

Who Pays for the Tuna Sandwiches? Part 2

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Several years ago, our CEO, Kris Dangerfield, wrote an article called “Who pays for the Tuna Sandwiches?” It relates to billing practices of firms and provides guidance about certain office expenses and whether it is appropriate to pass these costs on to firm clients as individual disbursements when sending out a statement of account. It would be prudent to review the article from time to time to ensure that your firm’s billing practices are consistent with guidance that the Law Society provides. The article may be accessed [here](#).

Some of the issues addressed in the article continue to arise and raise concerns about the appropriateness of certain billing practices. It has come to our attention that some firms routinely charge clients both a “file opening fee” and a “file maintenance fee” (or firms charge a higher fee upon opening a file and indicate that it is intended to cover both file opening costs and file maintenance costs). It appears that firms are charging a file maintenance fee to help cover the firm’s anticipated storage costs after a file is closed.

Is it fair and reasonable to charge clients for a service that has not been provided and is, ultimately, for the firm’s benefit?

Closed files are considered to be the property of the firm. Although there is a rule that requires lawyers to retain accounting records for a period of ten years [See Rule 5-54(1)], there is no rule that sets out how long a client file must be stored. The Law Society has suggested that lawyers may wish to retain closed client files for a period of time in case a client later makes an allegation of negligence or professional misconduct. Keeping the file for this purpose is for the benefit of the firm and not the client.

The reasonableness of such a fee is brought into question when you consider a range of circumstances.

- In situations where clients are taking their business elsewhere, the anticipated “service” of storing a closed file will not be provided. Under those circumstances, if these clients have already paid a “file maintenance fee”, is the fee reasonable and should the client be reimbursed?
- When a lawyer leaves a firm and receives the necessary authorization to transfer a client’s open file to a new firm, there is no obligation on the part of the former firm to retain any part of that file. If a firm chooses to make a copy of the entire current file (or any portion of the file), it is a choice made by the firm, for the firm’s own benefit – not the client’s. How could a firm reasonably justify passing on the costs of storing its own copy of a file to the former client?
- With increasing amounts of legal work being conducted online (including the practice of scanning letters and documents and saving them into a computer “file folder”), firms may decide to keep an electronic client file for a reasonable period of time and appropriately dispose of the “original” or paper client file (assuming it was properly culled upon closing). The cost of electronically saving a client file for a reasonable period of time is less-expensive than paying for warehouse storage.

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In some cases, firms may charge a file opening fee as well as a blanket “administration fee.” It is unclear what a general administration fee is intended to cover. Is this an effort to pass on a portion of the costs of running a firm, such as rental payments or staff salaries, to individual clients? Other firms charge an “imaging” fee, which may be an effort to cover some costs associated with the firm’s electronic document management system (such as scanning documents), which is just another form of “file maintenance.” Is it appropriate to charge individual clients these kinds of fees in an effort to recoup some of the cost of doing business?

Perhaps if this anticipated law firm expense is explained to a client at the initial meeting and confirmed in a retainer agreement in such a way that the client is able to make a fully informed decision about whether to consent to such a charge at the outset, a firm may be able to justify its practice. However, you ought to carefully consider what are appropriate costs to pass along to a client.

In light of all of the considerations identified about billing issues and concerns, please review your firm’s billing practices while keeping in mind the professional ethical obligation of lawyers to not charge or accept a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.