

# Fee Disputes Invite Malpractice Suits

By Anne E. Thar, Vice President and Corporate Counsel

**A** recent Illinois Appellate Court ruling from the first district highlights the malpractice risk associated with suing a client for unpaid fees.

The facts of *Weisblatt v Colky*, 1994 WL 313661 (June 30, 1994), are simple. Client Weisblatt entered into an oral agreement with attorney Colky under which Colky agreed to represent Weisblatt in her divorce. Weisblatt refused to pay her \$25,499 bill, and Colky filed an attorney fee petition.

Weisblatt then hired attorney Silverman to represent her in the fee dispute with Colky. Silverman filed a counterclaim against Colky and his firm alleging negligence, breach of the oral agreement, and breach of fiduciary duty for failure to use reasonable care and skill in representing Weisblatt.

Weisblatt and Colky settled their fee dispute, releasing each other from all claims arising out of the divorce in exchange for Colky's agreement to accept, and Weisblatt's to pay, \$12,500 in full satisfaction of the fee petition.

The story does not end there, however. Weisblatt then sued both Silverman and Colky, alleging breach of fiduciary duty and constructive fraud by Colky and Silverman, which invalidated the release. Colky filed a motion to dismiss based upon the release, which the trial court granted and the appellate court affirmed.

Writing for the majority, Justice McNulty found that Weisblatt and Colky no longer had an attorney-client relationship and therefore Colky owed Weisblatt no fiduciary duty. McNulty relied heavily on the fact that Weisblatt was represented by independent coun-



***Take a few simple steps to avoid fee disputes and the retaliatory malpractice claims they generate.***

sel — Silverman — when she executed the release with Colky.

This case illustrates two common and easily preventable causes of malpractice claims: (1) failure to enter into a written agreement outlining the scope and cost of the engagement, and (2) pursuing a fee suit, which almost inevitably brings a counterclaim for malpractice. ISBA Mutual continues to handle malpractice claims arising out of fee disputes, particularly where no fee agreement has been executed. Filing a fee petition often creates more problems than it solves.

Fortunately, you can take some of the following simple steps to reduce these risks.

***Engagement letters:*** Send an engagement letter to each new client

(and for each new matter you undertake for a current client). The engagement letter should clearly define the scope of your services and the fees you will charge (e.g., hourly, contingency, or per project). Also mention any additional costs and expenses that you will pass along to the client, such as filing fees, travel, and so forth.

***Detailed monthly billings or reports:*** Provide clients with detailed monthly bills. In lieu of

bills, attorneys who charge contingency fees should provide written monthly updates to their clients. This gives your client a better appreciation of what you're doing to earn the fee.

***Prompt fee collection:*** Never permit a client to fall months behind in paying a bill. Consider requiring a retainer if you regularly have trouble collecting your fee.

***Client updates:*** In addition to providing monthly bills or updates, you should copy clients on all correspondence, pleadings, and other documents relating to their matter. This not only allows clients to see where their money is going, but also reassures them that they're being carefully attended to.

***Fee Arbitration:*** Arbitration is usually a quicker, less expensive, and less contentious way to resolve a fee dispute. The ISBA Voluntary Fee Arbitration Committee offers free arbitration if both parties consent. For more information, contact Athena Taite or Sonja Lloyd at (217)525-1760.

In short, avoid the temptation to sue clients for fees. More often than not, fee petitions lead to costly and time-consuming malpractice claims.