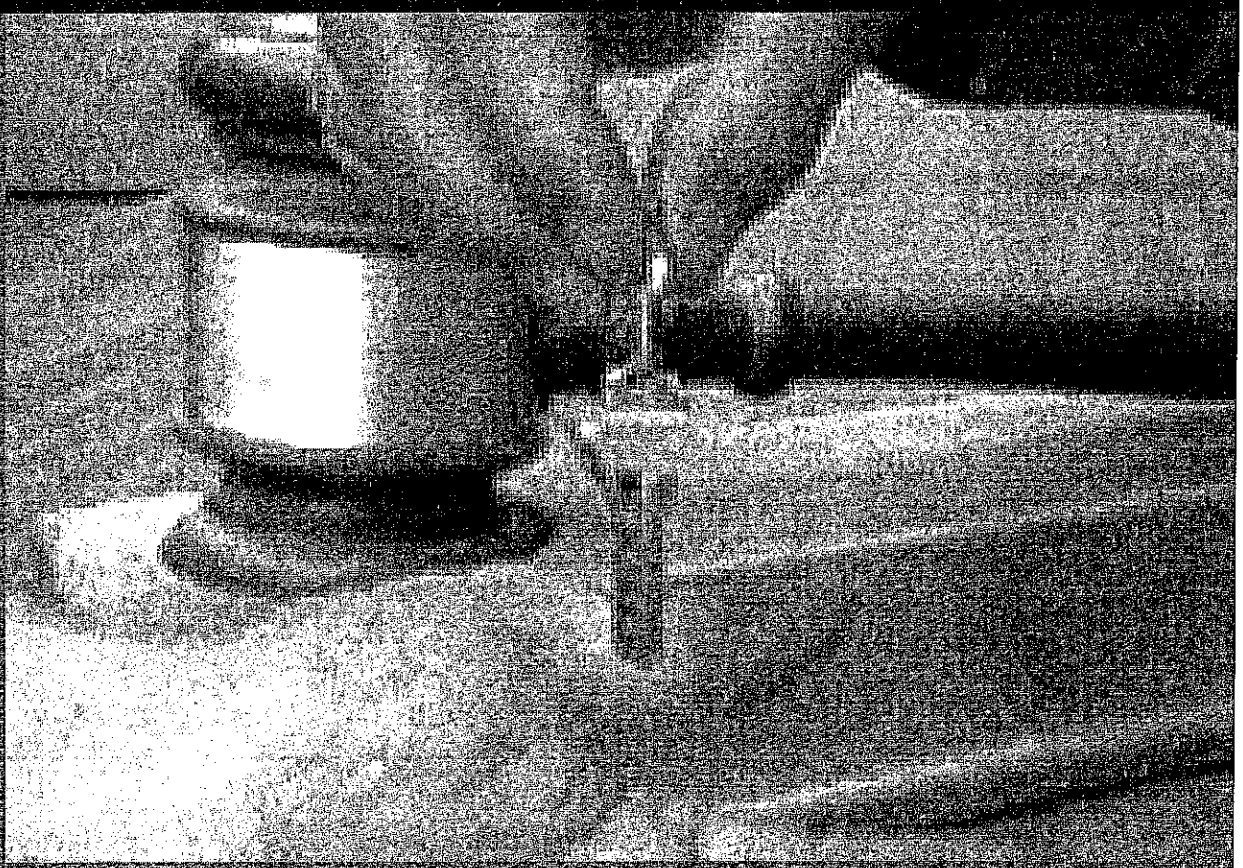
Current Ethical Issues in the Practice of Real Estate Law



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Boston Bar Association

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PREVENTION & RESOLUTION OF FEE DISPUTES

By C. Peter R. Gossels of Weston Patrick, P.A.

We think of ourselves as lawyers, officers of the Court, if you will, who do our best to help our clients achieve justice in and through our judicial system. Many of us, who are not litigators, work to help our clients obtain an equitable result as we assist them in solving and documenting transactional problems of all kinds.

And most of us wish that we could do all this without renting space, paying our staff, investing in our library and media and supporting our family. Unless we are employed by a law firm or corporation, however, we can not serve our clients unless we charge them a fee.

Once upon a time, until 1973 to be exact, a lawyer could open his or her Lawyer's Diary (the Red Book) and negotiate a fair compensation arrangement with a client based on schedules of minimum fees published by the Massachusetts Bar Association and virtually every other bar association in the Commonwealth with respect to any legal service you might imagine. (I still have those schedules and you may be interested to know that the Boston Bar Association never adopted such a schedule).

Left to their own needs and devices, most lawyers adopted certain formulae to value their professional services:

(1) Where clients seek damages in automobile and most tort cases, lawyers generally agreed to accept such matters on a contingency basis, meaning that they would charge fees measured by a percentage, usually 33 to 40 percent of the amount that they helped their client to recover. If the client recovered nothing, the attorney received no fee.

(2) In cases involving the administration of large estate, lawyers, especially in Connecticut, try to negotiate a fee based on a percentage of the size of the estate. Today, in Massachusetts, many lawyers charge for estate administration on a time basis.

(3) In most other cases, however, lawyers negotiate a fee based on the number of hours that it may and/or will, take to complete the project. That hourly rate may vary based on the seniority skill, the reputation of the lawyer working on the project and/or the location of his office. This formula protects the lawyer against unforeseen problems, of course, but it also exposes clients to unscrupulous lawyers who charge their clients for hours not spent on their case or for the unproductive churning of their case.

There are, of course, many variations in these formulae, including caps on fees, performance premiums for lawyers, who achieve successful or unexpectedly successful results, and a combination of these formulae too numerous to describe this morning.

To regulate such fee agreements, the Supreme Judicial Court adopted Rule 3:07:1.5 in 1997 and provided a form of Contingent Fee Agreement that lawyers might use in negotiating with their clients. Many lawyers have followed the recommendation of the Supreme Judicial Court and wise attorneys, like Martha Faigen, by submitting retainer agreements or engagement letters to their clients explaining their fees and conditions of employment before they agree to represent them.

Unfortunately, many attorneys, accustomed to practices deemed acceptable in years past, or otherwise, do not sue such retainer agreements or engagement letters, rely on oral understandings with their clients or believe they can dictate their fees by simply sending a bill to their client. As a result, many clients raise questions about how their attorney has computed his or her fees and some of these questions have led to litigation between lawyers and their clients, especially where a client has not enjoyed the success he or she had hoped for.

Such litigation is, of course, expensive, and often painful to both parties, whatever the outcome. As a result, a number of bar associations created fee dispute committees or fee arbitration boards, which offer arbitration services to clients and/or their lawyers engaged in a legal fee dispute, who are willing to agree to submit their dispute to arbitration. Claims of malpractice and professional misconduct are generally excluded from such arbitration process.

I served as Chair of the Fee Dispute Committee of the Boston Bar Association for many years until our committee was recently dissolved for lack of business by the Council of the Association, which decided to send all of our future applications to the Legal Fee Arbitration Board of the Massachusetts Bar Association, whose rules may be found and printed on-line. During my service of the Fee Dispute Committee, we faced a number of problems we had not anticipated:

In one case the lawyer who had allegedly overcharged his client declined to submit the dispute to arbitration. As a result, we could not help either party to the dispute and left the client with no alternative but to sue his lawyer to recover the excess fee charged or collected by his lawyer. They are still in court.

Another problem we faced was when a prospective client, who claimed to be blind, complained to the Attorney General, alleging that our staff had not done enough to help him draft a complaint against his lawyer, based on allegations of fact that made little or no sense to our committee.

Many of our other cases involved complaints from clients who wanted to recover all or part of the retainer they had paid their attorney, who had allegedly been negligent or worse in prosecuting their claim or in defending them against the plaintiff. Those cases forced us to determine whether the complaints were fee disputes or complaints sounding in professional misconduct.

You may also be interested to know that we did not accept claims by lawyers against their clients for failing to pay their bills or complaints of lawyers against their lawyers clients, but the Mass. Bar evidently does accept such complaints.

Despite all of these problems, I am happy to report that we managed to mediate almost all of the complaints that were filed with us over the years and that only a few went into arbitration.

On the information and belief, the Supreme Judicial Court would like to amend its rules to require all lawyers to submit every dispute concerning their fees to binding arbitration, but they have not promulgated such a rule, because there is currently no administrative tribunal to provide such arbitration and there is no money to create such a tribunal. To my knowledge, there are only three bar associations that provide or offer fee arbitration and/or mediation: the Hampden County Bar Association, the Worchester County Bar Association and the Massachusetts Bar Association, of which the MBA has the only full-time, salaried administrator. For that reason, we the Boston Bar Association, are now referring all fee dispute complaints to the Massachusetts Bar Legal Fee Arbitration Board.

I look forward to your questions.