.5(b) requires that the basis for charging expenses be communicated at the beginning of a representation. However, these provisions do not give clear guidance as to when an expense should be considered part of the lawyer's overhead or when the expense should be considered an expense that should be covered by the client.

Comment [1] to Rule 1.5 does make clear that certain expenses may be "passed on" to the client. Specifically, Comment [1] states: "[a] lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer."

In 1993, the American Bar Association issued Formal Opinion 93-379, which gave attorneys further guidance on the expense issue. This ABA Opinion made clear that a "lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing, and equipping an office." *Id.* at 1. In making this statement the ABA included the following as examples of overhead expenses: "costs in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like [that] would be subsumed within the charges the lawyer is making for professional services." *Id.* at 7.

Notably, the ABA opined that "the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house, such as . . . computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered." *Id.* at 1. In addition, the opinion stated that with regard to "charges for photocopying, computer research, on-site meals, deliveries and other similar items . . . it seems clear that lawyers may pass on reasonable charges for these services." *Id.* at p. 8.

Seven years later, ABA Formal Opinion 00-420 affirmed the conclusion of Opinion 93-379 and the Association of the Bar of the City of New York followed the ABA Formal Opinion 00-420 in its Formal Opinion 2006-3. Finally, the San Diego County Bar Legal Ethics Committee (SDCBA) followed also followed ABA Formal Opinion 93-379. See SDCBA Legal Ethics Opinion 2013-3.

B. The Importance of Putting Expenses in the Attorney's Fee Agreement

In rendering its opinion, the San Diego Count Bar Legal Ethics Committee noted that it would be "better practice" for an attorney to "specify in her fee agreement that, in addition to costs paid to third-party vendors, she would bill, and Client would be expected to pay, certain in-house expenses related to the engagement." SDCBA Legal Ethics Opinion 2013-3, p. 7. (Emphasis added.) This is not the only time that the authorities summarized above made implicit or explicit reference to engagement letters.

Indeed, ABA Opinion 93-379 referred to placing "disbursements" for expenses in the engagement letter. For example, Opinion 93-379 stated that "**at the beginning of the engagement lawyers typically tell** their clients that they will be charged for disbursements. When that term is used clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf." *Id.* at 7. (Emphasis added.) While the Opinion does not specifically state that attorneys should place the anticipated expenses in a written engagement letter, an engagement letter is typically when attorneys "tell" clients about disbursements "at the beginning of the engagement."

C. Contrary Authority

It should be noted that in certain contexts, some federal courts have concluded that certain out-of-pocket may not be recouped by attorneys. The SDCBA Legal Ethics Opinion 2013-3 summarized these cases as follows:

> Some federal courts in California, however, have concluded that some such charges are overhead—albeit in very different contexts—such that they would not properly be billed to a client. Accordingly, the courts refused to award such charges as costs. For example, in *Allen v. City of Los Angeles* (C.D. Cal. January 13, 1995) 1995 WL 433720, at *20, in deciding the award of attorney's fees and costs in the Rodney King civil rights case "the court … disallows costs for meals, parking and telephone charges." In *Zynga Game Networks v. Ekran* (N.D. Cal. August 31, 2010) 2010 WL 3463630, a Lanham Act case, the court determined that Lexis/Nexis computer research and telephone charges were overhead and in *In re Media Vision Technology* (N.D. Cal. January 23, 1996) 913 F.Supp. 1362, 1370, in approving the settlement of a securities class action, the court held that "private express mail services are a part of the firm's overhead and should be absorbed as the cost of doing business." The court also reduced photocopy charges of $0.25 per page to $0.08 to reflect the average price charged by most

> commercial copy services. (*Id.* at 1368.) In *Ringcentral, Inc. v. Quimby* (N.D. Cal. April 8, 2010) 711 F.Supp.2d 1048, 1066, another Lanham Act case, "the Court considers expenses incurred as a result of long distance telephone calls to be overhead not properly included in an award of costs." And in *American Small Business League v. U.S. Small Bus. Admin*. (N.D. Cal. September 12, 2005) 2005 WL 2206486 at *2, a FOIA action, "the court finds that the $1,660.83 in 'Westlaw legal research costs' should properly be treated as overhead, not costs."

SDCBA Legal Ethics Opinion 2013-3, p. 3.

However, the SDCBA noted that "[n]one of these federal cases . . . addressed the ethical propriety of charging a client for these kinds of expenses; rather, the only issue was whether the court would award them as costs." In other words, none of these matters analyzed the Rules of Professional Conduct or situations where an attorney had specifically notified the client in an engagement letter that he or she would seek recoupment for a certain disbursement. Instead, all of these cases were decided in the context of statutory claims (*e.g.,* Lanham Act, Civil Rights Act, Freedom of Information Act) where the trial court had discretion to award costs and the decision to award costs was left completely up to the trial court.

Because of the court's discretion, the results in some of these cases were inconsistent with the explicit permissions granted in the Indiana Rules of Professional Conduct. For example, in two instances, the court did not grant reimbursement for telephone charges, even though the Indiana Rules of Professional Conduct specifically permit reimbursement for such expenses. *Allen,* 1995 WL 433720, at *20; *RingCentral, Inc.,* 711 F.Supp.2d at 1066. In addition, one of these courts awarded costs for computer research (*In re Media Vision Technology,* 913 F.Supp. at 1371), while another court did not (*American Small Business League,* 2005 WL 2206486 at *2).

Because these cases do not deal with the ethical propriety of "passing on" expenses to clients, these cases have no bearing on this opinion. However, it should be noted that the scope of this opinion does not cover the recoupment of costs stemming from statutory claims where the trial court has discretion to award costs. In such matters, regardless of the ethics rules, the courts will determine which costs are awarded and which ones are not.

D. Our Opinion Regarding Issue #1

As noted above, the Indiana Rules of Professional Conduct and the ABA Ethics Committee have approved billing clients for out-of-pocket expenses or disbursements, such as copying costs, telephone charges, computer research, special deliveries and secretarial overtime. In addition, these same authorities have approved recouping the costs of these expenses if they are explicitly set out in the engagement letter. Therefore, it is our opinion that like computer research, the CasePacer expenses may be ethically "passed on" to clients by Indiana plaintiff's attorneys, provided the CasePacer expense is explicitly agreed to by the client, in a written engagement letter, at the outset of the engagement.

VI. Issue #2: An Indiana Attorney May Ethically Calculate His or Her Contingent Fee Prior to Deducting the CasePacer Expense, Provided that Such Term is Stated in a Written Fee Agreement that is Established at the Outset of the Representation

Rule 1.5(c) of the Indiana Rules of Professional Conduct discusses contingent fees. That Rule states that "[a] contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; **and whether such expenses are to be deducted before or after the contingent fee is calculated.**"

This leads to the conclusion that provided such term is agreed to by the client in a written fee agreement at the outset of a representation, Rule 1.5(c) permits an Indiana attorney to calculate his or her contingent fee prior to any expense being deducted from the client's recovery. Therefore, it is our opinion that provided the Indiana lawyer and his or her client have agreed in a written fee agreement, at the outset of the representation, that the contingent fee will be calculated prior to the CasePacer expense being deducted, it is an ethical practice for an Indiana attorney to calculate his or her contingent fee in this manner.

Conclusion

As stated before, the purpose of this memorandum was to provide an ethics opinion regarding whether Indiana attorneys may ethically pass on their CasePacer expenses to their clients and whether Indiana attorneys can ethically calculate their fee prior to charging expenses. Based on the above, it is our opinion that CasePacer expenses may be ethically "passed on" to clients by Indiana plaintiff's attorneys, provided the

CasePacer expense is explicitly agreed to by the client, in a written engagement letter, at the outset of the engagement. In addition, it is our opinion that provided the Indiana lawyer and his or her client have agreed in a written fee agreement at the outset of the representation that the contingent fee will be calculated prior to the CasePacer expense being deducted, it is an ethical practice for an Indiana attorney to do so. Please note that this opinion does not cover the recoupment of costs stemming from statutory claims where the trial court has discretion to award costs.